Neutral Citation No. [2011] NICA 17 | *Ref:* **GIR8181**

Judgment: approved by the Court for handing down | *Delivered:* **07/06/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Central Craigavon Ltd's Application [2011] NICA 17

IN THE MATTER OF AN APPLICATION BY CENTRAL CRAIGAVON LIMITED FOR JUDICIAL REVIEW

BETWEEN:

CENTRAL CRAIGAVON LIMITED

Appellant;

-and-

THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Respondent.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by Central Craigavon Limited ("the appellant") in respect of the judgment and order in judicial review proceedings which the appellant instituted against the Department of the Environment ("the DOE"). In those proceedings the appellant sought to challenge the decision of the DOE of 15 January 2008 whereby the DOE purported to adopt "draft Planning Policy Statement 5: Retailing, Town Centres and Commercial Leisure Developments" ("draft PPS5"), a draft policy statement which had previously been formulated by the Department of Regional Development ("DRD") purportedly in exercise of its planning

powers. The proceedings and the appeal arise in the context of a disputed application for development at Sprucefield Regional Shopping Centre ("Sprucefield"). The appellant is the landlord of Rushmere Shopping Centre in Craigavon and considers that it would be detrimentally affected by a major expansion of Sprucefield.

[2] The appellant's challenge at first instance to the DOE's adoption of draft PPS5 was based on four key grounds. Firstly, it contended that the DRD had no lawful power to formulate and produce PPS5 having regard to its restricted powers in the field of planning law. This unlawfulness was not remedied by the DOE's purported taking over and adoption of draft PPS5. Secondly, in the formulation of draft PPS5 the DOE had not complied with the mandatory environmental assessment requirements of EU law or the domestic law regulations giving effect to the Directive. Thirdly, the DOE had failed to comply with the requirements of the Planning (Northern Ireland) Order 1991 for the development plan process. Fourthly, the Department and the Minister had adopted draft PPS5 without the required Executive approval of the policy. In its appeal the appellant does not pursue its third ground of challenge which was rejected by the trial judge. In this appeal the appellant does challenge the trial judge's rejection of its first and second grounds of challenge. In relation to the fourth ground of challenge the judge found for the appellant, finding a breach of the Ministerial Code, but considered that it was inappropriate to quash the impugned decision adopting the policy. The appellant challenges the judge's refusal to grant relief on that ground.

[3] The DOE on its part did not appeal against the trial judge's finding against the Department of a breach of the Ministerial Code. It does seek to uphold the trial judge's approach to the question of the remedy. After the trial judge gave his decision in the case a letter was sent by the DOE solicitors on 11 August 2010 to the appellant's solicitors indicating that the DOE had decided not to give draft PPS5 any weight until such time as it had been approved by the Executive Committee. This being so, the DOE contends that the fourth issue is academic. We did not in the course of the hearing give a ruling on that issue instead permitting the parties to make submissions to the court on the issue while leaving open the question whether the court would decline to rule on the point because of the departmental decision that the matter would go before the Executive Committee.

Background

[4] In June 1996 the DOE published Planning Policy Statement 5: Retailing in Town Centres ("the original PPS5"). At that time it had responsibility for strategic and other planning policy issues. Paragraph 35 of the original PPS5 deals with regional shopping centres and identifies Sprucfield as the only purpose built out of town regional shopping centre in Northern Ireland. It provides that the Department would continue to control the scale and nature

of the Sprucefield Centre taking into account all relevant policies in PPS5 and in particular the impact of any proposed development at Sprucefield on the environment generally, existing centres and traffic.

