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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NO GAS CAVERNS LIMITED AND FRIENDS OF THE EARTH LIMITED FOR JUDICIAL REVIEW

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Conor Fegan (instructed by Tughans) for the Applicants
Tony McGleenan KC, Philip McAteer and Laura Curran (instructed by the Departmental Solicitor's Office) for the Respondent
David Elvin KC and Yaaser Vanderman (instructed by Carson McDowell) for the Notice Party

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HUMPHREYS J

Introduction

[1] Speaking extra-judicially in March 2023, Mr Justice Maurice Collins commented:

> "Regulators, operators and users have for some time been confronting a series of profound and conflicting challenges. On the one hand, there is the *Scylla* of the energy crisis resulting from the invasion of the Ukraine, the natural response to which is to prioritise the need for energy security, whatever the environmental cost. On the other, there is the *Charybdis* of global warming and climate change, pointing to the need for clean energy and warning against convenient and expedient short term recourse to hydrocarbon-fuelled power generation. Steering a safe course between these twin perils is a challenge of immense proportions."

[2] Fortunately, I am not called upon to conduct this exercise of Odyssean navigation. However, it provides the context to this application for judicial review

which concerns a proposed development of seven natural gas storage caverns to be located under Larne Lough off the coast of Co Antrim.

[3] The applicants are both limited companies which are advocates for environmental protection. The first applicant was formed by a number of local residents opposed to the proposed development whilst the second applicant is an established campaigner on environmental matters.

[4] They seek to impugn three decisions taken by the respondent, the Department for Agriculture, Environment and Rural Affairs ('DAERA') in November 2021, namely;

(i) The grant of a Marine Construction Licence under the Marine and Coastal Access Act 2009 ('MCA 2009');

(ii) The grant of a revised Discharge Consent under the Water (Northern Ireland) Order 1999; and

(iii) The grant of a revised Abstraction Licence under the Water Abstraction and Impoundment (Licensing) Regulations (Northern Ireland) 2006.

[5] Collectively, these authorised the marine aspects of the development, planning permission having previously been granted in respect of the terrestrial parts in October 2012. The developer is Islandmagee Energy Limited ('IMEL') (formerly known as Islandmagee Storage Limited), the notice party to the judicial review application.

Background

[6] The gas caverns are proposed to have a total capacity of around 500 million cubic metres and be formed at a depth of some 1350 metres below sea level by a process known as solution mining. This entails the creation of cavities in the salt layer by pumping seawater and causing it to dissolve. There are a number of steps in this process:

(i) The drilling of a wellbore to the required depth and location, the drilling rig being located on a wellpad;

(ii) The installation of a diameter pipe in the wellbore;

(iii) The installation of a wellhead to control the inflow and outflow of seawater, brine and gas;

(iv) The installation of leaching equipment;

(v) Pumping of seawater to dissolve the salt and create caverns, causing a discharge of waste brine into the North Channel;

(vi) The de-brining of the leached cavern by filling with natural gas, replacing the remaining brine solution and discharging it into the North Channel;

(vii) The commencement of commercial operations, with the project expected to last around 40 years.

[7] The terrestrial elements of the development, in respect of which planning permission was granted in 2012, include the wellpad, a gas plant facility, a solution mining facility, an intake pumping station and pipelines to convey seawater and brine.

[8] The marine parts of the development are comprised in the boreholes, the seven caverns, a tunnelled pipeline for seawater intake running from the inlet pumping station to the abstraction point offshore and a brine outfall pipeline.

[9] The proposed development is located within the North Channel Special Area of Conservation ('SAC'), the proposed East Coast (Northern Ireland) Marine Special Protection Area ('SPA'), the Larne Lough SPA and close to the Maidens SAC.

[10] At the conclusion of the development's life, likely to be a period of around 40 years, the sea caverns will require to be decommissioned.

The History of the Applications

[11] The applications for a marine construction licence, water abstraction licence and discharge consent were first made in October 2012. The original application was accompanied by an environmental statement ('ES') and addendum. Draft licences and consents were issued by the respondent on 10 July 2014. The water abstraction licence and discharge consent were issued in final form on 14 November 2014 but not a final marine construction licence.

[12] In the summer of 2018 correspondence ensued between the respondent and IMEL in relation to the future of the project. The respondent confirmed that no marine construction licence had issued, and both the water abstraction licence and discharge consent would require to be reassessed. The environmental and habitats information would also need to be updated.

[13] On 31 October 2019 IMEL submitted an updated Environmental Conditions Report and an updated shadow Habitats Regulations Assessment to DAERA. Further revisions of these documents were forthcoming on 9 December 2019 and an updated application on 16 December.

[14] Public consultation commenced on 20 December 2019. Consultees with a statutory remit were written to on 23 December 2019 and 19 February 2020.

[15] Objections were received from both applicants, as well as various political parties and representatives, and from the Northern Ireland Marine Taskforce, a grouping of environmental organisations.

[16] IMEL's agents, RPS Consulting Engineers, provided responses to the objections and consultation responses, part of which took the form of a question and answer document ("Q&A").

[17] The application for a marine construction licence was considered in conjunction with a review of the abstraction licence and discharge consent. Public consultation on these review applications was conducted in December 2020 and January 2021.

The Determination of the Applications

[18] As part of the consideration process, DAERA sent the Habitats Regulations Assessment ('HRA') to a consultancy firm, DTA Ecology. Its review was received on 26 March 2021. The final HRA was dated 31 March 2021 and concluded that there would be no adverse effects on the integrity of any designated site.

[19] A submission with four options was sent on 31 March 2021 to the then Minister, Edwin Poots MLA. Contained with the submission were the environmental impact assessment ('EIA') consent decision, the draft marine construction licence, the Q&A, the draft discharge consent, draft abstraction licence and legal advice. The options given were as follows:

(i) Approve the issue of the EIA consent decision, draft marine licence, reviewed abstraction licence and discharge consent and the response to the consultation (question and answer document), which is the recommended option; or

(ii) Agree to refer the EIA consent decision and draft marine licence to the Executive; or

(iii) Agree to hold a public inquiry on the application for the marine licence or explore options for a wider joined up public inquiry with the Utility Regulator; or

(iv) Agree to delay the decision until further information is available from the outcome of the DfE 2021 Energy Strategy, which may be more definitive on the role of gas or storage caverns on the Northern Ireland glide path to net zero.

[20] On 27 September 2021 an email indicated that the Minister decided to approve the project as follows:

> "Option 1 on the basis that appropriate controls are in place to mitigate environmental impacts."

[21] Draft decisions were issued by DAERA officials on 12 October 2021 and the final consents followed on 5 November 2021.

[22] The marine construction licence granted to IMEL authorises the creation of the seven caverns as described in the environmental statement. It is subject to a number of conditions, including a limitation of user to the storage of natural gas. A programme of environmental monitoring and mitigation is required, including annual reporting. The licence includes 'Outline Decommissioning Conditions' which require a fresh licensing application for this process, based on best practice at the time of decommissioning.

[23] The consent to discharge relates to the discharge of brine arising from the solution mining subject to a limit of 24,000 cubic metres per day. Sampling and monitoring are required to ensure compliance with salinity requirements and other parameters.

