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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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(1) AN APPLICATION BY SEAPORT INVESTMENTS LIMITED

(2) AN APPLICATION BY MAGHERAFELT DISTRICT COUNCIL, F P McCANN (DEVELOPMENTS) LIMITED, YOUNGER HOMES LIMITED, HERRON BROS LIMITED, G SMALL CONTRACTS AND CREAGH CONCRETE PRODUCTS LIMITED

WEATHERUP J

[1] These two applications for judicial review concern "environmental assessments" carried out under the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 ("the Regulations"). The Regulations were introduced further to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the Directive"). Mr Lindblom QC, Ms Cook, Mr Jones and Mr Dunlop appeared for the first applicant, Mr Hanna QC and Mr Orbinson QC appeared for the second applicants and Mr McCluskey QC, Professor Wyatt QC and Mr McLaughlin appeared for the respondents in both applications.

[2] The first applicant is a property development company based in Portballintrae, County Antrim. The draft Northern Area Plan 2016 was published on 11 May 2005 covering the four administrative council areas of Ballymoney, Coleraine, Limavady and Moyle. Accompanying the draft Plan and described as "Technical Supplement 11" was a document described as a "Strategic Environmental Assessment".

[3] The second applicants are Magherafelt District Council and five property development companies operating in the Magherafelt area. The draft Magherafelt Area Plan 2015 was published on 28 April 2004 covering the

Magherafelt district. A document described as a "Strategic Environmental Assessment" was published in May 2005.

The Recitals to the Directive.

[4] The Recitals to the Directive provide that community policy on the environment is to contribute to, inter alia, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources based on the precautionary principle. Environmental protection requirements are to be integrated into the definition of community policies and activities in particular with a view to promoting sustainable development (Recital 1).

Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment because it ensures that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption (Recital 4).

Action is required at community level to lay down a minimum environmental assessment framework which would set out the broad principles of the environmental assessment system and leave the details to the Member States (Recital 8).

The Directive is of a procedural nature and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures (Recital 9).

In order to contribute to more transparent decision-making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes and that appropriate timeframes are set allowing sufficient time for consultations including the expression of opinion (Recital 15).

The Environmental Report and the opinions expressed by the relevant authorities and the public should be taken into account during the preparation of the plan or programme and before its adoption (Recital 17).

The terms of the Directive.

[5] Article 1 of the Directive states the objectives as being to provide a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development by ensuring that in accordance with the Directive an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

Article 2 deals with definitions. "Environmental assessment" means the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9. "Environmental report" means the part of the plan or programme documentation containing the information required in Article 5 and Annex 1.

Article 5 deals with the environmental report. Article 5.1 provides that where an environmental assessment is required an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1. Article5.2 provides that such environmental report shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment. Article 5.4 provides that the authorities referred to in Article 6.3 shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

Article 6 deals with consultations. Article 6.1 provides that the draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in Article 6.3 and the public. Under Article 6.2 the authorities and the public shall be given an early and effective opportunity within appropriate timeframes to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. By Article 6.3 Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental affects of implementing plans and programmes. Article 6.5

provides that the detailed arrangements for the information and consultation of the authorities of the public shall be determined by the Member States.

Annex 1 sets out the information referred to in paragraph 5.1 that should be included in an environmental report.

The Regulations.

[6] The 2004 Regulations came into operation on 22 July 2004.

Regulation 4 provides that the Department of the Environment shall be the consultation body. However where the Department of the Environment is at any time the responsible authority as regards a plan or programme, it shall not at the same time exercise the functions under the regulations of the consultation body in relation to the plan or programme.

Regulation 11 provides for the preparation of environmental reports. The reports shall identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives. Further, when deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation body.

Regulation 12 deals with consultation procedures. A draft plan and environmental report are to be made available to the consultation body and the public.

Schedule 2 sets out the information to be included in environmental reports as required by Annex 1 of the Directive.

The Guidance

[7] Representatives of Member States and the Environmental Directorate General of the European Commission prepared a document with the title "Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment". Paragraph 1.4 states that the document is designed to help Member States to understand fully the obligations contained in the Directive and assist them in transposing the Directive into their national law and equally important, in creating and improving the procedures which will give effect to the legal obligations. Paragraph 1.5 states that the document represents only the views of the Commission services and is not of a binding nature.