[5] Following political developments concerning the devolved administration in April 1998 responsibility for strategic planning passed to the newly established DRD. In exercise of its strategic planning function DRD published "Shaping the Future: The Regional Development Strategy for Northern Ireland 2025" ("the RDS") in September 2001. As part of the implementation of the RDS the DRD decided that it would initiate consultation with key interests on draft regional planning policy statements including one on retailing in town centres. The work on the development of this planning policy statement and initial research was carried out in conjunction with officials from the DOE. The initial research and policy information was gathered by the end of 2001. Officials from the DRD then began the drafting process during which comments and guidance were received from officials within the DOE. In February 2004 a joint working group was established between the DRD and the DOE to oversee preparation. In late February 2005 the Minister of DRD gave his approval for the proposed draft PPS5 and it was purportedly adopted in July 2006. Even before a draft PPS is finalised and adopted it becomes a material consideration in subsequent planning applications as an evolving policy, though the weight to be attached to it will, of course, be a matter for the relevant decision-maker. Thus unlike many draft documents, a draft PPS policy statement is not a document devoid of legal significance and a decision to adopt a draft PPS is one with legal effects.

[6] The new draft PPS incorporated a somewhat differently worded policy to be applied in relation to planning applications relating to Sprucefield. Policy RPP2 relating to Sprucefield stated:

> "Individual applications within the designated Sprucefield regional shopping centre will be judged on their own merits. This will include:
>
> - their contribution to Sprucefield's regional policy;
>
> - consideration of their impact on Belfast city centre and other retail centres and the provisions of policy RRP1; and
>
> - detailed policy in the prevailing development plan."

Under the heading Justification and Amplification, paragraphs 87 and 88 of the draft PPS state:

> "87. Sprucefield is, and will remain, the only out of town regional shopping centre in Northern Ireland. However, recent research suggests that it is performing below the level necessary to realise its appropriate position within the regional hierarchy.
>
> 88. The Department wishes to ensure that Sprucefield can perform at the level appropriate to its regional role and in a manner that is consistent with the objectives of sustaining and enhancing existing town centres in the region. The Belfast Metropolitan area plan, presently in draft form, sets out detailed policy for the Sprucefield regional shopping centre."

Paragraph 42 of draft PPS5 stated that:

> "Planning policy for Sprucefield regional shopping centre will be set through the development plan process."

[7] Paragraph 15 of the draft stated:

> "This draft PPS has been subject to a draft Strategic Environmental Assessment (SEA) under the European Directive 2001-42-EC on the assessment of the effects of certain plans and programmes on the environment. The purpose of environmental assessment is to ensure that the PPS has been systematically assessed and revised during its preparation and in light of potential impacts on the environment and quality of life. It ensures that the policy contributes to the globally accepted objectives of sustainable development."

[8] In June 2004 Sprucefield Centre Limited lodged a planning application to the DOE for a major retail development at Sprucefield. In March 2005 prior to the DRD's purported adoption of draft PPS5 DOE officials recommended that this be refused, in part because it was contrary to the original PPS5. In June 2005 the Minister announced his intention to approve the application. In June 2005 the applicant and others challenged that decision. In May 2006 the court quashed the decision to approve and the application fell to be re-determined.

[9] In September 2006 the appellant issued proceedings challenging the legal power of DRD to promulgate PPS5. Despite this challenge in March 2007 the new Minister in the DOE indicated his intention to grant the Sprucefield application taking into account draft PPS5. In July 2007 Sprucefield Limited withdrew its application but indicated an intention to make a further such application. In light of the withdrawal of the application the court dismissed the legal challenge on the basis that it was by then academic. In Re Omagh District Council's Application [2007] NIQB 61 Gillen J held that the DRD had no statutory authority to make substantive planning policy, that being a matter which fell exclusively within the remit of the DOE. He declined however to quash draft PPS14 because of the significant environmental consequences of doing so. On the day the judgment was given the Minister of the Environment made a statement to the Assembly indicating that her Department was assuming responsibility for PPS14 and its ongoing review. She also reissued the existing draft PPS14 and indicated that she would hold a further round of public consultation prior to issuing a final rural planning policy document.

