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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RES UK AND IRELAND LIMITED FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE PLANNING APPEALS COMMISSION DATED 26 JUNE 2017 (REFERENCES 2015/A012, 2015/A0168 and 2015/A0169)

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KEEGAN J

[1] This is an application for judicial review of decisions taken by the Planning Appeals Commissioner ("the Commissioner") on 26 June 2017. The applicant is a renewable energy developer and operator. The impugned decision dismissed appeals under Section 58 of the Planning Act (Northern Ireland) 2011 against the refusal of planning permission by Derry City and Strabane Council for the development of a wind farm at Barr Cregg Wind Farm, Claudy.

[2] Leave was granted by McCloskey J on 17 October 2017. Mr Nardell QC appeared with Mr Lyness BL on behalf of the applicant and Mr McLaughlin BL appeared on behalf of the respondent. Various interested parties were put on notice by way of service of the notice of motion but there was no further intervention in the case. I am very grateful to counsel for the focused and economical way in which this case was presented and for the high quality of the oral and written submissions.

Background

[3] The genesis of the case is a development proposal which was lodged by the applicant on 20 August 2012. This was in three parts for (i) a seven turbine wind farm and (ii) passing bays and (iii) access tracks. The application was accompanied by an environmental statement. The power to determine the application had

transferred at the relevant time from the Department of the Environment to the local Council ("the Council"). The proposal was refused by the Council on 21 July 2015 and 26 November 2015.

[4] The development proposal sought the expansion of 75 hectares located in open country in an area of north facing slope extending down to the Burntollet River. As I have said environmental information was provided with the application and this comprised an original environmental statement which included an outline habitat management plan. The Council refused the application and six reasons were given for that. Suffice to say at the appeal stage three of these reasons were pursued by the Council and one reason was pursued by local residents. The three reasons pursued by the Council were issues of visual amenity, active peat, blanket bog and upland heath. The residents raised the issue of residential amenity. The appeal was dismissed on the basis of the objection regarding blanket bog and upland heath.

[5] The relevant part of the appeal focussed on the protection of the habitat types of blanket bog and upland heath. Northern Ireland priority habitat is a classification that reflects duties imposed by the Wildlife and Natural Environment (Northern Ireland) Act 2011. This requires the Department of Environment to publish a list of habitat types that are considered to be of foremost importance for the purpose of conserving biodiversity. The proposed Barr Cregg Wind Farm site includes peatland habitats which is a generic term used to cover blanket bog (which is usually deep saturated peat) and wet heathland (which is usually shallow, wet heath). Under Annex 1 of the directive, wet heathland is classified as a priority habitat but blanket bog is only classified as a priority habitat if it is assessed to be active. The term active is only applied to deep peat types and relates to blanket bog, not heathland. In addition, for blanket bog to be active it is defined as "still supporting a significant area of vegetation that is normally peat forming".

[6] The planning policies in Northern Ireland place a particular emphasis upon active peat and projects for renewable energy development are not permitted in relation to this category unless there are "imperative reasons of overriding public interest". In this case it is important to note that Barr Cregg is not a special area of conservation and so it does not attract the engagement of the Habitats Directive nor is it a case that the development was considered to involve active blanket bog. As such the case came down to the issue of priority habitats and in particular the issue of blanket bog and wet heathland at Barr Cregg. The Commissioner in her written judgment referred to this and dismissed the appeal on the basis of priority habitat.

[7] The appeal took place on 23 November 2016. It was in the form of an informal hearing and so evidence was presented and witnesses were called but not cross-examined. It is correct to say that a considerable amount of written material was put before the Commissioner and also oral evidence was heard from an expert on behalf of the applicant Dr Sheila Ross and various witnesses on behalf of the respondent namely Emma McLaughlin and Christopher Perry.

[8] The two grounds for judicial review were streamlined as follows:

(i) An interpretation ground - that there was a misinterpretation of the relevant policy by the Commissioner.

(ii) That there was a failure to give adequate reasons.

[9] The evidence in this case is comprised in a comprehensive affidavit which was filed by Mr Trinick on behalf of the applicant. He had appeared at the hearing before the Commissioner. This affidavit is dated 22 August 2017. A further affidavit was filed by Dr Sheila Ross dated 6 September 2017. Dr Ross is an environmental consultant and she sets out her professional qualifications in detail in her affidavit. The respondent did not file an affidavit of evidence which is understandable given that the impugned decision is that of a decision-maker acting in an adjudicative capacity. However, I was greatly assisted by the skeleton arguments filed in this case and the legal submissions made by both counsel.