[24] The abstraction licence authorises the extraction of seawater by pumping for solution mining purposes, limited to 24,000 cubic metres per day. Record keeping and monitoring are required, and a fresh application is necessary in respect of any decommissioning.

The Legislative Framework

[25] Part 4 of the MCA 2009 sets out the licensing regime in respect of licensable marine activities, which this proposed development falls into. Section 67(4) prescribes that the appropriate licensing authority may require an applicant to furnish such information as may be necessary or expedient to enable it to determine the application.

[26] Section 69(1) of the MCA provides:

> "In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to—
>
> (a) the need to protect the environment,
>
> (b) the need to protect human health,

(c) the need to prevent interference with legitimate uses of the sea,

and such other matters as the authority thinks relevant."

[27] Section 58(1) requires any 'authorisation decision' (which includes the grant of a marine licence) to be taken in accordance with appropriate marine policy documents, unless relevant considerations indicate otherwise.

[28] The authority must either grant a licence unconditionally, refuse an application or grant the licence on such conditions as the authority thinks fit under section 71.

[29] Also in play in an application of this nature were the Marine Works (Environmental Impact Assessment) Regulations 2007 ('the EIA Regulations'). These impose various obligations in terms of the provision of environmental information, publicity, consultation and decision making. In making its decision, the Department is under a statutory duty to give reasons (regulation 23) and must take into account all information and representations received (regulation 22).

[30] The Water Abstraction and Impoundment (Licensing) Regulations (Northern Ireland) 2006 ('the 2006 Regulations') were made under the Water (Northern Ireland) Order 1999. They prohibit the carrying out of any controlled activity save in so far as it is permitted by the Regulations. Controlled activities may be authorised by licences which can be granted subject to conditions pursuant to regulation 6.

[31] Regulation 11 of the 2006 Regulations applies the assessment provisions of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 ('the Habitats Regulations') to applications under these Regulations.

[32] The Habitats Regulations require that permission may only be granted if the authority has ascertained that the project will not adversely affect the integrity of any designated site. Regulation 43 states:

"(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.

(3) The competent authority shall for the purposes of the assessment consult the Department and have regard to any representations made by it within such reasonable time as the authority may specify.

(4) The competent authority shall, if it considers it appropriate, take such steps as it considers necessary to obtain the opinion of the general public.

(5) In the light of the conclusions of the assessment, and subject to regulation 44, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposed that the consent, permission or other authorisation should be given."

[33] The Water (Northern Ireland) Order 1999 makes it an offence to discharge any poisonous, noxious or polluting matter into a waterway unless consent is given by the Department under Article 7A. Such a consent may be given on such conditions as the Department thinks fit.

General Principles

[34] The similarities between the marine and terrestrial planning systems are such that there is a strong read across in terms of the relevant legal principles. The extensive jurisprudence in the planning law area have given rise to a number of fundamental principles, including:

(i) The judicial review court exercises a supervisory jurisdiction. It is not a court of appeal and, as such, is concerned principally with the legality of the decision making process;

(ii) Matters such as the assessment of evidence, consideration of expert opinions and the exercise of judgement are properly for the decision maker;

(iii) The courts should be wary to avoid excessive legalism and a hypercritical approach to planning decisions;

(iv) A challenge to the adequacy of reasons given by a decision maker will only succeed when an aggrieved party satisfies the court that he has been substantially prejudiced by the failure to provide adequate reasons.

[35] As will become evident, much of the argument put forward by the applicants ultimately related to alleged failures to take into account material considerations and/or the taking into account of immaterial considerations.

[36] In a very different context, the challenge to the decision to release the serial rapist John Worboys, the Divisional Court in England & Wales in *R (DSD) v Parole Board* [2018] EWHC 694 (Admin) considered the different lines of authority on the issue of material and immaterial considerations. The requirement has its origins as a sub-species of Wednesbury irrationality. In *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 Lord Greene MR stated:

> "… a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

[37] As confirmed in *Re Findlay* [1985] AC 318, there is a separate line of authority concerning matters which must be taken into account by a decision maker as a result of the express or implied requirements of a statute. A failure to take such a matter into account will be a breach of legal obligation.

[38] The Divisional Court explained the importance of this distinction at para [141] of *DSD*:

> "The distinction between relevant considerations, properly so called, and matters which may be so obviously material in any particular case that they cannot be ignored, is not merely one of legal classification; it has important consequences. If a consideration arises as a matter of necessary implication because it is compelled by the wording of the statute itself, the decision-maker must take it into account, and any failure to do so is, without more, justiciable in judicial review proceedings. If, on the

> other hand, the logic of the statute does not compel that conclusion or, in the language of Laws LJ, there is no implied lexicon of the matters to be treated as relevant, then it is for the decision-maker and not for the court to make the primary judgment as to what should be considered in the circumstances of any given case. The court exercises a secondary judgment, framed in broad *Wednesbury* terms, if a matter is so obviously material that it would be irrational to ignore it."

[39] The court concluded that it was irrational for the Parole Board not to have taken into account evidence of further extensive offending committed by Worboys aside from the matters of which he was convicted. Importantly, however, it is recognised that only when the high bar of irrationality is met can a court intervene when a consideration is not mandated expressly or impliedly by statute.

[40] In the planning context, the Supreme Court recently considered the question of immaterial considerations in *R (Wright) v Resilient Energy Severndale Limited* [2019] UKSC 53, a case which has direct relevance to one of the applicants' instant grounds of challenge.

[41] Lord Sales confirmed the continuing applicability of the *Newbury* criteria to the question of the imposition of planning conditions. These must be for a planning purpose, must relate to the development permitted and must not be so unreasonable that no reasonable planning authority could have imposed them. These criteria can also define the ambit of material considerations since the ability to impose a condition can be a material factor in favour of the grant of permission.

[42] The issue in *Wright* was whether a fund proposed to be created by a developer for the benefit of the community was a material consideration in the planning decision making process. The court held:

> "In the present case, the community benefits promised by *Resilient Severndale* did not satisfy the Newbury criteria and hence did not qualify as a material consideration within the meaning of that term in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Dove J and the Court of Appeal were right so to hold. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought. *Resilient Severndale* required planning permission for the carrying out of "development" of the land in question, as that term is defined in section 55(1) of the 1990 Act. The community

> benefits to be provided by *Resilient Severndale* did not affect the use of the land. Instead, they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold. This is so whether the development scheme is regarded as commercial and profit-making in nature, as Hickinbottom LJ thought it was (para 39), or as a purely community-run scheme to create community benefits." [para 44]

Rigour, Amendment and Delay

[43] Before considering the specific grounds of challenge in this case, it is appropriate to address the need for procedural rigour in judicial review applications. In *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 Singh LJ identified "unfortunate trends" in public law litigation whereby grounds of challenge evolve and are only properly articulated at the stage of service of a final skeleton argument. In order to ensure fairness to all parties, and also to recognise the public interest in the outcome of judicial review applications, it is important that the courts do not permit grounds to be advanced which have not been properly pleaded or in respect of which leave has not been granted. The early and orderly identification of grounds which are arguable and worthy of pursuit will ensure that both the evidence and the legal arguments are suitably focussed. This, in turn, will serve to promote certainty in the decision making process and efficiency in the use of court time.