The Office of the Deputy Prime Minister issued "A Practical Guide to the Strategic Environmental Assessment Directive" in September 2005. The guidance was developed with the Department of the Environment for Northern Ireland and provides information and guidance on how to comply with the Directive. Paragraph 3.1 states that the guidance is not intended as an interpretation of the law

The applicant's grounds for judicial review.

[8] There are two broad grounds of challenge made by the applicants. The first concerns the transposing of the provisions of the Directive into the Regulations and the second concerns compliance with the requirements of the Directive and the Regulations.

[9] The alleged failure to transpose the requirements of the Directive into the Regulations resulted in a Notice of Devolution issued under paragraph 5 of Schedule 10 of the Northern Ireland Act 1998 and Order 120 Rule 3 of the Rules of the Supreme Court Northern Ireland 1980. The devolution issues were stated to be:

> "1. Whether, in respect of cases where the Department of the Environment is the responsible authority, it has failed to comply with its obligations under Article 6(3) of Directive 2001/42/EC on Strategic Environmental Assessment ("the SEA Directive") to designate one or more appropriate consultation authorities.
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> 2. Whether regulation 12 of the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 fails to transpose the requirement in Article 6(2) of Directive 2001/42/EEC that both the authorities with the relevant environmental responsibility and the public are given an early and effective opportunity within appropriate timeframes to express their opinion the environmental assessment."

None of the notice parties entered an appearance in the proceedings.

The first transposition issue - Article 6.3

[10] Article 6.3 provides that –

> "Member States shall designate authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes."

This is transposed by Regulation 4 which provides that -

> "(1) Subject to paragraph (2), for the purposes of these Regulations, the Department of the Environment shall be the consultation body.
>
> (2) Where the Department of the Environment is at any time the responsible authority as regards a plan or programme, it shall not at the same time exercise the functions under these Regulations of the consultation body in relation to the plan or programme; and the references to the consultation body in the following provisions of these Regulations shall be construed accordingly."

[11] The contested transposing of Article 6.3 by Regulation 4 arises because the Department of the Environment shall not exercise the functions of the consultation body where the Department is also the responsible authority as regards the plan or programme.

[12] The functions of the consultation body include those under Regulation 9 on the determination of whether a particular plan, programme or modification is likely to have significant environmental effects. The responsible authority is required to apply specified criteria to the plan, programme or modification under consideration and to prepare a report on whether the authority considers that the plan or programme or modification is likely to have significant environmental effects. The responsible authority is then required to send the report to the consultation body for consideration and if the responsible authority and the consultation body cannot reach agreement as to whether or not the plan, programme or modification is likely to have significant environmental effects the consultation body shall determine that issue. The functions also include those arising under

Regulation 11 dealing with the preparation of the environmental report where the responsible authority shall consult the consultation body when deciding on the scope and level of detail of the information that must be included in the report. In addition Regulation 12 sets out the consultation procedures on every draft plan and accompanying environmental report which the responsible authority is required to make available to the consultation body.

[13] The applicants contend that Article 6.3 of the Directive has not been transposed into the Regulations because there is no designated authority to be consulted on the environmental effects of implementing plans and programmes when those plans and programmes have been drawn up by the Department. Thus in the present cases there was no designated consultation body for the Department to consult with on the draft Plans. On the other hand the Department points to its wide environmental role extending to such matters as designating areas of outstanding natural beauty, national parks and areas of special scientific interest, access to the countryside, waste management licensing, controls on radioactive material, air quality and water quality. In the present cases the Department had the input of its Environmental Heritage Service which is a division of the Department with the requisite expertise on environmental matters. Thus the Department contends that it is not required to create a new environmental authority for consultation purposes and that the principle of subsidiarity recognised in the Directive permits the State to meet its environmental responsibilities within its existing structures.