[10] It was clear that the same issue arose as regards the validity of draft PPS5 which the DRD had purported to adopt. On 30 November 2007 the Minister of the DRD wrote to the Minister of the Environment suggesting that it would be appropriate for draft PPS5 and other planning policy statements to be transferred to the Department. On 12 December 2007 a joint letter signed by both Ministers went to all members of the Executive indicating that they had agreed to the transfer of PPS5 and other relevant planning policy statements to the Department. It is not in dispute that the transfer involved the transfer of appropriate staff and files. The issue as such was not raised before the Executive Committee at any of its meetings. However, all the Ministers were individually notified in writing of the transfer. No issue was raised by any other minister or Department. By letter of 14 February 2008 to the appellant's solicitors the DOE confirmed that it had assumed responsibility for draft PPS5 on 15 January 2008 when the document was adopted by the DOE under the powers conferred by Article 3 of the 1991 Order. It is that decision to assume responsibility for draft PPS5 which is the subject of challenge in the proceedings.

The issue of illegality

[11] The trial judge accepted and it is in not in dispute in these proceedings, that the promulgation of PPS5 by the DRD was unlawful for the reasons noted above and which were fully dealt with in the Omagh decision which was not appealed and is accepted by DOE to be correctly decided. He noted earlier co-operation between DRD and the DOE in the preparation of PPS5 policies. He did not consider the Department was inhibited from evaluating the work done and taking it into account in deciding whether or not it was appropriate to issue the planning policy guidance. He found that the fact that

there was a preceding ultra vires act by another department could not operate to remove the legal duty on the Department to formulate and co-ordinate a planning policy.

[12] Mr Scoffield on behalf of the appellant argues that under Article 3(1) of the 1991 Order the Department must "formulate and co-ordinate policy". He noted that the respondent had described what had happened as a formal transfer. He contended that draft PPS5 was an already finalised text and that no question of the DOE formulating or co-ordinating policy arose because the DOE had simply adopted PPS5. The appellant also avers that the 1991 Order does not expressly give the DOE any power to adopt. While a preceding unlawful act by another department cannot operate to remove the legal duty on the Department to formulate and co-ordinate planning policy in merely adopting the product of DRD's unlawful actions the DOE had plainly failed to comply with its duty.

[13] Mr Maguire QC who appeared with Mr McLaughlin maintained that the terms in which Article 3(1) were cast are broad. The formulation and co-ordination of policy is a matter for the DOE. There are no statutory or other policy constraints on the process relevant to the question whether a draft or a final policy has been formulated or published. Counsel pointed out that the affidavit evidence showed that this was not an unthinking or mindless process by the DOE but rather that the DOE had given full and proper consideration to the draft prior to satisfying itself as to its adequacy before accepting it. Counsel also referred to a "work in progress" argument noting that the content of draft PPS5 had not been finally determined and work continues. Officials within the DOE, as was normal and proper, had worked closely with their counterparts in the DRD and in the preparation of the document. Both Departments previously formed part of a single larger department until 1999 and there clearly existed relevant expertise and experience in both Departments. The respondent observed that if the court were to strike down the draft on the basis suggested by the appellant the effect would be that the officials in the Department would have to start again and disregard the work done by officials and the DRD. This would have a severe impact on the ability of the Department to deliver a revision of what is a 15 year old policy and would delay the production of a draft policy for a considerable time.

[14] The judge set out his decision on this issue in paragraph 13 of his judgment thus:

> "The work done by officials from DRD was outside the remit of that Department's powers and I am satisfied that the promulgation of draft PPS5 by DRD in July 2006 was unlawful. I do not consider however that the Department was thereby inhibited from

> evaluating that work and taking it into account in making its decision as to whether or not it was appropriate to issue the planning policy guidance. The decision as to whether guidance was required was clearly a matter of professional planning and judgment which it was for the Department to make. The fact that there was a preceding unlawful act by another department cannot operate to remove the legal duty on the Department to formulate and co-ordinate planning policy. I do not consider therefore that this ground of challenge invalidates the adoption by the Department of draft PPS5."

[15] The judge correctly identified the true question as being whether the DOE had adopted the draft PPS5 after evaluating the work done by the DRD officials and taking it into account in deciding whether it should adopt the policy guidance in that document as the DOE's policy. Absent such a process the Department could not be said to have formulated a policy as opposed to simply adopting a policy formulated by somebody else. It thus becomes a question of fact whether the DOE did indeed evaluate the work and the policy ideas set out in the DRD's draft before adopting the draft as representing DOE policy. The unchallenged evidence of Mr Lyndon in paragraph 22 clearly establishes the evidential basis for the judge's conclusion.