Legislative framework and policy context

[10] There were two legislative provisions relied on by counsel as follows. Firstly, the Planning Act (Northern Ireland) 2011 ("the Planning Act") which by virtue of Section 1(1) sets out the general functions of the Department with respect to the development of land as follows:

> "(1) The Department must formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development.
>
> (2) The Department must—
>
> (a) Ensure that any such policy is in general conformity with the regional development strategy;
>
> (b) Exercise its functions under subsection (1) with the objective of furthering sustainable development and promoting or improving well-being.
>
> (3) For the purposes of subsection (2)(b) the Department must take account of—
>
> (a) Policies and guidance issued by—

(i) The Department for Regional Development;

(ii) The Office of the First Minister and deputy First Minister;

(b) Any other matter which appears to it to be relevant."

[11] Section 45(1) of the Planning Act requires the decision-maker in a planning application to "have regard to the local development plan, so far as material to the application, and to any other material considerations". Also, Section 58(7) applies that requirement to appeals to the Planning Appeals Commission ("PAC"). Finally Section 6(4) requires that where "… regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise".

[12] In this case the local development plan (namely the Derry Area Plan 2011) did not contain any relevant policies. As such this case came down to a consideration of a number of planning policies namely:

(a) Planning Policy Statement 2 Natural Heritage- "PPS2" (2013).
(b) Planning Policy Statement 18 "Renewable Energy-"PPS18" (2009).
(c) Strategic Planning Policy Statement for Northern Ireland –"SPPS" (2015).

[13] A further legislative provision which was referred to is the Wildlife and Natural Environment Act (Northern Ireland) 2011 ("the Wildlife Act") Section 1 provides as follows:

"(1) It is the duty of every public body, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.

(2) In complying with subsection (1), a public body must in particular have regard to any strategy designated under Section 2(1).

(3) Conserving biodiversity includes—

(a) In relation to any species of flora or fauna, restoring or enhancing a population of that species;

(b) In relation to any type of habitat, restoring or enhancing the habitat.

(4) The Department must issue guidance containing recommendations, advice and information for the assistance of public bodies in complying with the duty under subsection (1)."

This legislation also refers to the biodiversity strategy Section 2 and biodiversity lists in Section 3. Section 3(3) reads:

"Without prejudice to Section 1(1) and (2), a public body must –

(a) Take such steps as appear to the body to be reasonably practicable to further the conservation of the species of flora and fauna and type of habitat included in any list published under this section; or

(b) Promote the taking of others of such steps."

[14] A brief explanation of the policy context is offered as follows;

Policy NH5 of PPS2 was issued in 2013 and it deals with habitats, species or features of natural heritage importance. The operative part of this policy states as follows:

"Planning permission will be granted for development proposal which is not likely to result in the unacceptable impact on, or damage to known:

- priority habitats;
- priority species;
- active peatland;

A development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species or features may only be permitted where the benefits of the proposed development outweigh the value of the habitat, species or feature.

In such cases, appropriate mitigation and/or compensatory measures will be required."

PPS2 contains the following general provision in the opening of the policy document:

> "The planning policies of this Statement must … be read together and in conjunction with the relevant contents of development plans; other planning policy publications … The provisions of these policies will prevail unless there is other overriding policy or material considerations that outweigh them and justify a contrary decision."

[15] PPS18 was issued in 2009 and it deals with renewable energy development. The relevant section in relation to this is as follows:

> "Development that generates energy from renewable resources will be permitted provided the proposal, and any associated buildings and infrastructure, will not result in an unacceptable adverse impact on:
>
> (c) Biodiversity, nature conservation or built heritage interests.
>
> Where any project is likely to result in unavoidable damage during its installation, operation or decommissioning, the application will need to indicate how this will be minimised and mitigated, including details of any proposed compensatory measures, such as a habitat management plan or the creation of a new habitat. The matter will need to be agreed before planning permission is granted.
>
> The wider environmental, economic and social benefits of all proposals for renewable energy projects are material considerations that will be given significant weight in determining whether planning permission should be granted."