[14] At the heart of the issue lies the nature of the consultation process required by the Directive. Recital 15 states that consultation is necessary "in order to contribute to more transparent decision-making" and also "with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable." Consultation with the designated authorities is required under Article 5.4 when deciding on the scope and level of detail of the information that must be included in the environmental report. Consultation with the designated authorities is required by Article 6.2 so that they might express their opinion on the draft plan or programme and the accompanying environmental report. The applicants contend that the independence of the responsible authority and the consultation body is implicit in the arrangements. The Department contends that the arrangements are concerned to gather all appropriate expertise into the preparation of the documents and that the participation of an independent authority is not required. As the Department puts it, the rationale of designating bodies with specific environmental responsibilities is to ensure that "the left hand" of Government knows what the "right hand" of Government knows; the mischief aimed at is a possible failure of communication between on the one hand an authority promoting a plan or programme and on the other hand an authority whose specialist environmental expertise is relevant to that exercise. However the Department

recognises separation, if not independence, between the responsible authority and the consultation authority. This, it is said, was achieved in the present cases by the preparation of the draft plans by the Planning Service in consultation with the Environment and Heritage Service.

[15] I am unable to accept the argument of the Department on this issue. By the terms of the Directive it is apparent, as the Department accepts, that there be separation between the responsible authority and the consultation body. In the present cases I am satisfied that no such separation occurred and that it was not achieved by the Planning Service and the Environmental and Heritage Service being separate divisions of the same Department. For all practical purposes there was integration between the Planning Service and the Environmental and Heritage Service in the preparation of the documents. In any event had their been a formal separation of roles between the Planning Service and the Environmental and Heritage Service I would not have been satisfied that there was sufficient separation for the purposes of the Directive while the two services remain part of the same Department and legal entity. I reject the Department's contention that the primary concern of the consultation process is access to expertise and consider that the purpose of the process relates not only to access to expertise but also to independence. Accordingly I am satisfied that the rationale of designating bodies with specific environmental responsibilities is not to ensure that all parts of Government are fully informed of the information available to all other parts. The necessity for consultation contributes to more transparent decision-making and to comprehensive and reliable information being available and these require not only expertise but independence. I consider it to be necessarily implicit in Article 5.4 and Article 6.3 that there be consultation with an authority with relevant environmental responsibilities which is external to the responsible body.

[16] Accordingly it may become necessary to create such an authority if it is not already in existence in the domestic structures. The relevant regulations transposing the Directive in England and Wales and Scotland designate more than one consultation body in each jurisdiction and this issue should not arise. The Department refers to Protocol No 30 of 1997 on subsidiarity and proportionality at point 7 which states:

> "Regarding the nature and extent of community action, community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the treaty. While respecting community law, care should be taken to respect well established national arrangements and the organisation and working of Member States legal systems. Where appropriate and

> subject to the need for proper enforcement, community measures should provide Member States with alternative ways to achieve the objectives of the measures."

[17] I reject the Department's contention that the interpretation of the requirements of the Directive set out above offends the principle of subsidiarity. The margin of appreciation accorded to Member States must be consistent with securing the aim of the measure and observing the requirements of the Treaty. I am satisfied that the aim of the measures relating to the consultation process is directed to achieving an input from a consultation body which has sufficient expertise and which is independent of the body responsible for the preparation of the plan.

[18] In addition the applicants contend that limited opportunity is afforded to the consultation body in relation to the scope of the environmental report. Article 5.4 provides that the consultation body shall be consulted when the responsible authority is deciding on the scope and level of detail of the information which must be included in the environmental report. Under Regulation 11(6) the consultation body shall respond within the period of five weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation. The applicants contend that a period of five weeks is too short for effective consultation on the scope of an environmental report. Reference is made to the response of the Environment and Heritage Service to scoping consultation where compliance with the timeframe was described as totally impossible. The respondent defends the five week time limit as preventing scoping consultation becoming protracted, being identical to the time limits in the equivalent English and Scottish Regulations, being applied flexibility in that consultation bodies may receive material in advance of the consultation period and may receive extensions of time as the time limit is not regarded as mandatory. I accept the respondent's position on this issue and reject the applicants' complaint in relation to the five week time limit.

The second transposition issue - Article 6.2.

[19] Article 6.2 provides that

> "The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate timeframes to express their opinion on the draft plan or programme and the accompanying environmental

report before the adoption of the plan or programme or its submission to the legislative procedure."

This is transposed by Regulation 12 which provides that –

"(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 11 and its accompanying environmental report ("the relevant documents") shall be made available to the consultation body and to the public in accordance with the following provisions of this regulation.

(2) As soon as reasonably practicable after their preparation, the responsible authority shall send a copy of the relevant documents to the consultation body and invite it to express its opinion on the relevant documents within a specified period.