[44] There will, of course, be cases in which an applicant seeks to amend or refine its grounds of challenge in light of evidence served by the respondent or as a result of evolving legal principles. By virtue of section 18(2)(d) of the Judicature (NI) Act 1978 and Order 53 rule 6(2) of the Rules of the Court of Judicature, the court enjoys an untrammelled discretion to permit amendment of the grounds of challenge, but such applications should always be made timeously and in recognition of the respondent's entitlement to file evidence and advance legal arguments relevant to the amended grounds. In any event, when considering whether to permit such amendment, the court must determine whether leave ought to be granted on the basis that the amended ground is an arguable one with a realistic prospect of success, including whether the claim is out of time and, if so, whether an extension of time ought to be granted.

[45] In this case, the applicants served a skeleton argument three weeks before the substantive hearing which made it clear that certain grounds were no longer being pursued but also seeking to advance grounds which did not feature in the Order 53 statement and in respect of which leave had not been granted.

[46] On 1 May 2022 leave was granted on ten separate grounds of challenge. In October 2022 the respondent served extensive evidence amounting to over 2500 pages of affidavits and exhibits. No doubt time was required to consider the implications of this evidence but, despite decisions having been made with regard to the merits of various claims, no application was made to amend the Order 53 statement. A draft amended document was only forthcoming on the second day of hearing, following the direction of the court. The failure to abide by the most basic of procedural requirements is difficult to comprehend and caused practical problems for the efficient management of the case. The trial bundle extended to over 8000 pages, many of which were rendered irrelevant by decisions not to pursue certain grounds. In addition, the failure to plead grounds which were relied upon in a proper and timeous manner deprived the court of the necessary focus on the real matters in contention. Such an approach is evocative of Singh LJ's "unfortunate trends" and must be deprecated.

[47] Aside from these practical problems, the failure to make an application to amend the pleaded case gives rise to issues about delay and good reason. If an applicant is unaware of a potential ground of challenge until evidence is served by a respondent, it may well be able to persuade the court to extend the time for bringing of a claim under this particular head. If such a course of action is not adopted, and the matter left to be raised at hearing, there is a real risk that a meritorious ground of challenge will be lost since no good reason can be established for the delay in bringing the claim.

[48] Having heard the respondent and notice party on the issue of the proposed amendments, it was determined that the hearing could proceed so that any grounds in respect of which leave had not been granted could be addressed on a 'rolled-up' basis.

The Grounds of Challenge

[49] The applicants' skeleton argument and draft amended Order 53 statement identified the following grounds of challenge:

(i) The failure to refer the applications to the Executive Committee;

(ii) The taking into account of an irrelevant consideration, namely the community fund;

(iii) The failure to comply with section 58 of the MCA 2009;

(iv) The failure to take into account material considerations, namely the response from the Council for Nature Conservation and the Countryside ('CNCC') and the impact on scallops and skate;

(v) Breach of regulation 43 of the Habitats Regulations;

(vi) The failure to assess the environmental impact of decommissioning;

(vii) The failure to comply with Schedule 5 of the EIA Regulations.

(i) Failure to Refer to the Executive Committee

[50] The applicants contend that the project was cross-cutting, significant and/or controversial and ought therefore to have been referred to the Executive Committee pursuant to the provisions of sections 20 and 28A of the Northern Ireland Act 1998 ('NIA').

[51] Section 20 establishes the Executive Committee, made up of the First Minister, deputy First Minister and the Northern Ireland Ministers. By section 20(3), it has the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement which include: "discussion of and agreement on issues which cut across the responsibilities of two or more ministers."

[52] Section 20(4), inserted by the Northern Ireland (St Andrews Agreement) Act 2006, provides:

> "(4) The Committee shall also have the function of discussing and agreeing upon—
>
> (a) where the agreed programme referred to in paragraph 20 of Strand One of that Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;
>
> (aa) where no such programme has been approved by the Assembly, any significant or controversial matters;
>
> (b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee."

[53] However, as a result of amendments introduced by the Executive Committee (Functions) Act (Northern Ireland) 2020 ('the 2020 Act'), subsections 20(3) and 20(4) are expressly subject to subsections (8) and (9):

> "(8) Nothing in subsection (3) requires a Minister to have recourse to the Executive Committee in relation to any matter unless that matter affects the exercise of the

statutory responsibilities of one or more other Ministers more than incidentally.

(9) A matter does not affect the exercise of the statutory responsibilities of a Minister more than incidentally only because there is a statutory requirement to consult that Minister."

[54] Section 28A of the NIA, again inserted after the St Andrews Agreement, deals with the Ministerial Code:

"(1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.

(5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(6) The Ministerial Code must include provision for a procedure to enable any Minister or junior Minister to ask the Executive Committee to determine whether any decision that he is proposing to take, or has taken, relates to a matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.

(10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5)."

[55] In compliance with section 20(3) and (4), section 2.4 of the Ministerial Code reads as follows:

"Any matter which:

(i) cuts across the responsibilities of two or more Ministers;

(ii) requires agreement on prioritisation;

(iii) requires the adoption of a common position;

(iv) has implications for the Programme for Government;

(v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement;

(vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or

(vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009 shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee."

[56] This area has been the subject of recent consideration by the courts in a number of cases, including *Re Central Craigavon's Application* [2011] NICA 17 & [2010] NIQB 73, *Re Buick's Application* [2018] NICA 26, *Re Safe Electricity A&T Limited's Application* [2022] NICA 61 & [2021] NIQB 93 and *Re Mooreland and Owenvarragh Residents Association's Application* [2022] NIQB 40.

[57] The NIA offers no definition of the concepts of 'significant' or 'controversial.' In *Buick* the Court of Appeal determined that the waste disposal incinerator, the subject matter of that application, satisfied both tests. It was regarded as significant in light of the importance of waste management policy and compliance with the relevant EU Directive in Northern Ireland. It was controversial due to the range of political views which had been expressed on the issue.

[58] In *Central Craigavon*, Morgan LCJ at first instance held that the decision to adopt PPS5 was not significant or controversial since no interest had been raised by any other Minister in response to correspondence on the issue. The Court of Appeal declined to rule on the question since, by that time, it had become academic.

[59] Scoffield J in *Safe Electricity* described significant and controversial as referring to:

> "… a matter of some importance and noteworthiness, judging that against the gamut of other responsibilities the Minister has. Significance might arise because of the financial implications of the matter … or because of the

> effects it will have on citizens in Northern Ireland." [para 73]
>
> "There may be different levels of controversy in relation to a proposed decision, ranging from mild disagreement to implacable hostility … A common sense approach to this matter has to be taken. Not every decision which will displease some can be required to be referred to the Executive." [para 81]"

[60] Whilst the decision was overturned on appeal on other grounds, the Court of Appeal did not demur from this approach.