> "The Department was already extremely familiar with the process of preparing draft PPS5 and the policies which had influenced its content. As a result of the additional meetings and discussions described above, officials within the Department were also able to obtain an insight into the responses which had been received to the public consultation process for draft PPS5 and also the work which had been carried out by DRD since its publication. In this way, the Department was able to satisfy itself that the existing draft and the consultation response is received having gauged all of the key policy issues and considerations which were necessary to address prior to the publication of a final policy. At the end of that process, the Department was satisfied that the existing draft PPS5 was a suitable basis from which to work towards the preparation of a final policy which may or may not incorporate policy changes. The Department was therefore content to accept the transfer of draft PPS5 in its existing form and afforded the status of a draft planning policy statement which

had been published by it pursuant to its powers under the 1991 Order."

The issue of the lack of Executive approval

[16] Section 28 of the Northern Ireland Act 1998 as amended by the Northern Ireland (St Andrews Agreement) Act 2006 provides for compliance with a Ministerial Code which, inter alia, in Clause 2.4 requires a Minister to bring to the attention of the Executive Council of the Assembly to be considered 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 1 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"

[17] The appellant at first instance asserted that the adoption of draft PPS5 by the Department gave rise to an obligation under the Ministerial Code to refer the matter to the Executive Committee for a decision. It was argued that the matter fell within paragraph 2.4(i), (iii) and (vi) of the Code. The trial judge rejected the suggestion that the adoption of the policy was significant or controversial since the policy had been promulgated by the DRD in July 2006 and appeared to have raised no interest or contention at Executive level. He was of the view that whether or not something was controversial or significant must refer to those matters which members of the Executive might

believe to be so. That conclusion is not challenged in this appeal. Secondly, the trial judge did not accept that the constraints of the RDS under which the Department was required to operate necessitated the adoption of a common position since the regional development strategy simply acted as a constraint on the freedom of the Minister to exercise Executive power. Within the area of policy-making the Minister of the DOE was free to act as he chose.

[18] On the question whether this was a matter which cut across the responsibilities of two or more Ministers for the purposes of paragraph 2.4(i) of the Code the judge did accept that such a case was clearly made out. On this basis he concluded that the matter ought properly to have been referred to the Executive Committee for its consideration under the Ministerial Code. However, he declined to grant a remedy because he considered that the failure to refer the matter to the Executive Committee was an oversight which did not deprive the DOE of the power to adopt draft PPS5.

[19] This aspect of the appeal has been overtaken by events in that, in response to the judgment, the Department has decided not to give draft PPS5 any weight until such time as it has been approved by the Executive Committee. It is thus unnecessary to finally decide whether the judge was correct in his conclusion that the issue was a cross-cutting matter falling within Clause 2.4(i) of the Ministerial Code. Where, as here, one Department clearly has an exclusive power to formulate a policy in a given field and its policy is uncontentious so far as concerns another Department with an interest in the outcome of the formulation of that policy, it is not self-evident that it is a matter giving rise, in fact, to any cross-cutting of departmental responsibilities. That issue is one of some difficulty and complexity and may require closer examination and analysis at some future time. It is not necessary for this court to reach a concluded view on a point which is not actually before the court. Similarly it is unnecessary to finally decide whether the judge was correct in his rejection of the appellant's claim to a remedy following his finding of a breach of Clause 2.4(i). Whether the judge was correct in his analysis and conclusion or whether he could have founded his rejection of a remedy on other discretionary grounds are matters of difficulty and complexity which are not subject to a straightforward solution. We do not consider that it is necessary to say anything further in relation to that issue which is now of academic interest.

The environmental assessment question

<u>The relevant provisions</u>

[20] Directive 2001/42/EC ("the relevant Directive") notes in recital 4:

> "(4) 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 and the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

[21] Recitals 8 to 10 provide:

"8. Action is therefore 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, having regard to the principle of subsidiarity. Action by the community should not go beyond what is necessary to achieve the objective set out in the Treaty.