(3) The responsible authority shall also-

(a) within 14 days of the preparation of the relevant documents, publish in accordance with paragraph (5), or secure the publication of, a notice-

(i) stating the title of the plan, programme or modification;

(ii) stating the address (which may include a website) at which a copy of the relevant documents may be inspected or from which a copy may be obtained;

(iii) inviting expressions of opinion on the relevant documents;

(iv) stating the address to which, and the period within which, opinions must be sent; and

(b) keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge; and

(c) publish a copy of the relevant documents on the authority's website.

(4) The periods referred to in paragraphs (2) and (3)(a)(iv) must be of such length as will ensure that those to whom the invitation is extended are given an

> early and effective opportunity to express their opinion on the relevant documents.
>
> (5) Publication of a notice under paragraph (3)(a) shall be by such means as will ensure that the contents of the notice are likely to come to the attention of the public affected by, or likely to be affected by, or having an interest in, the draft plan or the programme.
>
> (6) Nothing in paragraph (3)(a)(ii) shall require the responsible authority to provide a copy of the documents concerned free of charge; but where a charge is made, it shall be of a reasonable amount.

[20] The contested transposing of Article 6.2 by Regulation 12 concerns the "early and effective opportunity" to be afforded "within appropriate timeframes". The applicants contend that such timeframes should be specified in the Regulations, whereas the Regulations leave the timeframe to the responsible authority. The respondent relies on Article 6.5 of the Directive which provides that "The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States." The respondent contends that the Directive confers on the Member State a significant margin of appreciation by adopting the broad elastic terminology in Article 6.2 of "early and effective opportunity" and "appropriate timeframes" and this is said to be supported by Recital 15 and the reference to allowing "sufficient time" for consultation.

[21] The Commission guidance discusses Article 6.2 of the Directive and states -

> "The timeframe needs to be laid down in legislation. Member States are free to determine its duration so long as it meets the requirement to give an `early and effective' opportunity for responses" (paragraph 7.9).
>
> "Different timeframes may be appropriate for different types of plan or programme but care should be taken to allow sufficient time for opinions to be properly developed and formulated on lengthy, complex, contentious or far-reaching plans or programmes. Adequate time will also be needed for the planning authority to take these views into account before deciding on the plan or programme" (paragraph 7.10).

[22] The transposition of the Habitats Directive was considered by the European Court of Justice in Commission of the European Communities v United Kingdom (Case – 6/04 20 Oct 2005). The ECJ found that –

> "It is important in each individual case to determine the nature of the provision, laid down in a Directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States."

The ECJ stated that the UK's argument that the most appropriate way of implementing the Habitats Directive was to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their function so as to secure compliance with the requirements of that Directive could not be upheld. The UK legislation implementing the Habitat's Directive was found at paragraph 27 to be –

> "…. so general that it does not give effect to the Habitat's Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the Directive and allow harmonised and effective implementation of the rules which it lays down."

[23] The nature of Article 6.2 is such that it requires consultation with environmental authorities and the public in circumstances where appropriate timeframes are set that admit of sufficient time for consultation including the expression of opinion (recital 15). To achieve sufficient precision and clarity to satisfy the demands of legal certainty requires Member States to set the appropriate timeframes and not to pass to a public authority the responsibility for setting timeframes from case to case. Accordingly the requirement in Article 6.2 of the Directive for consultation within appropriate timeframes has not been transposed by Regulation 12 which does not set appropriate timeframes.

The contents of Environmental Reports.

[24] The applicants contend that there has not been compliance with the requirements for the contents of the environmental report. Article 5.1 of the Directive provides that an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or

programme and reasonable alternatives, taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated and the information to be included for this purpose is set out in annex 1 of the Directive. Article 5.2 provides that the environmental report shall include the information that may reasonably be required, taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment. Regulation 11 transposes these requirements and schedule 2 specifies in ten paragraphs the information required for environmental reports. The relevant paragraphs in schedule 2 provide for the environmental report to contain –

> (1) An outline of the contents and main objectives of the plan or programme, and of its relationship with other relevant plans and programmes.
>
> (2) The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme.
>
> (3) The environmental characteristics of areas likely to be significantly affected.
>
> (4) Any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of particular environmental importance, such as areas designed pursuant to Council Directive 79/409/EEC on the conservation of wild birds and the Habitat's Directive.
>
> (6) The likely significance effects on the environment, including short, medium and long term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage, including architectural and archaeological heritage, landscape and the inter relationship between the issues listed.
>
> (8) An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know how) encountered in compiling the required information.
>
> (10) A non technical summary of the information provided under paragraphs 1 to 9.