[16] Subsequent to these policies, the Department issued the Strategic Planning Policy Statement for Northern Ireland (SPPS) which is designed to replace the PPSs. However transitional provisions refer to the fact that policies remain in place until local development plans are formulated. The SPPS is an overarching policy document which deals with both the conservation and the renewable energy issue. In relation to the conservation issue paragraphs 6.191 to 6.193 are relevant as follows:

"6.191 It is recognised that many other important habitats, species and features of natural heritage, which deliver ecosystem services, fall within or outside a designated site. To ensure international and domestic responsibilities and environmental commitments with respect to the management and conservation of biodiversity are met, the habitats, species and features mentioned below are material considerations in the determination of planning applications.

6.192 Planning permission should only be granted for a development proposal which is not likely to result in the unacceptable adverse impact on, or damage to known:

- priority habitats;
- priority species;
- active peatland;
- ancient and long-established woodland;

6.193 A development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species or features listed above may only be permitted where the benefits of the proposed development outweigh the value of the habitat, species or feature. In such cases, appropriate mitigation and/or compensatory measures will be required."

The SPPS also relates to renewable energy at paragraph 6.224 to 6.231 as follows:

"6.224 Development that generates energy from renewable resources will be permitted where the proposal and any associated buildings and infrastructure, will not result in an unacceptable adverse impact on the following planning considerations:

- Biodiversity, nature conservation or built heritage interests.

6.225 The wider environmental, economic and social benefits of all proposals for renewable energy projects are material considerations that will be given

appropriate weight in determining whether planning permission should be granted.

6.231 Where any project is likely to result in unavoidable damage during its installation, operation or decommissioning, developers will be required to indicate how such damage will be minimised and mitigated, including details of any compensatory measures, such as a habitat management plan or the creation of a new habitat. These matters will be agreed before planning permission is granted."

Arguments made by the parties

[17] Mr Nardell QC, on behalf of the applicant, supplemented his skeleton argument with impressive oral submissions. I do not intend to repeat all of the points made however I summarise these as follows:

(i) Mr Nardell argued that on a correct reading of PPS2 NH5 and the corresponding provisions of the SPPS, there are not three stages to assessment of impacts on priority habitat but two as he said both sides agreed in their written and oral submissions in the appeal.

(ii) Mr Nardell submitted that there was little controversy over the first question which is whether the development proposal would be likely to result in unacceptable impact or damage to priority habitats.

(iii) He submitted that if so the second stage involves a balancing exercise under which proposed mitigation and/or compensation measures are taken into account in assessing and weighing the benefits of the proposal and the value of the habitat which is sustaining adverse impact or damage.

(iv) Mr Nardell argued that the policy makes no provision for a third stage and that this is the logical and sensible reasoning of the policy.

(v) Mr Nardell drew on the context of a development proposal which has as a forerunner an environmental statement and also requires an applicant to address proposals for mitigation and compensation measures such as in this case the management plan.

(vi) Mr Nardell also pointed to the fact that the policy affirms that wider environmental, economic and social benefits of renewable energy proposals are material considerations that will be given

significant/appropriate weight in determining whether permission should be granted.

(vii) It was argued that the Commissioner's interpretation involves severing mitigation from compensatory measures however this is artificial.

(viii) Mr Nardell argued that the Commissioner's argument that compensatory measures consideration falls outside the policy is wrong and the policy provides no guidance for it and in essence he was saying this would lead to uncertainty in decision making.

(ix) Mr Nardell said that the decision-maker is not saved by the overarching omnibus conclusion at paragraph 58 as this is too late in the balancing exercise hence he argued that the Commissioner clearly fell into error in relation to interpretation and that this is not saved by an overall view of the decision.

(x) In relation to inadequacy of reasons Mr Nardell criticised the decision in terms of the lack of explanation as to the favouring of the NIEA evidence over that of Dr Ross. He said that this met the test in the agreed authorities as the person affected by the decision could not easily recognise why they had lost the case.

[18] Mr McLaughlin BL, on behalf of the respondent, in equally impressive oral submissions supplementing his written submissions made the following points:

(i) He submitted that the Commissioner was correct to apply a three stage test and that this was clearly founded in the language of policy in particular in NH5.

