Neutral Citation No. [2009] NIQB 95 | *Ref:* **WEA7659**

Judgment: approved by the Court for handing down | *Delivered:* **01/12/2009**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEENS BENCH DIVISION (JUDICIAL REVIEW)

Boswell's Application [2009] NIQB 95

AN APPLICATION FOR JUDICIAL REVIEW BY

JOHN BOSWELL

_____

WEATHERUP J

Refusal of Planning Permission.

[1] This is an application for Judicial Review of a decision of the Planning Appeals Commission of 1 December 2008 dismissing the applicant's appeal against the refusal of planning permission for the retention of a serviced site for a single Traveller family on land at 38a The Slopes, Ballyduggan, Portadown, County Armagh. Mr O'Hara QC and Ms Kilpatrick represented the applicant and Mr Larkin QC and Mr Lynch the respondent, the Planning Appeals Commission. The Northern Ireland Housing Executive and the Department of the Environment, Planning Service, were Notice Parties to the application but were not represented at the hearing.

[2] The applicant is an Irish Traveller as defined by the Race Relations (Northern Ireland) Order 1997. In 2001 he purchased the site at 38a The Slopes, Ballyduggan and has occupied the site with his wife and adult son since February 2004. The applicant's daughter also occupied the site for a time with her two young children but by reason of ill health she has temporarily relocated, although she would wish to return to live on the site. On the site are two caravans and one mobile home with a timber shed containing kitchen facilities. The site is serviced with water, electricity and a septic tank.

[3] The applicant and his family have what he describes in his grounding affidavit as 'an abiding cultural aversion to living in conventional bricks and

mortar housing'. However the applicant's family are now unable to travel because of his health problems and those of his wife. The site purchased by the applicant lies within the Green Belt area designated by the Craigavon Area Plan 2010. The applicant applied for planning permission on 29 July 2005 for the retention of the serviced site. On 9 June 2006 planning permission was refused in the first place because the site was within the Green Belt and there were no exceptional circumstances that warranted approval and secondly there were no adequate visibility lines between the site access and the public road. The applicant appealed the refusal of planning permission on 20 November 2006 and the Planning Appeals Commission dismissed the appeal on 1 December 2008, upholding the reasons that Planning Service had adopted in refusing planning permission.

Planning Strategy for Rural Northern Ireland.

[4] There are two relevant planning policy documents, namely the Planning Strategy for Rural Northern Ireland (PSRNI) and Planning Policy Statement 12 (PPS12) 'Housing in Settlements'.

First, PSRNI contains Policy GB/CPA 1 'Designation of Green Belts and Countryside Policy Areas'. It is stated that there will be a clear presumption in Green Belts and Countryside Policy Areas against any new building and against any use of land which might create a demand for more buildings, apart from a limited number of uses which are in principle appropriate to a rural location. "No other development will normally be allowed unless there are *overriding reasons why that development is essential* and could not be located in a town or village, or in a part of the open countryside not subject to policy constraint." (italics added)

PSRNI also contains Policy GB/CPA 3 'Dwelling Houses'. It is stated that in a Green Belt or Countryside Policy Area planning permission will be granted for a new dwelling house in five specified cases which include "to meet special, personal or domestic circumstances (Policy HOU 12)". Further it is stated that in order to preserve the open character and visual amenity of Green Belts and CPAs it is necessary to prevent the proliferation of isolated new dwellings, including rural dwellings. However while new dwellings may be justified in the specified instances the onus is on the applicant to provide justification of the need for the dwelling.

Policy HOU 12 'Personal and Domestic Circumstances' permits the grant of planning permission for a dwelling house when there are compelling and site specific personal or domestic circumstances for living in the countryside. "The applicant will have to demonstrate that a new dwelling is a necessary response to the particular circumstances of the case and that genuine hardship would be caused if planning permission were refused. The test is *whether a dwelling on that particular site is needed for special personal or domestic*

reasons, as against a general need or desire to live in the countryside." (italics added)

Planning Policy Statement 12

[5] Secondly, PPS12 'Housing in Settlements' applies to all residential development proposals within cities, towns, villages and small settlements in Northern Ireland. The policy document does not apply to dwellings in the countryside, except in exceptional circumstances in respect of Travellers accommodation as outlined in Policy HS3.

Policy HS3 'Travellers' Accommodation' states -

> "Where a local housing needs assessment identifies that there is a demonstrable need for Travellers specific accommodation, planning permission will be granted for a suitable facility which meets this need. This may be provided through either a grouped housing scheme, a serviced site or a transit site where the following criteria are met –
>
> - adequate landscaping is provided;
> - the development is compatible with existing and proposed buildings and structures in the area paying particular regard to environmental amenity; and
> - where appropriate, the provision of workspace, play space and visitor parking is provided.
>
> Where a need is identified for a transit site and this cannot be accommodated within a settlement, a site adjoining, or in close proximity to a settlement; other areas subject to policies of restraint, such as the Green Belt, should be considered. The exceptional release of land for such a facility should take full account of environmental considerations.
>
> **Justification**
>
> Travellers have distinctive needs which will be assessed as part of the local housing needs assessment undertaken by the Northern Ireland Housing Executive. Where a need is identified and a development plan is under preparation, this should identify a suitable site(s). In other cases, proposals will be considered under this policy. Where a suitable site within a settlement is not available,

exceptionally, a site adjoining or in close proximity to a settlement will be considered."