[25] In Berkeley v. Secretary of State for the Environment (2000) 3 WLR 420 the House of Lords considered the grant of planning permission for the redevelopment of Fulham Football Club where the Secretary of State's decision had been made without consideration of the need for an environmental assessment under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 implementing Council Directive 85/337/EEC. The argument before the House was whether on the facts there had been substantial compliance with the requirements of the Directive. The Secretary of State relied on Commission of the European Communities v. Federal Republic of Germany (1995) ECR 1-2189. The State had failed to transpose the Directive into domestic law by the stipulated date and had given consent to the construction of a power station without an EIA. The State had however following the procedures required by its own domestic law and the Commission conceded that the developer had supplied the information required by the Directive and had made that information available for public consultation. It was held in Berkeley that what Lord Hoffman described as a "paper chase" could not be treated as the equivalent of an environmental statement. Lord Hoffman stated –

> "Commission v. Germany (Case C- 431/92) in my opinion establishes an EIA by any other name will do as well. But it must in substance be an EIA."

[26] The responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports. The Court will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required by schedule 2. It is proposed to consider whether the specified matters have been addressed rather than considering the quality of the address.

[27] The respondent contends that there has been substantial compliance with schedule 2 in both cases. The first applicant contends in relation to paragraph 10 of schedule 2 that there has not been a non technical summary of the information provided under the other paragraphs. The draft Northern Area Plan contains a "Technical Supplement 11" with the title "Strategic Environmental Assessment" dated May 2005. The applicants refer to the title as illustrating the suggested confusion of the respondent in relation to the Directive and the Regulations in that Strategic Environmental Assessment is the name of the Directive, environmental assessment is a process rather than a document and reference to a technical supplement is misplaced. Page 1 has the title "Non Technical Summary" which sets out in seven short paragraphs that it is the SEA for the draft NAP, that it complies with the European Directive, states the objective of the SEA Directive, refers to the objectives of the SEA, explains baseline data collection, refers to the analysis of other

relevant plans and programmes and refers to consideration of a range of alternatives for each of the policy groupings. Paragraph 10 requires a summary of the information provided under the preceding nine paragraphs. The non technical summary on page 2 of the report to a large extent does not provide any summary of the information provided under the specified headings.

[28] Paragraph 1 requires an outline of the contents and main objectives of the plan or programme and of its relationship with other relevant plans and programmes. Section 1 of the report provides an outline of the contents and main objectives of the plan. Other relevant plans and programmes are listed in table 4 and reviewed in appendix 2, including implications for the draft plan and the key points arising from the analysis set out in section 2.2.

[29] Paragraph 2 requires the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme. Section 2.1 of the report refers to the relevant aspects of the current state of the environment. Baseline data are set out in appendix 1 with indicators grouped according to SEA objectives. There are columns dealing with trends and targets. This material does not address the likely evolution of the current state of the environment without implementation of the plan.

[30] Paragraph 3 requires the environmental characteristics of the area likely to be significantly affected. Section 2.1 of the report identifies the environmental characteristics by reference to the attached maps and provides a brief overview of the plan area. This necessarily identifies certain areas within the plan area but what is not apparent from this presentation are those areas which are likely to be "significantly affected".

[31] Paragraph 4 refers to any existing environmental problems which are relevant to the plan or programme (in particular those relating to areas of particular environmental importance such as areas designated for the conservation of the wild birds or habitats). Section 2.3 of the report and table 5 set out existing problems and implications for the area plan. Ian Gilder of Planning and Environmental Resources Management Ltd on behalf of the applicant states at paragraph 95 of his affidavit that there is no reference to the special protection areas and RMASAR sites under the Wild Birds Directives or candidate special areas of conservation under the Habitats Directive even though these are of major significance particularly along the coast and at Rathlin Island. Andrew Meinagh on behalf of the respondent suggests that not every environmental problem can be expected to be listed and that must be correct. However, given the specific reference to designated wild bird and habitat areas in paragraph 4 it is striking that there is no reference to the areas in the discussion.