(ii) Mr McLaughlin argued for a disjunctive view of the three parts to NH5 arguing compensatory or migratory measures comes as a third stage.

(iii) He drew an analogy with the Habitats Directive whereby compensatory and mitigating measures are viewed in sequence. He argued strongly that mitigation and compensatory measures do not feature as part of the balancing exercise.

(iv) Mr McLaughlin referred to a planning decision of *Re John Ritchie* in which the three stage test appeared to have been applied and affirmed.

(v) Mr McLaughlin also referred to the Northern Ireland biodiversity strategy which he said was the umbrella provision when looking at priority habitats.

(vi) Overall Mr McLaughlin argued that the Commissioner had properly applied the three stage test but in any event even if she had made an error of law she had considered the compensatory measures by virtue of paragraph 58 of her decision.

(vii) Dealing with the reasons challenge, Mr McLaughlin referred to the operative parts of the decision which he said clearly elucidate the decision-maker's view in relation to compensatory measures and as such he said that this would not meet the standard for impugning the decision on the basis of reasons.

Legal principles

[19] I was greatly assisted by the fact that counsel agreed the relevant legal principles to apply in this case in relation to the two core points at issue. I will simply summarise these as follows.

Ground 1: The interpretation point

[20] Both counsel agreed that the test to be applied was that of *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13. In particular the ratio of this case is as per Lord Reed at paragraph [18] that "policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." This paragraph continues as follows:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be

> interpreted objectively in accordance with the language used, read as always in its proper context."

Paragraph [19] of Lord Reed's judgment also reads:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

[21] As counsel have pointed out the *Tesco* case concerned development plan policy but the same considerations apply to the statements of policy embodied in planning policy statements: see *Department for the Environment's Application for Judicial Review* [2014] NIQB 4 at paragraph [22]. Reference was made to *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [1989] 59 P&CR 306 and the principle that where an error of law is established the decision must be quashed unless exceptionally the court is satisfied that the decision would inevitably have been the same absent the error. In (*R) Champion v Norfolk DC* [2015] 1 WLR 3710 further consideration is given to that issue. In that case the court examined the exercise of its discretion not to quash a planning decision where it identified a breach of an EIA Habitats Directive requirement. In that case, the court found that it was not always necessary to do so where the outcome would have been the same notwithstanding the legal error.

Ground 2: The reasons challenge

[22] In relation to the issues of reasons counsel referred to the House of Lords decision in *South Bucks District Council v Porter* [2004] 1 WLR 1953 where Lord Brown stated at paragraphs [35] and [36]:

> "[35] It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority.
>
> [36] The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[23] Further authorities were referenced which I will not recite in detail save to mention that this seminal decision has been considered further by the Supreme Court in *Dover District Council v CPRE (Kent)* [2017] UKSC 79. In summary that case pointed out that the decision-maker should identify the "principal important controversial issues" and express reasons with sufficient particularity to enable the party to understand why the matter was decided as it was.

The evidence

[24] The two affidavits filed on behalf of the applicant are substantial namely the affidavit of Mr Trinick filed on 11 September 2017 and that of Dr Ross filed on 24 August 2017. Mr Trinick sets out his involvement with the case. In particular in the background he sets out the environmental information which was submitted variously in 2012, 2014 and 2016. He then refers to the policy context in detail. He refers to the draft documentary material before the Commissioner and in particular the outline habitat restoration management plan which had been provided. He refers to the fact that a statement of case was provided by each party. In relation to the case preparation he confirms that Dr Ross was asked to prepare a technical report as part of the applicant's statement of case in the appeal and this she did by way of a report entitled "Peat, Priority Habitats and Outline Habitat Restoration and Management Technical Report."

[25] The applicant's statement of case is summarised at paragraph 36 of this affidavit as follows;

(a) So far as priority habitats are concerned the development will in fact result in net substantial habitat improvements which are unlikely to be achieved without the development.

(b) The blanket bog habitats on site have been drained, mown, flailed, cut over and sheep grazed and, until these typical agricultural practices are removed and/or further controlled, the blanket bog habitat will continue to be inactive and is likely to degrade further.

(c) The development will provide a valuable vehicle for delivering enhancement/improvement at degraded blanket bog and wet heath habitat and contributing to Northern Ireland's habitat action plan targets.