Travellers Accommodation in Craigavon.

[6] Since December 2003, following the introduction of the Housing (Northern Ireland) Order 2003, the Housing Executive has taken over responsibility for the provision of accommodation for Travellers. The Housing Executive published 'Travellers Accommodation – Needs Assessment in Northern Ireland 2008'. Colin McQuillan, Assistant Director Strategic Partnerships at the Housing Executive, states that the present reality is that the Housing Executive has not been able to meet the needs of members of the travelling community in the Craigavon area. Within the last 5 years the Housing Executive has been able to develop one serviced site and an emergency halting site in the Craigavon area and the 2008 needs assessment identified the need for an additional two serviced sites and a transit site for the area. In the short and medium term the Housing Executive cannot meet the needs of the applicant and provide alternative accommodation which will meet the culturally sensitive requirements of the applicant and his family. The Housing Executive supported the grant of planning permission to the applicant.

Planning Appeals Commission Decision.

[7] The Planning Appeals Commission adopted the report of Commissioner Hannan. The report concluded that policies GB/CPA 3 and HOU 12 refer to 'dwelling houses' and are not applicable to the applicant, although the personal circumstances of an appellant are always a material consideration. The relevant policy context was stated to be Policy GB/CPA 1 of PSRNI and Policy HS 3 of PPS 12. In relation to PPS 12 the report stated that the main purpose of PPS 12 was to address housing in settlements; under Policy HS 3 there was a demonstrable local need for Travellers specific accommodation identified by the local housing needs assessment; the three environmental criteria set out in the policy were satisfied; however under Policy HS 3 serviced sites were required to be within a settlement or exceptionally on a site adjoining or in close proximity to a settlement and the appeal site did not satisfy that requirement. In relation to PSRNI, Policy GB/CPA 3 on 'Dwelling Houses' did not apply and the applicant's personal circumstances did not provide an overriding reason why the development was essential under Policy GB/CPA 1. Accordingly the Planning Service's first reason for refusal was upheld.

[8] In relation to visibility at the access to the site, the report noted that the land required for the northern visibility splay was not within the ownership or control of the appellant; the access was considered to be dangerous; use of the access was not in the public interest; the appellant's personal circumstances

could not outweigh the road safety concerns. Accordingly the Planning Service's second reason for refusal was upheld.

The Applicant's Grounds for Judicial Review.

[9] The applicant's grounds for judicial review are as follows:

(a) The PAC misdirected itself as to the application of relevant planning policy, in particular -

(i) It interposed by implication a limitation in policy HS 3 that permission for the retention of a serviced site for a single Traveller family could only be granted within a housing settlement or in exceptional circumstances in close proximity to a settlement. The policy does not so provide. Rather it distinguishes between transit sites, which are to be considered within settlements and grouped housing or serviced sites which have no such qualification.

(ii) It failed to consider properly whether the exception to residential dwellings within Green Belt provided by a policy HOU 12 was satisfied by the personal and domestic circumstances of the applicant and his family. The omission imposed a higher threshold than is provided for by the policy.

(iii) It erred in failing to consider whether the site was located in close proximity to a settlement.

(b) The PAC failed to take proper account of the evidence that there was no alternative available to the family and therefore misdirected itself that planning permission for the appeal side was not essential.

(c) The PAC when considering the personal and domestic circumstances of the applicant failed to have due regard to relevant considerations and in particular failed to take into account the extent of the families debilitating medical conditions for which they received disability living allowance and for which they have specially adapted the appeal site. By doing so the PAC failed to attach sufficient weight to the families attachment to and

reliance upon the appeal site and the effect the loss of their home would necessarily have upon the families health. The necessary consequence of the loss of the home would be constant travel between unlawful encampments with no access to medical, educational or support services.

(d) The PAC when considering access to the site failed to consider properly whether, in light of the families medical and personal circumstances and demonstrable need, refusal of planning permission was disproportionate to the impact upon road safety.

(e) The PAC failed to take into account the vulnerable position of Travellers generally and the Boswell family in particular and failed to give special consideration to their needs and their lifestyle when determining the appeal is required by law.

(f) The PAC failed when considering the appeal to have regard to the duty of a public authority to support respectful and inclusive communities where Travellers have fair access to suitable accommodation, education, health and welfare provision; recognise, protect and facilitate the traditional way of life of Travellers; help avoid Travellers becoming homeless and promote more private Traveller site provision in appropriate locations through the planning system.