[61] The issue arises as to the scope of the supervisory jurisdiction in relation to challenges brought to Ministerial decisions in this area. On the analysis of Scoffield J, these are questions of fact and judgement for Ministers, subject only to challenge on rationality grounds. The applicants contend that this is wrong and that these are questions of law upon which a court can, and should, reach its own concluded view.

[62] I had occasion recently to consider the thorny distinction between questions of fact and law in *Re Palmer Agencies Limited's Application* [2023] NIKB 35, at paras [37] to [41], and I quoted the editors of De Smith:

> "Perplexing problems may, however, arise in analysing the nature of the process by which a public authority determines whether a factual situation falls within or without the limits of standard prescribed by a statute or other legal instrument" [11-038]

[63] Applying first principles, the words 'significant' and 'controversial' bear ordinary meanings in the English language, they are not legal concepts. Whether a particular issue falls properly within the definition is a matter of assessment for the decision maker, who will properly engage in an exercise using his or her knowledge of the Ministerial role. I therefore agree with Scoffield J that these are properly regarded as matters of fact and therefore bear judicial scrutiny only to the extent that the decision maker has acted irrationally in the *Wednesbury* sense.

[64] Ms Claire Vincent, Principal Scientific Officer in DAERA, who swore the principal affidavit on behalf of the respondent, made the following points in support of the Ministerial determination that the issue was neither significant nor controversial:

(i) There was no discussion at Executive level on any of the consents granted for the project;

(ii) No previous applications for marine licences had been the subject of consideration by the Executive;

(iii) Although the issue was the subject of questions and answers at Assembly level, no MLA sought to have the matter escalated to the Executive Committee;

(iv) The planning application terrestrial aspect of the project was treated as a regular application, not as one of regional significance, and was not referred to the Executive;

(v) The Minister was aware of the level of local opposition but did not regard that as meeting the threshold to be treated as 'controversial';

(vi) In February and March 2021, other Ministers, including Robin Swann in Health, Deidre Hargey in Communities and Conor Murphy in Finance, all received correspondence from representatives of the first applicant asserting that the matter ought to be referred to the Executive for determination but none of them sought to do so.

[65] The applicants disagree and contend that this was recognised by DAERA officials as a major infrastructure project and a key part of Northern Ireland's energy strategy, and it would impact upon climate change for many years to come. It also generated a significant level of political and public opposition, including from statutory consultees and leading environmental non-governmental organisations.

[66] The mere fact that the ultimate decision was taken by the Minister cannot, of itself, render a matter significant and requiring referral to the Executive.

[67] The Minister correctly recognised the importance of the project and the scope of the opposition to it. However, his decision not to refer on the basis that the decision was not significant or controversial cannot be impugned on the grounds of irrationality. It was classically an exercise of evaluative judgement with which the courts will be slow to interfere. In this case, the Minister was entitled to hold that, measured against the full gamut of Departmental responsibilities, the project was not significant and in light of the nature and extent of the opposition, it was not properly to be regarded as controversial. The views of other Executive Ministers and elected representatives on these questions are important and no-one contended that the question was properly one for the Executive.

[68] The amendments made to section 20 of the NIA by the 2020 Act mean that the relevant test for 'cross-cutting' is now whether the matter "affects the exercise of the statutory responsibilities of one or more other Ministers more than incidentally." This is a narrower test than was applicable at the time of the decisions in *Buick*.

[69] Unlike the issues of significance and controversy, the question of cross-cutting has a statutory definition and can therefore be properly recognised as a matter of law, amenable to judicial review on a legality basis. This accords with the approach of Scoffield J in *Safe Electricity*.

[70] The applicants argue that this decision cut across the responsibilities of the Department for Economy 'more than incidentally' insofar as matters relating to climate change and energy supply policy are concerned.

[71] However, it has to be recognised that the statutory test speaks of cutting across the exercise of statutory responsibilities on the part of another Minister. Very many decisions made by Ministers will have social and economic impacts beyond the ambit of their particular Department. All decisions around infrastructure will have implications for finance, the economy, the environment and communities and some will impact upon health and education. That cannot mean that all such decisions require Executive approval.

[72] In order to challenge a decision that a matter is not cross-cutting, the statutory responsibility in question must be identified and then one must show how the decision cuts across the exercise of this responsibility. Identifying relevant subject matter is not enough, nor is the identification of statutory consents required from other agencies. The fact, for instance, that further consent would be required from the Utility Regulator could not render a decision cross-cutting within the statutory definition.

[73] In this case, the applicants have failed to identify the statutory responsibilities in question, or the manner in which it is said that their exercise has been cut across.

[74] For these reasons, this ground of challenge must fail.

[75] Had I determined otherwise, that would not be the end of the matter since, as the recent jurisprudence illustrates, the mere fact of contravention of the Ministerial Code does not automatically lead to relief. In *Central Craigavon*, Morgan LCJ held that section 28A would only be triggered in the case of a conscious contravention by a Minister. In *Safe Electricity*, Scoffield J expressed some doubts about this principle but was not prepared, applying the principle of judicial comity, to depart from the precedent. Likewise, I regard any departure to be a matter for the Court of Appeal.

[76] There is no evidence in this case that the Minister embarked on the kind of 'solo run' which was the mischief aimed at by the legislation. The fact that no other Ministers objected to the course of action is indicative of this approach. Had I found, for instance, that the Minister had acted unreasonably in deciding the decision was not controversial, I would not have found that there was a "conscious act of opposition or violation" as required by *Central Craigavon* at para [30].

(ii) The Community Fund

[77] The applicants contend that an immaterial consideration was taken into account, namely the 'community fund' proposed by IMEL. In its 2010 ES, IMEL states:

> "Subject to obtaining planning permission and full funding for the gas storage project, the Company would like to set up a Trust that would include representatives from the local area, who, together with representatives from the Company, would support local projects and ideas themed around its main aims and objectives which will be Education, Geology and the Environment. The Trust would be set up in accordance with The Department for Social Development regulations and it is proposed that there will be an initial investment of £1million on a range of projects in the first three years, following full funding of the gas storage project, with another £50,000 per annum thereafter for a minimum of 6 years." [para 13.4]

[78] In DAERA's EIA consent decision of March 2021 under the heading 'Potential Environmental Impacts and Proposed Mitigation', a number of specific measures are addressed then it continues:

> "In addition to the main issues raised above, there are other important areas for which mitigation measures are required. These are outlined below …
>
> Social and Economic
>
> As Islandmagee lacks the infrastructural requirements to supply natural gas to each household, the local community will receive few direct benefits from the proposed project … As a compensatory measure, the Company proposed to set up a community benefit scheme as part of the overall proposal. A community fund of £1M has been created by {IMEL}, with the aim of supporting local projects and initiatives over the life of the project."

[79] This document formed part of the submission to the Minister and therefore, the applicants say, must have been a consideration taken into account by him in arriving at his decision.

[80] Reference was also made to the community fund in a written answer to an Assembly question on 3 March 2020.

[81] It was not in dispute between the parties that such a community fund was not a relevant consideration in light of the UKSC decision in *Wright*, referred to at para [40] above.