(d) It is the case for the appellant that the residual effects of the development, taking account of mitigation measures which can be secured by condition, and also taking account of offset measures, are such that the development would certainly be acceptable in terms of policy NH5 and PPS2, Policy RE1 and PPS18 and paragraph 6.192-3 of the SPPS. That is not to acknowledge that it would not have been unacceptable without such measures, but that argument does not need to be made.

(e) In addition the appellant proposes nature conservation enhancement measures which mean that development will bring a net major conservation benefit to the site.

[26] The proposed mitigation and enhancement interventions are discussed by Dr Sheila Ross in this statement, in the further environmental information of 2014.

[27] Mr Trinick helpfully summarises the statement of case made by Council in particular at paragraph 39 of the affidavit as follows:

> "If the Commissioner comes to the opinion that the peatland is not active, it is considered that the habitat remains subject to protection as wet heathland and blanket bog under SPPS and NH5 of PPS2. Under this element of the policy it may be appropriate to consider the relevant compensatory measures. The conclusions of NIEA … consider that the compensatory arrangements are inadequate, and do not outweigh the probable impacts of the proposal."

[28] Mr Trinick then refers to the nature of the hearing. At paragraph 46 he says:

> "At one point the Commissioner asked whether proposed mitigation and compensation were triggered only once it was concluded that benefits outweigh them – that is, after the policy balancing exercise has been undertaken. Mr Simmons for the Council submitted that consideration of mitigation and compensation is required once impacts are found to be unacceptable. Mitigation was relevant to the net harm to be put into the scales, and compensation measures were also put into the scales. I agreed."

[29] The affidavit of Dr Sheila Ross sets out her extensive qualifications and then explains the fact that she was engaged by the applicant in August 2013 to provide expert consultancy services in relation to the planning applications. The history is given of the treatment of priority habitats in the planning application and appeal and in particular the environmental impacts that were considered. Dr Ross goes on to explain that in her technical report she considered the measures that would be taken as part of the development for the various areas (a) and (f) which were part of the development.

[30] At paragraph 32 of her affidavit Dr Ross states:

> "I concluded at paragraph 121 that the overall

> package of habitat improvements at Barr Cregg is assessed to be over 4.5 times more than the areas of degraded habitat lost to the proposed development, and more (1.86 times more) than would be advised adequate biodiversity off-setting using the DEFRA (2012) calculation method. It can be concluded that the implementation of the proposed HRMP would result in overall benefit and improvement of blanket bog conditions."

[31] Dr Ross explains that there were areas of dispute between her and the NIEA. She summarises this at various comprehensive paragraphs throughout her affidavit dealing with the various areas at issue.

The Commissioner's decision

[32] The Commissioner's decision is comprehensive and I need not recite all of it in detail. I observe that at the outset of the decision the Commissioner sets out the various policies at play. Then she considers the core issues in this case. The first question in relation to adverse effects is uncontroversial and the Commissioner deals with that which brings her to paragraph 51 of the ruling. It is really paragraphs 52 to 58 of the ruling that are impugned. Paragraph 52 reads as follows:

> "The second question that must be considered under policy NH5 is whether the benefits of the proposed development outweigh the value of the priority habitats. The proposed development as described and the respective application forms comprises the wind farm, passing bays and access track. The compensation and enhancement measures proposed in the outline habitat restoration and management plan are intended to off-set the development and cannot reasonably be considered to be part of it; they are something additional. Consequently these measures cannot be taken into account in assessing the second test within Policy NH5."

[33] At paragraph 53 the Commissioner then refers to paragraph 4.1 of PPS18 in relation to renewable energy proposals. She states that:

> "… the Council does not dispute that there would be wider environmental, economic and social benefits and I consider it appropriate to attribute these substantial weight."

These are set out in some detail at paragraph 12 of the ruling as follows:

- The Strategic Energy Framework (SEF) document issued by the then Department of Enterprise, Trade and Investment in 2010 indicated that 40% of Northern Ireland's energy consumption should be derived from renewable resources by 2020. The expected installed capacity of the Barr Cregg Wind Farm is 14 megawatts which would contribute 1.26% towards the SEF target at 40%.

- The proposal would meet the electricity needs of 11,000 homes per annum.