9. This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures of Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of hierarchy of plans and programmes.

10. All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed and annexes 1 and 2 to Council Directive 95/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and all plans and programmes which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When they determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment."

[22] Article 2 defines plans and programmes as:

> "plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> - which are required by legislative, regulatory or administrative provisions."

[23] Article 3 so far as material provides:

> "1 An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2 Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in annexes I and II to Directive 85/337/EEC, or
>
> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

[24] Article 4 provides:

> "1 The environmental assessment referred to in Article 3 shall be carried out during the preparation of

a plan or programme and before its adoption or submission to the legislative procedure.

2 The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

3 Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Articles 5(2) and (3)."

[25] Article 5 so far as material provides:

"1 Where an environmental assessment is required under Article 3(1), 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 I.

2 The environmental report prepared pursuant to paragraph 1 shall include the information that may be 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.

3 Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision making or through other community legislation may be used for providing the information referred to annex I."

[26] Effect was given to the Directive domestically by the Environmental Assessment of Plans and Programmes Regulations (NI) 2004 which contain provisions incorporating the requirements of the Directive.

The parties' submissions

[27] Mr Scoffield relied on the provisions of the Directive and the Regulations to argue that PPS5 was a plan or programme on the environment which required environmental assessment (often referred to as a Strategic Environmental Assessment or SEA). Such an assessment required to be done during the preparation of the plan. Article 5.4 provides that the designated authorities shall be consulted when deciding on the scope and level of detail that must be included in the environmental report. The DOE has merely adopted wholesale the terms of draft PPS5 and has not conducted the necessary environmental assessment of its effects. Much less has it conducted a proper environmental assessment at a time when there was an early or effective opportunity to express an opinion. The notion of a plan or programme has an autonomous EU meaning. The key issue is whether the plan or programme is likely to have a significant environmental effect. Plans and programmes prepared (inter alia) for town and country planning fall within the concept where they set out the framework for future development consent of projects listed in Annex I and II to the Directive. The Commission in its guidance has indicated that Member States should adopt a wide scope and a broad purpose in answering the question as to what is a plan or programme. The judge was wrong to accept the DOE's contention that, while area plans fall within the definition, other policy documents such as a PPS do not. Paragraph 3.27 of the Commission's guidance indicates that normally the plan or programme will contain criteria and conditions which guide the way the authority decides an application for development consent. Draft paragraph 86 of PPS5 states clearly that RRP2 represents the policy for Sprucefield.

[28] Mr Scoffield forcefully contended that draft PPS5 represented a significant shift from the original PPS5. That original policy emphasised the need to control the nature and scope of Sprucefield taking account of the policy tests in paragraph 39 of PPS5 and the impact on the environment, existing centres and traffic. The draft PPS neutralises that policy of control excluding any presumption of control, explaining instead the contribution to Sprucefield's regional role which is then contrasted with the role of non-regional town centres in RRP3. Mr Scoffield's argument proceeded on the basis that there had been a fundamental change of direction.

[29] Mr Scoffield did accept that not every planning policy statement would be subject to an SEA. The question must be judged on a case by case basis. In his submission PPS5 descends into the detail of the policy approach to be applied to Sprucefield. The applicable policy overarches the provisions of the

Belfast Metropolitan Area Plan. It is draft PPS5 which sets the framework for future development at Sprucefield.