[82] In her affidavit, Ms Vincent states that the community fund was not, in fact, taken into account in the decision to grant the marine licence. This is, she avers, illustrated by the fact that it was not made a condition of the licence, unlike other proper mitigation measures. She accepts that it was inappropriate to place the text around the fund in the section of the EIA decision headed 'Other Mitigation Measures' since it was merely a recital of the company's intentions rather than a material consideration.

[83] The applicants take issue with this, pointing out that the EIA decision is a statutory document. The Minister was not told that the community fund was a matter to which no weight should be attached when he received the Ministerial submission and, viewed through his lens, was a matter he could properly take into account.

[84] In the email emanating from the Minister on 27 September 2021 reference is made to controls being in place to mitigate 'environmental impacts' and, on this basis, the project was approved. The community fund was referred to in the EIA decision as a 'social and economic' mitigation measure, not one which was therefore connected to environmental harm.

[85] In *R (Shasha) v Westminster City Council* [2016] EWHC 3283 (Admin), an area planning officer employed by the Council, Ms McKenzie, prepared a report recommending the grant of planning permission in respect of a particular development. The decision to grant permission was taken by her team leader. The report contained an erroneous consideration of certain objections to the application. John Howell QC, sitting as a high court judge, held that evidence as to Ms McKenzie's thought processes when writing the report was inadmissible since she was not the decision maker and:

> "the Report must be taken to mean what it appears to say, since there is no evidence (even if admissible) of what the decision maker understood it to mean" [para 43]

[86] The court has the evidence of a senior Departmental official to the effect that the community fund was not a matter taken into account, but has no evidence from the decision maker. In *HMRC v Tooth* [2021] UKSC 17, the Supreme Court pointed out:

> "There is no principle of collective knowledge within a department. If a civil servant acts on behalf of a Minister, it is the civil servant's knowledge and state of mind which are relevant; if the Minister decides to take the relevant decision himself or herself, it is the Minister's knowledge and state of mind which are relevant."

What the court does have in this case is the Minster's email, which limits reference to the environmental mitigation measures, and the fact that the requirement for a community fund was not made a condition of the marine licence. If the community fund were a feature of Ministerial decision making, one would have expected a means of enforcement of the funding obligation to have appeared in the suite of documents. It is significant that the EIA consent decision itself recites, at para 8.1.2:

> "The Marine Licensing Authority through assessment of the environmental impacts detailed within the Environmental Statement and through consultation believe that all material considerations have been assessed and adequate mitigation has been identified to minimise the impacts of the project. The mitigation identified has been incorporated into the Marine Licence and associated DAERA licences and will augment the existing mitigation in the planning permission."

[87] All of the mitigation measures identified in that decision resulted in informatives and/or conditions being recited or imposed in the licences issued by DAERA with the exception of the community fund. I am satisfied therefore that whilst reference to the proposal ought not to have featured in the submission, it was not treated as a material consideration. For these reasons, I am not persuaded that the applicants have established on the balance of probabilities that an irrelevant consideration was taken into account and this ground of challenge therefore fails.

(iii) Section 58 of the MCA 2009

[88] As originally pleaded, the argument advanced on this issue was that the respondent had failed to take the decisions in accordance with the UK Marine Policy Statement which requires consideration of the impact on climate change of the project. The evidence adduced by the respondent made it clear that the potential impacts on climate change were, in fact, considered.

[89] As a result, in the draft amended Order 53 statement, this had mutated to:

(i) The taking into account of an irrelevant consideration, namely the potential for the caverns to be repurposed for hydrogen storage;

(ii) An irrational assessment of climate change impact;

(iii) The failure to take into account a material consideration, namely the energy use of the project.

[90] Properly analysed, each of these were fresh claims, not previously pleaded and in respect of which leave had not been granted.

[91] The respondent was obliged, by section 58, to make decisions in accordance with the UK Marine Policy Statement unless relevant considerations indicated otherwise.

[92] In the section of the EIA consent decision dealing with climate change, para 7.16.7 states:

> "IMEL has also indicated that the caverns could be repurposed in the future for hydrogen or compressed air storage, as reliance on natural gas diminishes. Although that is not part of the current application, or planning permission, the potential for repurposing is a consideration."

[93] In the Ministerial Submission dated August 2021 Ms Vincent comments:

> "Islandmagee Energy has highlighted a vision to support NI's net zero ambition through transitioning the caverns to hydrogen storage … It may be that consideration of the effects of hydrogen storage may strengthen the environmental case to license the project" [para 6]

[94] In her evidence Ms Vincent states:

> "I can confirm however that that potential did not feature as part of the determination of the Marine Licence, which is apparent from a number of other documents." [para 362]

[95] In a letter dated 11 November 2020 from John Wood, the CEO of Infrastrata plc, the parent company of IMEL, to the Minister it is expressly stated:

> "For the avoidance of doubt, whilst the report seeks to cast an eye into the future regarding hydrogen storage and notes that the proposed Islandmagee could be repurposed as a hydrogen storage facility in the future

> should technology develop in relation to that gas, consent for hydrogen storage at Islandmagee has not been sought. Should my company at any stage in the future seek to repurpose the Islandmagee facility to store hydrogen then that would have to be the subject of a separate future application."

[96] The Minister replied to this correspondence thanking Mr Wood for his "clear statement" that consent for hydrogen storage was not being sought at this stage.

[97] Condition 4 of the Marine Licence itself provides:

> "The facility authorised to be constructed under this Licence shall only be used for the storage of natural gas. The Licensee shall contact the Licensing Authority immediately if it is proposed to vary or change the intended use of the facility from the storage of natural gas. It should be noted that a change of use may invalidate a licence and a further application may be necessary."

[98] In a written response dated 28 October 2021 to a question tabled in the Assembly by the MLA for East Antrim, the Minister confirmed that any proposal to transition the development to hydrogen storage would require a fresh application. The same point is reiterated at question 15 in the Q&A document.

[99] It is not surprising that IMEL would seek to reference some potential future use for the caverns. This does not, in light of the explicit approach adopted by both the respondent and the notice party, make that issue a material consideration for the purposes of the Marine Licence application.

[100] The irrationality alleged by the applicants stems from a statement in the Ministerial Submission dated 31 March 2021 to the effect that:

> "Climate change considerations were considered, and it appears while the UK plans to reduce its reliance on fossil fuels, transition will take a significant time. Gas will continue to play an important part in the UK fuel mix for some years to come." [para 17]

[101] The applicants say that this latter conclusion lacked any rational basis. The problem with this analysis is that the words in question are a direct lift from para 3.3.11 of the very UK Marine Policy Statement which underpins the section 58 obligation. It could scarcely be irrational to act in compliance with the statutory duty.

[102] In any event, an analysis of the role to be played by fossil fuels in the UK's future energy requirements and how this may interact with the route to net zero is quintessentially a matter for policy makers and not the courts. There is, of course, a debate around the future use of oil and gas but it could not be classified as irrational to hold the view expressed in these documents. As the Court of Appeal in England & Wales observed in *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 the statutory and policy arrangements leave the government a "good deal of latitude" in how they attain the stated policy objectives. It is the role of government to determine how the goal of net zero is reached – see para [87].

