

Judicial Communications Office

Tuesday 19 September 2017

COURT DISMISSES A6 APPEAL

Summary of Judgment

The Court of Appeal today dismissed an appeal against the decision to proceed with the new trunk road between Toome and Castledawson.

On 28 March 2017, Mrs Justice Keegan dismissed an application by environmental campaigner Chris Murphy to quash the decision by the Minister in the Department for Infrastructure (“the Department”) to proceed with that part of the Randalstown to Castledawson road dualling scheme from Toome to Castledawson. Mr Murphy (“the appellant”) challenged that decision, contending that it gave rise to three issues of law in respect of requirements contained in Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (“the Habitats Directive”) and that these issues should be referred to the European Court of Justice (“ECJ”).

The challenge centred on the significance of the Lough Neagh, Lough Beg and Portman Lough areas as sites of special scientific interest, special protection areas (“SPA”) and special areas of conservation for wintering and breeding bird species. Article 6 of the Habitats Directive establishes a process of strict protection for such sites including a requirement for Member States to take appropriate steps to avoid the deterioration or disturbance of the habitats and to carry out appropriate assessments of the implications of any plans likely to have significant effect on the habitats.

In this case the land on which the proposed dualling is to occur lies outside the boundary of the SPA but this land provides foraging and roosting locations for some protected species. It was not in dispute, however, that this precluded the applicability of the requirements laid down in Article 6(3) of the Habitats Directive which required the decision maker to take into account any adverse effect on the protected species caused by the construction of the proposed road before authorising it.

The Roads (Northern Ireland) Order 1993 (“the 1993 Order”) prescribes what the Department is required to do before constructing a trunk road. The Court of Appeal said there was no suggestion that the Department failed to comply with any of these statutory requirements and its judgment describes the steps taken by the Minister and the Department since September 2005 when the then Minister announced a preference for the route with which this application is concerned. In September 2009 the Department issued a statement indicating that it had decided to proceed with the scheme as described. The Trunk Road T8 (Toome to Castledawson) Order (Northern Ireland) 2011 (“the 2011 Order”) was made on 14 March 2011 and came into operation on 7 May 2011. Funding for the project, however, was not made available until 2016. In March 2016 the Department established the Whooper Swan Working Group comprising, inter alia, the Department, RSPB, NIEA

Judicial Communications Office

Natural Environment Division and landowners. In August 2016 consultants produced a document reviewing the previous appropriate assessment findings in light of the time that had elapsed. On 17 August 2016 the Minister issued a written statement to the Assembly informing members of his decision to proceed with the £160 million A6 Randalstown to Castledawson dualling scheme and the making of the necessary vesting orders.

On 15 September 2016 the appellant sent a pre-action protocol letter contending that the Minister's decision was unlawful as no appropriate assessment was carried out in accordance with the requirements of Article 6(3) of the Habitats Directive. The underlying contention advanced by the appellant was that alternative routes to the south were available which would not have adversely affected the SPA. The feature of concern was the availability of foraging land outside the SPA for the Whooper Swan.

The issues in the appeal

The appellant accepted that he was now too late to challenge the 2011 Trunk Road Order but submitted:

- Even if there was an appropriate assessment prior to the making of the 2011 Order the passage of time and changes on the ground now required a further appropriate assessment before the project was implemented.
- If he was wrong on the first point he submitted that Article 6(2) of the Habitats Directive provided the same level of protection as Article 6(3) and that accordingly an appropriate assessment was required.
- In any event any review was quite inadequate because there was no consultation with Northern Ireland Environment Agency ("NIEA"), the Whooper Swan Management Group was inadequate and the RSPB were misled.
- The purported mitigation by way of field amalgamation and/or land management was in fact compensation which fell under Article 6(4) of the Habitats Directive.