- The potential reduction in CO2 emissions as a result of the proposed development would be up to 20,000 tons per annum.

- There would be a reduction of fossil fuel dependency and a contribution to the security of domestic energy supply within Northern Ireland.

- The capital spend associated with the construction phase of the proposed development is estimated at £21.5m with £7.7m planned to be spent in Northern Ireland with local suppliers and contractors being used, where possible.

- The construction and operational phases would result in the creation and sustainment of jobs.

- Rates would be payable annually; at current rates this would constitute a contribution of £3.5m over 25 years.

- Landowner rents would be payable over a 27 year period.

[34] At paragraph 53 the decision states that these facts are attributed substantial weight. However the Commissioner says that substantial weight does not necessarily mean determining weight as there is a need to balance the benefits against the adverse impacts. She then refers to priority habitats on the appeal site requiring conservation action because of their decline, rarity and importance. The ultimate outcome at paragraph 53 is expressed as follows:

> "Consequently, the wider benefits of the proposal do not outweigh the value of the Northern Ireland priority habitats that would be damaged."

[35] At paragraph 54 the decision-maker says:

> "As the benefits of the development do not outweigh the value of the Northern Ireland priority habitat, the third matter to be considered under Policy NH5, the requirement for appropriate mitigation and/or compensatory measures is not triggered. Accordingly, the Council has sustained its third reason for refusal based upon paragraph 6.192 of the SPPS, Policy RE1 of PPS18 and Policy NH5 of PPS2."

[36] However the decision-maker at paragraph 55 says that given the overriding policy statements in Section 5 of PPS2 that she should go on to consider compensation and enhancement measures in what she describes as "the overall planning balance. " She does this at paragraph 56 which sets out some detail of the proposed compensatory measures. At paragraph 57 she refers to some issues in relation to hydrology and such like which she says would not have an unacceptable adverse impact. The ultimate conclusion is at paragraph 58 as follows:

> "I have concluded that there are substantial environmental, economic and social benefits associated with the proposed wind farm to which I have attached appropriate weight. However, contrary to the view of the appellant these benefits even when taken together with the outline measures for compensation/enhancement do not outweigh the unacceptable adverse impact and damage that the proposed development would cause to blanket bog and upland heath which are Northern Ireland priority habitats. Accordingly appeal one must fail."

Consideration

[37] I observe at the outset that this court is exercising a supervisory jurisdiction. I am not trying the case on the merits or making a planning decision. There are many areas that are exclusively within the judgment of the adjudicator in the planning world as reflected in established authority. But the court can correct errors of law by virtue of judicial review and deal with inadequacy of reasons. This case has been argued with sharp focus in relation to these two issues.

[38] This case also highlights the tension between two policy drivers namely, environmental protection and renewable energy. Neither trumps the other but they are not always easy companions. In the absence of local planning policy there are different policy strands and policy documents with subtly different wordings. It is not a simple task to settle upon a fixed and consistent meaning. However, the policies are drawn together in the SPPS policy document and I am guided by that

and in particular the paragraphs which draw together the environmental and renewable energy factors.

[39] The core issue in this case relates to the interpretation of Policy NH 5 of PPS 2 as replicated in paragraph 6.193 of the SPPS. It is important to note that this policy is part of a suite of policies which contain different levels of protection depending on the environmental issue under consideration.

[40] Applying the ratio of the *Tesco* case the policy documents must be interpreted objectively, in accordance with the language used, read always in its proper context. In conducting this exercise it is clear to me that there are two stages rather than three to the relevant consideration namely assessment of impact and a balance of impact against benefit as follows:

i. The first question is whether the proposal would be likely to result in unacceptable adverse impact on or damage to priority habitats. This was not controversial and counsel agreed that mitigation measures could be taken into account at this stage.

ii. If there is unacceptable adverse impact the second stage is reached. This involves a balancing exercise.

[41] In this case the Commissioner conducts a balancing exercise at stage two by looking at the benefits of the plan in the context of renewable energy against the unacceptable harm she has assessed as established. These wider benefits are defined in PPS 18. That is fine. However the Commissioner leaves the compensation and or mitigation measures as a potential benefit out of account at this stage. That is the point at issue.