[30] Mr Maguire QC in his argument stressed that the Directive did not define what is meant by the term "plan or programme". A plan encompasses a way of achieving an end. A programme may indicate a scheme for doing things in a particular way or over a particular time. A policy on the other hand is a statement of general approach and is not aimed at a particular application. In his submission the history of the Directive was interesting and instructive. The original proposal was to include policy statements expressly within the Directive but that was dropped following objections from various Member States. Bell and McGillivray Environmental Law 6th Edition at page 549 notes that the word "policies" was dropped and the Directive only covers the assessment of the effect of certain plans and judgments. He also referred to the Handbook on the Implementation of EC Environmental Legislation which notes that the Directive does not apply to policies. The Practical Guide to the Strategic Environmental Assessment Directive published in 2005 by the Office of the Deputy Prime Minister sets out an indicative list of types of plans or programmes in the UK subject to the Directive. While this includes area plans in Northern Ireland it does not include policy statements such as those in a PPS or its equivalent in England, a PPG. The guide indicates that the list is kept on the ODPM website and is used for reporting to the EC on the implementation of the Directive as required by Article 13.4. There is nothing to suggest that the Commission has ever criticised the omission of PPSs or PPGs. In practice the DOE has never subjected a PPS to an SEA. The fact that the DRD while it was purporting to formulate the draft policy, outwith its power to do so, carried out an SEA does not establish that it was required as a matter of law. If the DRD considered that it was bound by the Directive to do so then it was wrong. Nor does the fact that the DOE responded to the purported assessment exercise carried out by the DRD establish a legal requirement for the SEA by the DOE. Mr Maguire contended that draft PPS5 was a policy statement and not a plan or programme.

[31] If he was wrong on that contention, he argued that it was not a plan or programme falling within the second indent in Article 2.1 which provides that to fall within the Directive it must be a plan or programme "required" by legislative regulatory or administrative provisions. There was no requirements as a matter of law imposed on the DOE to produce draft PPS5.

[32] Mr Maguire contended further that for Article 3(2)(a) to apply the relevant plan or programme must set the "framework" for future development to consent to projects listed within Annexes I and II of Directive 85/337/EEC. Draft PPS5 did not set a framework. That term has not been defined by any ECJ decision. While Advocate General Kokott in Terre Wallonne ASBL v Région Wallonne [2010] ECJ 04.03.2010C/105/09 (C-110/09) was apparently prepared to adopt a fairly wide definition of framework the ECJ did not say

anything in its decision in that case that indicated that it accepted the Advocate General's approach. Mr Maguire called in aid the approach adopted by Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities and Local Government [2011] EWHC 97 (Admin) ("Cala No2") and argued that draft PPS5 did not set out a framework falling within Article 3.

The judge's approach to the question

[33] The judge noted that when DRD published draft PPS5 it considered the Directive applied to it but he considered that the DRD was in error in so concluding. He noted that Commission Guidance on the issues advises that Member States should adopt a wide scope and broad purpose in answering the question of whether a document gives rise to a plan or programme and the extent to which an act is likely to have significant environmental effects is the yardstick. Paragraph 3.5 of the Guidance suggests that a plan is a document which sets out how it proposed to carry out or implement a scheme or policy. The judge further noted the example given in the Guidance of what might comprise a programme namely a plan covering a set of projects in a given area such as a scheme for regeneration of an urban area. It is suggested that such a programme would be quite detailed and concrete. The Commission went on to suggest that the word "programme" is sometimes used to mean the way it is proposed to carry out a policy in the same way that a plan is used. The judge had no doubt that the Directive applied to development plans which were the mechanism by which a planning authority indicates what kind of development is appropriate for a particular location as well as being the means by which the planning authority sets out the framework for future development consent. That was not to exclude other plans from the remit of the Directive. He noted that recital 9 of the Directive enjoined the avoidance of duplication of assessment by recommending that Member States should take account where appropriate of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes. The relevant development plan covering the Sprucefield site is the Draft Belfast Metropolitan Area Plan ("BMAP"). The judge noted that papers before the court indicate that environmental assessment work had been carried out in connection with the bringing forward of that plan. In his view therefore draft PPS5 should not separately be subject to an environmental impact assessment under the governing EU law.

Discussion

The key issues

[34] Mr Maguire's submissions helpfully highlighted three key questions which arise in this case. The first two are:

(a) Did draft PPS5 constitute a plan or programme falling within Article 2 of the Directive?

(b) If so, was it a plan falling within Article 3(2)(a) that is to say did it set the framework for future development consent of projects listed within Annexes I and II of Directive 85-337-EEC?