[32] Paragraph 6 refers to the likely significant effects on the environment including short, medium and long term effects, permanent and temporary effects, positive and negative effects and secondary cumulate and synergistic effects on specified issues. Section 3.2 of the report and table 10 deal with impact assessment and cumulative impacts of the plan. There is an extensive list of the types of effects that are to be considered and not all have been addressed.

[33] Paragraph 8 requires an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken. Table 9 of the report sets out the alternatives considered. The approach adopted does not provide an outline of the reasons for selecting the alternatives.

[34] There has not been substantial compliance with the requirements of schedule 2. Parts of paragraphs 2, 3, 4, 6 and 8 are not addressed and there is an inadequate non technical summary for the purposes of paragraph 10.

[35] Similarly, the second applicants contend that there has not been substantial compliance with schedule 2 in relation to the environmental report prepared in connection with the draft Magherafelt Plan. The environmental report was published in May 2005. The Court adopts the same approach as that outlined above in relation to the first applicant's complaints about the report relating to the draft Northern Area Plan. It is not proposed to set out the details of the report relating to the draft Magherafelt Plan. The conclusion is that for the same reasons as applied to the report relating to the draft Northern Area Plan there has not been substantial compliance with the requirements of schedule 2 in the report relating to the draft Magherafelt Plan. There are shortcomings in the report in that the same parts of paragraphs 2, 6 and 8 are not addressed and there is an inadequate non technical summary for the purposes of paragraph 10.

[36] The applicants contend that up to date baseline data were not used on the key issue of housing density. At page 10 of the report in relation to the draft Northern Area Plan it is stated that only limited baseline data is available for housing needs, housing density and noise pollution. New data on the above and other indicators if considered relevant and were available, would be included in the next round of plan making. The applicants contend that up to date information on housing density was available and should have been used in the reports. The respondent relies on Article 5.2 of the Directive which states that the environmental report shall include information that may reasonably be required taking into account current knowledge and methods of assessment. Further the respondent contends that a practical approach is essential and that it is not to be expected that all relevant information will be obtained in the first report prepared for the plan or programme. If up to date

data are already in the public arena it is to be expected that such up to date data would be included in the information contained in the report.

The development of plans and environmental reports.

[37] This issue concerns the sequencing of the draft plans and environmental reports and not the quality of the documents. A draft Northern Area Plan was circulated in April 2004 prior to the coming into operation of the Regulations. This draft plan had been prepared under the provisions of the Planning (Northern Ireland) Order 1991, the Planning (Development Plan) (Northern Ireland) Regulations 1993 and the Planning Policy Statement 1 – General Principles. PPS 1 included provisions relating to the carrying out of a strategic environmental appraisal in respect of the development plan. An environmental appraisal under the previous legislation does not comply with the requirements for an environmental report under the Regulations.

[38] Regulation 6 provides that where the first formal preparatory act for a plan was before 21st July 2004 and that plan had not been adopted before 22nd July 2006 the responsible authority shall carry out an environmental assessment before adoption. Regulation 6.2 provides that an environmental assessment of a particular plan is not required if the responsible authority decides that such assessment is not feasible and informs the public of its decision. When the Regulations came into effect on 22 July 2004 the respondent believed that the plan would be adopted before 22 July 2006 and that the Regulations would not apply. However later in 2004 the respondent decided that it would not be possible to achieve adoption of the plan by July 2006. The respondent did not decide that an environment assessment of the draft plan was not feasible. Rather the respondent decided that the preparation of the draft plan would be completed and an environmental assessment carried out in a manner that complied with the Directive and the Regulations. The draft plan and environmental report issued on 11 May 2005.

[39] The parties are in dispute as to the nature of the respondent's obligation in the circumstances that had arisen. On the one hand the applicants contend that to undertake an environmental assessment at a late stage in an attempt to "catch up" with the draft plan could not be in accordance with the Directive or the Regulations. On the other hand the respondent contends that the later publication and consultation on a draft plan and environmental report in May 2005 accorded with the Directive and the Regulations. The Environment and Heritage Service demonstrated the manner in which their earlier involvement in the environmental appraisal fed into their later involvement in the environmental report.