Passage of Time

The appellant argued that in light of the passage of time since the making of the 2011 Order a further appropriate assessment was required. The Court of Appeal did not accept this submission and stated that the 2011 Order for this section of road constituted the authorisation for the carrying out of the proposed roadworks until it was either successfully challenged under the relevant appeal provisions or alternatively was revoked:

"There was no challenge to the March 2011 Order and it has not been revoked. The decision of the Minister to allocate funding for the project did not constitute a fresh authorisation. By virtue of the statutory scheme he had no power to do that. The Habitats Directive imposes no time constraint on the duration of an appropriate assessment and in the case of major infrastructural projects there is

Judicial Communications Office

often a likelihood of some time lag between authorization and implementation of the project.”

Application of Article 6(2) of the Habitats Directive

The appellant submitted that if he was wrong on the first point then he felt that Article 6(2) of the Habitats Directive provided the same level of protection as Article 6(3) and that accordingly an appropriate assessment was required. Article 6(2) establishes an obligation of general protection aimed at avoiding deterioration and disturbances in the habitats which could have significant effects. The Court of Appeal accepted that Article 6(2) did apply in this case but held that Article 6(3) had been complied with and that a further assessment was not required. It said the 2016 statement did not purport to be a new appropriate assessment but it was intended to review the 2008 assessment in the light of up-to-date information and practices and address the impacts on each of the significant features. It excluded any likely significant effects except in relation to the Whooper Swan on the basis that the birds were mobile and had alternative foraging areas or that the birds were associated with open water areas or shoreline that were some distance from the scheme. Mitigating effects in relation to the design were incorporated to address many of those.

Appropriate Assessment

The appellant thirdly contended that the appropriate assessment was insufficient because the RSPB were misled. The Court of Appeal noted that the RSPB had withdrawn its objection on confirmation that the Roads Service would put in place the mitigating measures it had proposed. The appellant contended that the NIEA had not been involved in the consultation process however the Court was satisfied that NIEA were properly involved in the consultation process: they were involved with the Whooper Swan Management Group and representatives of the NIEA attended the meeting in July 2014 when the methodology for assessing disturbance and the lack of any adverse effect were agreed. The appellant also challenged the use of the assessment of total swan days lost for foraging and the calculation of replacement swan days as a result of mitigation. This methodology was agreed by the RSPB, the NIEA and all of the statutory agencies involved. The Court accepted that it is possible that a different approach might have been taken to the assessment of impact but there was nothing in its view which suggested that the judgement of the Whooper Swan Management Group was erroneous or that it failed to identify any relevant disturbance or deterioration. This was a matter of judgement for the competent authority and there is no reason to disturb it.

The appellant also sought to rely on material obtained from Scotland where consequent upon the implementation of a building project there had been a considerable diminution in the use of a protected area by Whooper Swans. The Court said, however, it was clear from the background material provided that there were issues around human activity apparently contributing to the problem and the situations were not comparable. The appellant referred to evidence of shift in the use by Whooper Swans of foraging areas. The Court held that that,

Judicial Communications Office

if anything, tended to confirm the evidence of the Department that the Swans were mobile in terms of their foraging areas.

Field Amalgamation Measures

The final issue concerned whether the field amalgamation measures which the Department agreed to put in place are mitigation or compensatory measures. The importance of this matter lies in the fact that if these are compensatory rather than mitigating measures they can only be justified if the stringent test set in Article 6(4) of the Habitats Directive is satisfied. The Court stated that a mitigation or protective measure is one which lessens the negative effects of a plan or project with the aim of ensuring that the integrity of the site is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project but seeks to counterbalance the failure to do so through different, positive effects in order to avoid a net negative effect.

That analysis requires the identification of the feature at risk. In this case the protected feature was the Whooper Swan. The Court of Appeal concluded that there is no direct impact on the protected feature:

“The foraging lands are not themselves a protected feature. The appropriate assessment and the Statement indicate that with the field amalgamation measures there will be no adverse impact on the protected feature. The measures in this case are aimed at avoiding or reducing any significant adverse effects on the protected feature. They are plainly mitigating measures.”

Conclusion

The Court of Appeal dismissed the appeal and said it was satisfied there was no requirement to refer any of the matters raised by the appellant to the ECJ.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST

Judicial Communications Office

BT1 3JF

Telephone: 028 9072 5921

E-mail: Alison.Houston@courtsni.gov.uk