[103] The applicants also put forward a vague claim that the impugned conclusions were inadequately reasoned without elucidating either why a duty to give reasons exists in the circumstances or how it is said that the stated reasons were inadequate.

[104] The third aspect of this ground of challenge alleges that the Minister failed to take into account a material consideration, namely the substantial energy use of the project. The applicants' ES states that the facility will have significant power demand during its construction and operational phases. It is recorded that it is likely to be one of Northern Ireland's biggest power consumers when running at peak operations. There is no statutory obligation, express or implied, to take this matter into account and therefore the applicants must show that the Minister acted irrationally in failing so to do. Simply because an objector states that an issue would be a material consideration does not generate a basis for judicial review. There is no basis to hold that the failure to specifically address this matter was irrational.

[105] None of the aspects of this ground of challenge are arguable and therefore leave and permission to amend are refused. If I had found any part of the section 58 challenge to be arguable, I would nonetheless have refused leave on the grounds of delay. Leave was granted on the basis of a section 58 challenge which alleged that the respondent had failed to take into account the climate change impact of the project. Ultimately the claim which was pursued was an entirely different case focused on material/immaterial considerations and broader irrationality. None of these claims were advanced within three months of the impugned decisions and no application made to amend the Order 53 statement until 3 May 2023. Had such an application been made within a reasonable time of the service of the respondent's evidence in October 2022 then a different view may have been taken. However, I am not satisfied that any reason, let alone any good reason, has been articulated for the failure to plead the proper basis for the section 58 challenge until after the substantive hearing of the application had commenced.

(iv) Material Considerations - the CNCC Response, scallops and skate

[106] This is a ground in respect of which leave was not originally given but which has been sought to be added as a new claim by way of amendment at the commencement of the substantive hearing.

[107] The CNCC was established by the Nature Conservation and Amenity Lands (Amendment) (Northern Ireland) Order 1989 with a statutory role to provide advice to DAERA on nature conservation and environmental issues.

[108] DAERA was obliged, pursuant to regulation 22(a)(v) of the EIA Regulations, to take account of any representations made by the "consultation bodies." The Natural Environment and Rural Communities Act 2006, section 32, defines the 'UK consultation bodies' as including the CNCC.

[109] On this basis, the respondent was clearly obliged as a matter of law to take into account any representation made by the CNCC.

[110] In Ms Vincent's affidavit she candidly admits that, by reason of a misunderstanding, the CNCC response relating to this project was not considered by the marine licensing team. As a result, the section in the EIA decision setting out the dates responses were received from various consultees is, in the case of the CNCC, blank.

[111] The respondent says that if the CNCC representation had been considered, it would have made no difference to the outcome of the decision making process.

[112] In *R (Weir) v Camden LBC* [2005] EWHC 1875 (Admin), Collins J considered a challenge to a grant of planning permission in circumstances where the highway authority was an obligatory consultee, but its view had, in error, not been considered by the decision maker. The learned judge found:

> "It seems to me that it is clear that there was here a failure to have regard to a material consideration; that is to say, that there was an objection and the terms of it from Westminster. Indeed, the contrary has not been argued. The only question, therefore, that I have to decide, in the light of all these circumstances, is whether the defect was such that, notwithstanding the error, the decision would have been the same. I cannot take that view. It seems to me that the Committee may well have been influenced by the knowledge that this objection had been raised by Westminster and may well have been persuaded, as a result, that greater weight should have been attached to the objections than the officers believed to be the case, and that the remedies suggested were not in fact sufficient to meet the situation." [para 16]

[113] In the first Casement Park decision, *Re Mooreland and Owenvarragh Residents Association Application* [2014] NIQB 130, the fact that the Minister was not informed of the police objections to the application was found to be a fundamental flaw in the process.

[114] It is necessary therefore to consider the content of the representation which was made by CNCC. It states that CNCC has objections as follows:

- The information supplied does not include all the data on priority species such as quahogs and sand eels;
- The latest techniques for brine disposal have not been addressed;
- A cost benefit analysis of either using the extracted salt on site or exporting it is required;
- The application has not demonstrated that it will have little or no impact on the features of designated sites;
- Adequate mitigation measures have not been offered;
- The project does not fit with government policy of moving away from a carbon based economy.

[115] Ms Vincent deposes to ex post facto consideration of the CNCC objection which took place by the marine licensing team after the Ministerial decision had been made. She asserts that there was nothing in the objection which was not considered within the process in any event. She was satisfied, for instance, that the area of sea bed affected was very small and therefore the impact on quahogs and sand eels would be minimal. The impact on both is referenced in the ES.

[116] In any event, as has been pointed out by IMEL, neither quahogs nor sand eels were priority species at the time of the decision. They have only been added to the list in 2023. As such, the first point of objection made by CNCC was misconceived.

[117] In relation to brine disposal, Ms Vincent states that other options were considered and discounted, and that the Department remained of the view that the 2010 proposal remained the best approach. In relation to the other matters, she avers that the HRA and proposed mitigation addressed all such issues.

[118] This issue relating to the failure to take into account the representations made by a statutory consultee was not sought to be pleaded until 3 May 2023, some 18 months after the decisions under challenge were made and six months after the respondent filed its evidence in the case, candidly admitting that the representation was not originally considered.

[119] The court would have expected a detailed affidavit, explaining the reasons for the delay in pursuing this ground of challenge. None was forthcoming and therefore no reason has been presented for its omission from the application. Moreover, the fact of the failure to consider was well known to the applicants since it

formed part of the submissions in the interlocutory hearing, heard and determined in March 2023, [2023] NIKB 41, whereby the applicants sought to strike out part of the respondent's evidence.

[120] This ground, whilst arguable, is out of time and I decline to exercise my discretion to extend time on the basis that no good reason has been established. Leave and permission to amend the Order 53 statement is therefore refused.

[121] Had I granted leave, I would have found that the grounds of objection put forward by CNCC were, in any event, set out with detail and force by other objectors and consultees and would have been satisfied that the outcome of the application would have been the same if the CNCC representation had been properly considered.

[122] In the proposed amended Order 53 statement, the case is advanced for the first time that the respondent failed to take any account of the concerns in respect of the impact of the project on scallops and the scallop fishing industry.

[123] The evidence of Ms Vincent is that there were verbal discussions between officials to the effect that the impacted area was extremely small and, scallops being a mobile species, would not suffer any significant detrimental effect. This is detailed in the ES which states:

> "Provided the dispersion of brine from the outfall diffuser approximates to the predicted levels … there should be no significant impact on the productivity of local fishing operations for lobster, crab and scallop."

[124] Accordingly, conditions were imposed in the marine licence on the nature and extent of the brine discharge in order to mitigate any risk of harm.