[40] In the second application the issue of the timing of the publication of the report and the draft Plan was expressed by the second applicants as follows –

> "The respondent has failed to ensure early and effective consultation in relation to both the DSEA and the DMAP by –
>
> (a) Failing to consult on the DSEA prior to the publication of the DMAP.
> (b) Failing to publish a DSEA at the same time as publication of the DMAP.
> (c) Failing to publish a DSEA that complies with the requirements of the Directive; and
> (d) Improperly restricting the range of issues upon which the public were entitled to comment when published the revised DSEA."

[41] The draft Magherafelt Area Plan was published on 28th April 2004 with a 6 week period for consultation. An environmental appraisal was published as a technical supplement to the draft plan on 6th May 2004. The 6 week consultation period ended on 9th June 2004 before the coming into operation of the Regulations on 22nd July 2004. The respondent did not decide that an environmental assessment of the draft plan was not feasible and accordingly the obligation arose to carry out an environmental assessment in accordance with the Regulations. The Respondent decided to complete an environmental assessment in accordance with the Regulations. On 10th May 2005 the earlier environmental appraisal was withdrawn and a draft plan revision statement was published. On 24th May 2005 an environmental report was published and a consultation period ended on 5th July 2005.

[42] The applicants contend that the Directive and the Regulations contemplate that the draft plan and the environmental report are to be made available for consultation at the same time and if that was not the case it would not be possible for any member of the public or any consultation body to express any opinion on the draft plan that may have been inspired or influenced by anything contained in the environmental report.

[43] The respondent contends that the public would be free to comment on any aspect of the report during the consultation period. The second applicants counter that the public were not free, during the consultation period on the report, to make representations on the draft Magherafelt Plan. The absence of representations on the draft plan arising out of the report is said to have the effect of excluding any such objections from the consideration of the Public Inquiry that is to be held by the Planning Appeals Commission.

[44] Further the respondent emphasises the different phases of the process envisaged by the Directive and Regulations. First there is the beginning of the plan adoption process and secondly there is the end of the process when the plan is finally adopted. The respondent contends that the details of what occurs between the two phases is a matter for the discretion of Member States. The references in the Directive and the Regulations to the environmental report "accompanying" the draft plan are not confined to an act which occurs at the beginning of the process. The respondent contends that with the later publication of the environmental report it then "accompanied" the draft plan. In addition the respondent notes that while the word "accompanying" appears in the English text of the Directive an equivalent word does not appear in the French or Spanish texts of the Directive.

[45] Article 4.1 provides that the environmental assessment (which includes the preparation of the environmental report and the carrying out of consultations) shall be carried out "during the preparation of a plan". Article 5.4 provides that the designated consultation authority shall be consulted when deciding on the scope and level of detail of information that must be included in the environmental report. Article 6.2 provides that the designated consultation authorities and the public shall be given an early and effective opportunity to express an opinion on the draft plan and the accompanying environmental report. The domestic requirements in relation to the preparation of the environmental report and consultation procedures are to be found in Regulations 11 and 12.

[46] The Commission's guidance discusses the manner in which the Commission envisaged Article 4.1 being applied:

> "As a matter of good practice the environmental assessment of plans and programmes should influence the way the plans and programmes themselves are drawn up. While a plan or programme is relatively fluid, it may be easier to discard elements which are likely to have undesirable environmental affects than it would when the plan or programme has been completed. At that stage, an environmental assessment may be informative but is likely to be less influential. Article 4.1 places a clear obligation on authorities to carry out the assessment during the preparation of the plan or programme" (paragraph 4.2).

[47] The scheme of the Directive and the Regulations clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter throughout the periods

before, during and after the public consultation. In the period before public consultation the developing environmental report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations may be placed in jeopardy. The later public consultation on the environmental report and draft plan may not be capable of exerting the appropriate influence on the contents of the draft plan.

[48] Then there is the public consultation period. Article 4.1 continues to apply. Article 6.2 provides that consultees shall be given an early and effective opportunity within appropriate timeframes to express their opinion "on the draft plan or programme and the accompanying environmental report before the adoption of the plan." Regulation 12(1) refers to the draft plan and its "accompanying" environmental report as "the relevant documents". Regulation 12(2) provides that as soon as reasonably practical after their preparation the responsible authority shall send a copy of "the relevant documents" to the consultation body. Regulation 12(3) provides that the responsible authority shall publish a notice that includes inviting expressions of opinion on the relevant documents.