Before a plan or programme falls within the definition in Article 2 it must be one which is required by legislative, regulatory or administrative provisions. Accordingly, a third question arises as to whether a draft PPS5 was required by any such provisions.

[35] If the third question is answered No then draft PPS5 would not fall within the remit of the Directive and the other issues would not arise for consideration. It hence may be useful to reach a conclusion on the third question first.

Was a draft PPS5 required by a relevant provision?

[36] The word "required" in English points clearly in the direction of interpreting Article 2 as necessitating the existence of an obligatory duty on the part of the authority producing the plan or programme to produce such plan or programme. The French text (*exigés*) and the German text (*erstellt werden müssen*) are in equally strong terms pointing to a relevant provision demanding such a plan or programme. The Italian text is more ambiguous (*previsti da dispozioni legislativi* etc) since the verb *prevedere* may mean both prescribed by or provided for by legislative or other provisions. In reading a community text it is necessary to distil from all the language texts the true intent, no one text having priority. The Commission Guidance clearly confirms the sense emerging from the English, French and German texts where it distinguishes between plans which an authority shall prepare and a plan which it may prepare. The former is within Article 2 but the latter not. The Commission's advice confirms the clear impression from the wording of the text that there must be an obligation or duty on the authority to produce the plan. This conclusion is clearly established in Terre Wallone in which the ECJ concluded that the relevant action programme in question was within Article 2 because the Member State was required to implement and monitor it. The Advocate General at paragraph 42 of her opinion considered it was based on a legislative obligation.

[37] A draft PPS proposing to alter an earlier PPS is not something which the Department was obliged to produce. It is a statement of evolving departmental policy thinking. While the DOE is required to formulate and coordinate policy for securing the orderly and consistent development of land and the planning of that development, the ongoing duty to formulate policy did not oblige the DOE to introduce draft PPS5 or to produce it in the form which it did. It represents a policy choice and, at this stage, it is a preliminary policy choice which will not be finalised until the consultation process is exhausted.

[38] Lindblom J in Cala No 2 points out at paragraph 50:

> "The power of a minister to issue a statement articulating or confirming a policy commitment on the part of the Government does not derive from statute. As was noted by Cooke J in Stringer (at p. 1295), Section 1 of the Town and Country Planning Act 1943 imposed on the minister a *general* duty to secure consistency and continuity in the framing and execution of national policy." (italics added)

While Article 3 of the Planning (Northern Ireland) Order 1991 imposes a general duty to formulate and coordinate planning policy it does not oblige the Department to formulate a particular PPS or a particular policy within a PPS. Hence Article 3 cannot provide the basis for an argument that a draft PPS5 was required by legislative, regulatory or administrative provisions.

[39] We also conclude the draft PPS5 does not in fact constitute a plan or programme providing a framework within Article 3.2(a). The *travaux préparatoires* of the formulation of the Directive forms part of the relevant matrix for arriving at the intent of the Directive. They indicate that the word *policy* was specifically omitted from the text. In many situations policy choices will be reached by Government in the exercise of governmental power rather than in the exercise of a specific duty, as we have noted in relation to draft PPS5 and such a policy thus does not qualify as a plan or programme within Article 2(a). A policy formulated on foot of a statutory duty could in certain circumstances constitute a plan giving rise to a framework depending upon its precise provisions and context. The label attached to the document would not be determinative of that issue for as the Commission Guidance points out "the name alone (plan, programme, strategy, guidelines etc) will not be a sufficiently reliable guide. Documents having all the characteristics of a plan or programme as defined in the Directive may be found under a variety of names".

[40] Mr Scoffield argued that the draft PPS5 was a plan containing a framework for development of Annex I and II projects at Sprucefield but that

argument must fail for the reason that the draft PPS5 contains none of the necessary indicia of a framework governing such development. Draft PPS5 currently has no legal status until Executive Committee approval is obtained and, thus, cannot constitute even a material consideration of any weight in a planning application and for that reason even in Mr Scoffield's argument it could not constitute a plan with a framework. The present case, however, raises the somewhat wider question whether, if approved by the Executive Committee, it would constitute a plan or programme within Article 2(2) thus necessitating an SEA. We shall, accordingly, leave aside for the moment the conclusive answer to Mr Scoffield's argument and consider the wider question assuming approval is obtained.