[125] In particular, the applicants object that the specific concerns in relation to scallops did not form part of the submission to the Minister. The material before the decision maker did reference shellfish and the impact on the local fishing industry generally without specifically mentioning scallops. However, it is well established that submissions of this nature do not need to descend into every detail. As Singh LJ said in *R (Christian Concern) v Secretary of State for Health and Social Care* [2020] EWHC 1546:

> "Ministerial submissions never include every piece of background information. Efficient government would become impossible if they did. Ministers can generally request further detail if they consider that necessary. The omission of particular details will cause a submission to be "misleading" only if those details are so critical that, without them, the court cannot be confident that the

> Minister took into account every legally mandatory consideration. In that regard, it is well established that it is for the public authority to decide on the manner and intensity of the enquiry to be undertaken; and the court should intervene if, and only if, no reasonable authority could have been satisfied on the basis of the enquiries it made that it possessed the information necessary for its decision."

[126] It is unarguable that there was some flaw in the material furnished to the Minister relating to scallops which rendered the ultimate decision capable of public law challenge. In any event, the fact that the conclusion drawn by officials was that no significant impact would be caused to scallops illustrates the point that no other decision could conceivably have been made if the further information had been supplied.

[127] As a result, I refuse leave and permission to amend the Order 53 statement in relation to the scallop issue. It also suffered from the same infirmity as a result of the unexplained delay in pursuing the ground.

[128] A similar point is advanced in relation to the impact of the project on the common skate, although this did appear in a somewhat different form in the original pleading in respect of which leave was granted. As now argued, the applicants say that the respondent failed to assess the impact of brine discharge on the common skate, being a material consideration rather than a freestanding breach of the Habitats Regulations. I am satisfied that this represents a legal reformulation rather than a fresh ground of challenge requiring leave.

[129] However, the ES specifically references the position of the common skate, concluding that this species is severely depleted in Northern Irish waters and that the brine discharge will not significantly impact on it as a result of the dilution and dispersal of the brine. There is therefore no evidential basis for the assertion that there was no consideration of the impact of the proposal on the common skate and it cannot succeed.

[130] This ground of challenge therefore fails.

(v) Breach of the Habitats Regulations

[131] Regulation 43 of the Habitats Regulations transposed the requirements of Article 6(3) of the Habitats Directive (92/43/EEC) into domestic law.

[132] In *R (Wyatt) v Fareham BC* [2022] JPL 1509, Sir Keith Lindblom helpfully set out the principles in play when a court is considering a challenge to a regulation 43 assessment, which I summarise and adopt:

(1) The duty imposed by the Habitats Directive and the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site is always a matter of judgement for the competent authority itself;

(2) The court must be wholly satisfied in the exercise of its supervisory jurisdiction that the competent authority's performance of its obligations was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment;

(3) When reviewing the performance by a competent authority of its duty, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty, the court will intervene only if there is some Wednesbury error in the performance of that duty;

(4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation;

(5) When provided with expert evidence in a claim for judicial review, the court will not substitute its own opinion for that of the expert. The court will bear in mind that decisions which entail "scientific, technical and predictive assessments by those with appropriate expertise" and which are "highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament)" should be accorded a substantial margin of appreciation;

(6) The Habitats Directive and the Habitats Regulations embody the precautionary principle, and make it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered;

> (7) The duty placed on the competent authority is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty." Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned";
>
> (8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. Whether there are grounds for "reasonable doubt" will always be a matter of judgement in the particular case;
>
> (9) An appropriate assessment must be based on the "best scientific knowledge in the field." Such knowledge must be both up-to-date and not merely an expert's bare assertion;
>
> (10) What is required of the competent authority, therefore, is a case-specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned.

[133] As Weatherup J explained in *Re National Trust's Application* [2013] NIQB 60, the obligation to provide information under the Habitats Regulations is on the developer and the Department will decide whether this information is sufficient. The court's supervisory role is limited to *Wednesbury* based rationality.

[134] It is well established that judicial review is the not the appropriate means by which to resolve disputes between scientific experts – see, for example, the judgment of Murray J in *R (MacDonald) v SSEFRA* [2019] EWHC 1783 at paras [113] to [118]. Equally, the rationality bar is recognised to be high in cases where Parliament has empowered a decision maker to make a determination based on expert and scientific advice.

[135] In *Re Mooreland and Owenvarragh* [supra] I followed the decision of Sullivan LJ in *R (Boggis) v Natural England* [2010] PTSR 725 in which he said at para [37]:

> "In my judgment a breach of article 6(3) of the Habitats Directive is not established merely because, sometime after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a

> significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned" … a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered."

[136] In this case, the HRA concluded that there would be loss of seabed or benthic habitat as a result of the development but that this would not be significant in light of the characteristics of the species concerned and the proposed mitigation. With the adoption of all the required control measures, DAERA determined that there would be no adverse effect on the integrity of any relevant site.

[137] The applicants contend that there are two respects in which the HRA is flawed:

(i) The calculation of the footprint of the brine outfall pipe; and

(ii) The quality of the data provided by bird surveys.

[138] IMEL accepts that an error was made in the calculation of the total footprint of the area impacted by the discharge of brine. The figure stated is 120 m^2 whereas this ought to have been 450 m^2. In her evidence, Ms Vincent states that even on this increased figure, "there is no significant loss to benthic habitat." The area actually impacted represents 0.000046% of the protected area.

[139] The respondent contends that the difference is negligible, and the error could not have caused any other outcome to the assessment. This is demonstrated by the fact there was a second error made in that DAERA believed the percentage area affected to be 0.013%. It must therefore be concluded that had the correct brine discharge figure been calculated, the respondent would nonetheless have concluded that there was no demonstrable risk or significant loss of habitat.

[140] The applicants have failed to demonstrate that there was a real risk caused by the incorrect figure being cited.

[141] The applicants make various criticisms of the quality of the bird survey data produced by IMEL and assessed by the respondent. It has been asserted, for instance, that the most recent bird surveys (2019) were not carried out at an appropriate time of year and previous surveys are now out of date. DAREA concluded that it had sufficient data to consider the likely significant effects of the

project on bird species. In doing so, it relied upon the advice of ornithologists within the Northern Ireland Environment Agency ('NIEA').

[142] As such, this is classic *Wednesbury* territory. The applicants must show not that a body of scientific opinion disagrees with the Department's conclusions but that the decision is irrational, bearing in mind the appropriate margin of appreciation when considering matters involving expert opinion.

[143] Dr McCulloch of the NIEA has sworn an affidavit and in it he acknowledges that the timing of the 2019 surveys was not auspicious and that in August 2020 he did recommend a full survey be undertaken. However, he maintains this was only a recommendation and not an essential requirement.

[144] In the Q&A document, the respondent states that surveys carried out in 2008/9, 2011/2, 2015 and 2019 have shown that the area in question is not an important area for feeding and that seabirds have extensive foraging areas. The timing of the 2019 survey is acknowledged but it is concluded that the results are similar to those previous surveys.

[145] In his conclusion, Dr McCulloch confirms:

> "I have therefore concluded that there was no reasonable scientific doubt regarding the absence of a likely significant adverse effect from the Islandmagee Gas Storage project on seabirds using the area…"

[146] It is for the Department to determine the adequacy of the information provided. In this case, it decided that it had sufficient information on the risks posed to birds by the project and the measures proposed to mitigate these. Further and better information could, of course, have been forthcoming but ultimately a decision was made on foot of the available evidence and expert advice. The conclusion that adequate information was available to reach an assessment could not be impugned by this court.