[49] Once again the environmental report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently "early" to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be "effective" in that it does in the event actually influence the final form. While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report it clearly contemplates the opportunity for concurrent consultation on both documents.

[50] The interim measures provide a "feasibility" test for environmental assessment when the development of a plan had commenced before the operative date. Clearly it would be a matter of fact and degree as to whether the plan had reached the stage where an environmental assessment was required. It must be borne in mind that there should be parallel development of the plan and the environmental aspects and that the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination.

[51] In the case of the Northern area a draft plan and "environmental appraisal" circulated in 2004. The draft plan was described by the respondent as "having reached an advanced stage" when the Regulations were introduced in July 2004. The "consultation body" had been involved in "environmental appraisal" from an early stage. The respondent referred to an

early consultation report, an issues paper and a further consultation report dealing with environmental issues before the draft plan was circulated in 2004. A revised version of the plan and an environmental report issued for consultation in 2005. The respondent relied in on the earlier environmental work as the groundwork for the environmental report. However it remains the case that the requirements for an environmental report are greater than previous requirements and it is not contended that the added requirements would have influenced the development of the draft plan. It is apparent that when the development of the draft plan had reached an advanced stage before the environmental report had been commenced there was no opportunity for the latter to inform the development of the former. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations.

[52] In the case of the Magherafelt area, in effect the draft plan issued for consultation in 2004 and the environmental report issued for consultation in 2005 and there was no parallel consultation on the plan and the report. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations.

The first applicant's delay.

[53] The respondent contends that the first applicant delayed in making the application for judicial review on 23 November 2005. Order 53 rule 4 of the Rules of the Supreme Court requires an application for leave to apply for judicial review to be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application may be made. For this purpose it is necessary to distinguish between the two broad grounds of challenge in the present cases, being in the first place the transposition of the provisions of the Directive into the Regulations and secondly compliance with the requirements of the Directive and the Regulations.

[54] As far as transposing the provisions of the Directive into the Regulations is concerned the Regulations came into effect on 22 July 2004 and therefore the application was not made promptly or within three months. However the issue relates to the continuing legality of the Regulations and the effective application of the provisions of a Directive. Where there have been failings in transposing the provisions of the Directive into the Regulations and non compliance with the provisions of the Directive, as has been found to be the position in the present case, there is an obligation to address those shortcomings. In order to do so and grant the necessary relief in the present

case there is considered to be good reason for extending the time to make the application for judicial review.

[55] As far as compliance with the Directive and the Regulations is concerned the draft plan and environmental report were issued on 11 May 2005. The applicant's solicitor's letter of 8 August 2005 raised the applicant's issues about the process and the respondent replied on 16 September 2005 rejecting the applicant's approach. I accept that the issues relating to the process could not have been raised in the manner that eventually came before the Court before the documents were issued in May 2005 and that it was appropriate for there to be an exchange of correspondence between the parties in relation to the implications of the respondent's approach before the applicant applied to the Court. The case raised complicated issues that required full consideration and examination with the respondent before the commencement of proceedings. I consider that time began to run against the first applicant upon receipt of the respondent's letter of 16 September 2005. In the circumstances the application for judicial review on 23 November 2005 was made promptly and was within time. However, if it is the case that time began to run against the first applicant at an earlier date, or if the application was not made promptly, neither of which is accepted, then it is considered that there is good reason to extend the time in order to address the fundamental issues relating to the application of the Directive and the Regulations that will impact on all future plans. While there will be an impact on the administration of development in the area affected by the draft Northern Area Plan there are issues of general application that require to be addressed.

[56] In summary I find that the designation of the Department of the Environment as the consultation body under Regulation 4 of the 2004 Regulations does not properly transpose Article 6.3 of the Directive; that the absence of appropriate timeframes in Regulation 12 does not properly transpose Article 6.2 of the Directive; that the environmental reports prepared for the draft Northern Area Plan and the draft Magherafelt Plan are not in substantial compliance with schedule 2 of the Regulations and Article 5 and annex 1 of the Directive; that the sequencing of the environmental reports and the draft plans was not in compliance Regulations 11 and 12 and Articles 4 and 6 of the Directive.