[42] In my view PPS 2 NH 5 refers to the fact that if the benefit outweighs the value of the habitat, species or feature *in such cases* mitigation and or compensatory measures will be required. The Commissioner interprets this to mean that only if benefit is established without any reference to mitigation/compensation do you consider the measures. In my view this approach is not sound. I consider that this second sentence does not represent a third stage but rather it explains what is required when assessing benefit. It is conjunctive rather than disjunctive. Otherwise the assessment becomes artificial.

[43] The operative part of SPPS in relation to the environment is contained within 6.192 and 6.193. It is also clear to me looking at the wording of that that there are two stages in the decision making process. In my view 6.193 makes it clear that the issue of the balancing of benefits against adverse consequences is not disaggregated from appropriate mitigation and/or compensatory measures. I also take into account the terms of the renewable energy aspect of this umbrella policy paragraph 6.224, in particular 6.225 which states that the wider environmental, economic and

social benefits of all proposals for renewable energy projects are material considerations that will be given *appropriate* weight in determining whether planning permission should be granted. In relation to this, reference is made to the wider environmental, economic and social benefits of renewable energy projects. I also bear in mind paragraph 6.231 which refers to the need for a habitat management plan or the creation of a new habitat as part and parcel of any project.

[44] The fact of the matter is that the Commissioner in reaching her decision recognised the "potential planning gain" (to use Mr Mc Laughlin's words) from the compensatory measures by virtue of the second balancing exercise she conducts. This was really the core of the appeal in relation to the priority habitat point. There was considerable written and oral evidence on this issue including expert evidence. The applicant's case was underlined by an argument that the priority habitat would in fact be enhanced by the development proposal.

[45] Why does the Commissioner consider compensatory measures at all having said that this obligation is not triggered? In my view the Commissioner's approach represents a tacit acceptance by her that these compensatory/enhancement measures may amount to a benefit in the context of priority habitats. They may be a consequential benefit but they are still a benefit. How else could they override the conclusion reached on the basis of the Commissioner's interpretation of policy? This accords with a wide definition of benefit which it seems to me is consonant with the aims contained within the policy. I also note that enhancement of habitat is specifically referred to in the Wildlife Act at Section 1(3)(b). I do not accept the argument that such an approach undermines environmental protection. Each case will be determined on its own facts as part of the balancing exercise bearing in mind the different policy considerations in PPS 2 NH1-6.

[46] It follows that there is a problem with how the Commissioner considers this factor as she brings it in outside the express policy. To that end I agree with the applicant that there is an a error in law as the Commissioner applied some "separate, but wholly unarticulated test under which compensatory measures might enable a scheme to be permitted on the basis of some exception to or derogation from the policy." To my mind this approach simply leads to uncertainty in decision making and cannot be an intended consequence of the overriding policy.

[47] I also bear in mind the unchallenged affidavit evidence of Mr Trinick which states that both parties were proceeding on the basis of a two stage test during this informal hearing and that the Commissioner did not indicate otherwise.

[48] Mr McLaughlin has valiantly tried to defend the Commissioner's method however I cannot accept his arguments. I understand why he draws the Habitats Directive in aid but that is a very different scheme where compensation measures require distinct consideration and are subject to a strict legal test pursuant to Article 6(4). Also, the case of *Ritchie* is not determinative in my view and I do not rely upon

it. In the alternative, Mr McLaughlin invited me to find that any error was corrected by virtue of the fact that the Commissioner has in fact balanced the relevant considerations and so notwithstanding the error of law the entire decision is not vitiated by that mistake. However, in this case the Commissioner has conducted a second balancing exercise outside of express policy on the basis of an apparently material consideration. This is a very different situation from the cases cited in support of this line of argument.

[49] In the light of my conclusions, I simply cannot be sure that had the Commissioner conducted the correct balancing exercise, the result would inevitably have been the same, applying *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P&CR 306. As such, the applicant must succeed in having the decision quashed on this ground and it will therefore have to be reconsidered.

[50] The further head of claim is in relation to reasons. In the light of my conclusion on the interpretation point I will deal with this ground briefly. I understand that the observer in this case is informed however I do not consider that the Commissioner gave adequate reasons as to why she favoured the expert evidence of the NIEA over that of Dr Ross. Accordingly this ground also succeeds.

Conclusion

[51] I have decided that the decision must be quashed and any reconsideration must be in the light of this judgment. I will hear the parties as to costs.