[147] The claim of breach of regulation 43 of the Habitats Regulations is therefore dismissed.

(vi) ***The impact of decommissioning***

[148] The applicants say that DAERA engaged in unlawful 'project splitting' by divorcing the construction and operation of the project from its decommissioning. Since the decommissioning of the caverns is an inevitable part of the project, it is argued, the environmental impacts must be assessed under the EIA Regulations.

[149] Andrews LJ in *R (Ashchurch Parish Council) v Tewksbury BC* [2023] EWCA Civ 101 observed, in the context of other similar regulations:

> "The identity of the "project" for these purposes is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the Directive and the Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a "project" – a process referred to in shorthand as "salami-slicing": see e.g. the observations of the CJEU in *Ecologistas en Accion-CODA v Ayuntamento de Madrid [2008] ECR 1-6097* at [48]" [para 78]

[150] The evidence here is that the decommissioning process has been assessed. The ES information furnished by IMEL specifically references the question of decommissioning and potential means by which this may be achieved through a process of cavern sealing and abandonment. It also stresses, however, that this will have to be done in accordance with the prevailing legislation and standards at the time when the caverns have reached the end of their life span.

[151] Ms Vincent points to the assessment of the potential harmful effects of decommissioning through the HRA process when these risks were screened out as not being of likely significant effect.

[152] DAERA formed the view that it had sufficient information to determine the potential effects of decommissioning and to conclude, on the basis of this, that such works would not present significant risk to the environment. These conclusions are matters of evaluative judgement, only impeachable on irrationality grounds.

[153] It would itself be irrational to seek to prescribe a detailed method by which the caverns ought to be decommissioned decades before the work would be carried out. Rather the respondent imposed conditions in the marine licence as follows:

> "22. The Licensee(s) shall notify the Licensing Authority in writing 6 months in advance of decommissioning of the installations and shall submit a new licensing application to cover the entirety of the decommissioning process
>
> 23. The Licensee(s) shall ensure that all materials (excluding rock armouring) shall be removed from the seabed, unless the Licensing Authority decides otherwise based on best practice at the time of decommissioning.
>
> 24. The Licensee(s) shall ensure that the remaining abstraction and discharge pipelines are capped at the

seabed, unless the Licensing Authority decides otherwise based on best practice at the time of decommissioning.

25. The Licensee(s) shall ensure the structural integrity of the salt caverns post decommissioning and ensure as best practice provisions detail at the time ensure the structural integrity is sustainable.

26. The Licensee(s) shall ensure that no materials or waste are deposited on the seabed.

27. The Licensee(s) shall supply a report of all materials that were in or on the seabed which were removed after decommissioning the marine structures and a list of any materials left behind in situ."

[154] In *Pearce v Secretary of State for BEIS* [2021] EWHC 326 (Admin) Holgate J commented:

> "The next issue is whether consideration of an environmental effect can be deferred to a subsequent consenting process. If, for example, the decision-maker has judged that a particular environmental effect is not significant, but further information and a subsequent approval is required, a decision to defer consideration and control of that matter, for example, under a condition imposed on a planning permission, would not breach EIA legislation (see *R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env. L.R. 406*)."

[155] This is the position in the instant case. As matters stand, the respondent has determined that there is no significant risk associated with decommissioning but has deferred further consideration pursuant to the marine licence conditions. This will ensure that an updated assessment is required, and the future works carried out in accordance with the best practice standards prevailing at that time. That accords both with common sense and the goal of ensuring environmental protection.

[156] The contention that the decommissioning element of the works has not been subject to assessment is not supported by the evidence and there is nothing to suggest that the approach of the respondent has been *Wednesbury* irrational. This ground of challenge therefore fails.

(vii) Schedule 5 of the EIA Regulations 2007

[157] Regulation 21 of the EIA Regulations provides that the decision maker must apply the provisions of Schedule 5 to the Regulations in relation to each representation it receives. Paragraph 4 of Schedule 5 states:

> "(1) If either—
>
> (a) the appropriate authority concludes in accordance with paragraph 3(1) that the representation is capable of being satisfied by an arrangement made between it, the applicant and the maker of the representation but no such arrangement is made within a reasonable period, or
>
> (b) the appropriate authority concludes in accordance with paragraph 3(1) that the representation is not capable of being satisfied by an arrangement made between it, the applicant and the maker of the representation,
>
> the appropriate authority must consider whether the representation gives rise to a dispute that calls for resolution of a question of fact in order to enable it to make its EIA consent decision.
>
> (2) If the appropriate authority concludes that the representation gives rise to such a dispute, it may, if it considers that it is appropriate to do so—
>
> (a) instigate a local inquiry; or
>
> (b) appoint a person whom it considers expert in the subject-matter of the dispute to report to it on the question of fact."

[158] The applicants contend that the respondent failed to address representations in the manner prescribed by Schedule 5. In their pleaded case, the applicants say that a number of issues of disputed fact were raised in representations, including the adequacy of bird surveys, noise impact and the impact of the project on protected species. The obligation to consider whether to trigger a public inquiry or appoint a suitably qualified expert was therefore in play.

[159] In this application process, DAERA produced the detailed Q&A document addressing many of the issues raised in representations during the consultation process. In order to answer many of the specific points raised, the respondent had

recourse to both its own and external expertise. In the EIA consent decision DAERA states:

> "The application, its supporting information and responses received in relation to Regulation 17 and Regulation 21 (representation from the public consultation following the outcome of the process set out in Schedule 5) have been considered by DAERA Marine Licensing (Marine Licensing Authority) when making the decision. The Department has received over 700 consultation responses from the public in relation to this application. In considering these responses, the Department has used the provision in Regulation 21(2) and has grouped those that are similar in nature. These have been presented as a Questions and Answers document and have been considered as per Schedule 5 of the Regulations."

[160] The respondent was therefore aware of, and turned its mind to, the provisions of Schedule 5.

[161] In relation to the specific examples relied upon by the applicants, the respondent satisfied itself, on the basis of the available evidence, that the bird surveys were adequate, the noise impacts were negligible, and the project would have no significant effect on protected species. These were all matters of evaluative judgement for the respondent to undertake. The applicants have not therefore identified an issue of disputed fact which ought to have triggered the duty to consider whether to instigate a public inquiry or appoint an expert. In the absence of this, the challenge does not get off the ground.

[162] Even if such a point were identified, it would only have led to the situation that the decision maker could have exercised a discretion if he considered it appropriate to do so. This could only have been challenged on the grounds of *Wednesbury* irrationality.

[163] In the event, the submission made to the Minister raised, as one of the options, the holding of a public inquiry. This was rejected by him. There is no evidence to suggest that any different decision would have been made had the matter been analysed through the lens of an issue of disputed fact and Schedule 5 of the Regulations.

[164] This ground of challenge therefore also fails.

Conclusions

[165] For the reasons set out, none of the grounds are made out and the application for judicial review is dismissed.

[166] I will hear the parties on the question of costs.