[41] In Cala Homes No 2 Lindblom J considered a challenge to a ministerial statement of policy that, pending the proposed revocation of regional strategies, planning authorities should have regard to the Government's policy commitment to abolish a regional tier of development planning policy and to seek the necessary legislative powers. On the question whether that constituted a plan or programme requiring an SEA Lindblom J stated at paragraph [99]:

> "Advice given by or on behalf of the Secretary of State that an intention or policy of the Government is a material consideration in a planning decision is not a "plan or programme" or a "modification" of a plan or programme; it is merely advice. The same may be said of the policy itself, whether it came into existence when announced in the coalition agreement or only in the statement and letter of 10 November 2010. Neither the policy nor the advice takes the form of a "plan or programme". Whether or not the statement and letter are to be regarded as national planning policy, they clearly do express "freely taken political decisions on legislative proposals." Furthermore they were not "required" by any legislative regulatory or administrative provision."

[42] Mr Scoffield suggested that the draft PPS5 was a material consideration which would influence a planning application and, hence, gave rise to a framework. He relied on the Advocate General's opinion in Terre Wallone at paragraph [67] of which the Advocate General stated:

> "To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in

particular with regard to location, nature, size and operating conditions or by allocating resources."

In the context of that case there was no question but that the relevant action programme contained a high degree of detailed precision as to the steps to be taken under the programme introduced pursuant to the Nitrates Directive. Insofar as the Advocate General may have suggested that anything which might influence a subsequent development consent constituted a framework we would respectfully differ from that conclusion. She was not however addressing anything other than whether the particular programme fell within Article 2(2). The ECJ accepted that it did and did not consider it necessary to adopt the wording of the Advocate General's formulation.

[43] RRP2 does not lay down anything that would fall within what we would normally understand to be a framework or *cadre, Rahmen* or *quadro* in the French, German or Italian texts, these latter words indicating a frame. What it does do is to indicate that the material planning considerations to be taken account of were the contribution of the application to Sprucefield's Regional Development, consideration of the development's impact on Belfast City Centre and other retail centres and the provisions of policy RRP1 and "detailed policy in a prevailing development plan". It goes on in paragraph 88 in the last sentence to state that "the Belfast Metropolitan Area Plan presently in draft form sets out detailed policy for the Sprucefield Regional Shopping Centre". The draft BMAP, albeit a draft and evolving plan (and now subject to criticism by the PAC), represents an existing material consideration. Pointing to existing material considerations cannot be said to lay down a framework for development. The planning decision-maker must give such weight (and perhaps none) to those considerations as he considers appropriate in the circumstances. Although Mr Scoffield sought to argue that RRP2 constituted a clear shift in policy for Sprucefield by no longer subjecting it to the word "control," such shift as it created in policy was modest. In any event that shift emanated from the draft BMAP which had been subjected to an SEA. In reality PPS5 was a policy statement that the framework set out in the draft Plan was the appropriate consideration. Draft PPS5 cannot be considered to be a plan within Article 2.

The course of the proceedings

[44] Judicial review proceedings in the present case were instituted by a motion dated 15 April 2008 with the substantive hearing concluding on 5 January 2009. Judgment was delivered on 14 June 2010. The principles stated in Laverty v Department of the Environment [2010] NICA 10 are restated in forceful terms in the judgment of Arden LJ Bond v Dunster Properties Ltd [2011] EWCA Civ 455 which provides a helpful analysis of the consequences which can flow from delay in decision making. Those authorities stress the duty of all courts to ensure Article 6 compliance. Having regard to the time this

matter has taken to reach this point and mindful of our own Article 6 obligations we have sought to avoid any further delay in reaching a final decision on the issues raised in this appeal and we have accordingly sought to expedite the decision in this appeal.

Disposal of appeal

[45] We dismiss the appeal and will hear counsel on the question of costs.