(g) The PAC decision was Wednesbury unreasonable in that in light of the above it reached a decision which no reasonable commission properly directing itself could have reached.

Interpretation of the Policy Documents.

[10] There is a dispute as to the proper interpretation of the two relevant policy documents referred to above. There is also a dispute as to the approach that this Court ought to adopt in relation to the PAC interpretation of the policy documents. Is it for the Court to interpret the policy documents or is it for the Court to accept the reasonable interpretation of the PAC as the decision maker? In South Cambridgeshire District Council v. Secretary of State for Communities and Local Government [2008] ECA Civ 1010 Scott Baker LJ stated that interpretation of policy is a matter for the decision maker and where the interpretation is one that the policy is reasonably capable of bearing there is no

basis for intervention by the Court, citing R(Woods) v. Derbyshire County Council 97 JPL 958. In Belfast Chamber of Trade and Commerce's Application [2001] NICA 6 Carswell LCJ referred to the decision in Woods and other cases and stated:

> "We would be in complete agreement with the propositions laid down in the cases to which we have referred if they were confined to application of words or phrases to fact situations, which appeared to be the issue in many of those cases. In so far as the propositions extend to the process of interpretation, we would doubt their correctness, for while we are conscious that the line between interpretation and application may at times be very difficult to draw, we are not persuaded that the former is anything other than a question of law for the courts."

It is for the Court to interpret the policy documents.

[11] The applicant contends that Policy GB/CPA 3 'Dwelling Houses' should apply in that although the application for planning permission does not relate to a dwelling house it does relate to residential use and the same approach should apply. Under Policy GB/CPA 3 and HOU 12 the approach to the proposed permission would be to determine whether a dwelling on the particular site is "needed for special, personal or domestic reasons". However the applicant contends that when Policy GB/CPA 1 is applied, as occurred in the present case, the applicant is at a disadvantage because a stricter approach is taken to any proposed dwelling, namely whether there are "overriding reasons why the development is essential".

[12] Policy GB/CPA 3 does contemplate an application to residential caravans or mobile homes, which are referred to in the commentary on the statement of policy, although these references are to temporary rather than permanent facilities. However I have not been satisfied that the distinction made by the applicant in relation to the operation of the two policies is of significance or that it had any effect in the present case. On a general level the planning policies are not to be interpreted as legislative measures. Further the approach to any new building in GB/CPA or to new dwellings in GB/CPA is, in either event, essentially one of necessity, to be established by the applicant. On the particular level of the applicant's case, while contending that Policy GB/CPA 3 in relation to special, personal or domestic circumstances did not apply to the applicant, because he did not seek planning permission for a dwelling house, the Commissioner nevertheless stated that the personal circumstances of an applicant are always a material consideration and he proceeded to consider those personal circumstances in determining whether the proposed development was essential. In the event the Commissioner

concluded that the particular circumstances of the applicant's case were not sufficient to warrant the grant of permission.

[13] Further, the applicant contends that Policy HS 3 'Travellers' Accommodation' should be interpreted to permit a "serviced site" within the Green Belt, provided it is shown to be a suitable facility that meets the need for Travellers accommodation and satisfies the three environmental criteria recited in Policy HS 3. The applicant interprets the second paragraph of HS 3 as imposing limits on the development of a "transit site" only and not as imposing such limits on a grouped housing scheme or a serviced site. On the other hand the Commissioner interpreted policy HS 3 as limiting permission for a serviced site to a settlement, or exceptionally, a site adjoining or in close proximity to a settlement.

[14] The first paragraph of Policy HS 3 provides for Travellers accommodation by three methods, namely a grouped housing scheme, a serviced site or a transit site, where certain conditions are satisfied, as they were in the present case. The second paragraph of Policy HS 3 permits the development of a transit site in the Green Belt when this cannot be accommodated within a settlement or a site adjoining or in close proximity to a settlement. It is only in the case of a transit site that there is an exception to permit development in the Green Belt. There is no such exception for a grouped housing scheme or a serviced site. This is further apparent from the "Justification" under Policy HS 3 which states that accommodation may be provided within a settlement or exceptionally a site adjoining or in close proximity to a settlement.

[15] The applicant contends that it does not make sense that what may be the larger development of a transit site should be permitted in the Green Belt and that what may be the smaller development of a serviced site is not permitted in the Green Belt. This may be related, as Mr Larkin contends for the respondent, not to scale but to permanence in that, at page 66 of PPS 12, "transit sites" are described as "sites to facilitate temporary or short term location of caravans" while grouped housing schemes and serviced sites are described in ways that suggest facilities in settled use.

Right to respect for private and family life and home.

[16] Article 8 of the European Convention on Human Rights provides the right to respect of private and family life and home.

> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in

> accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[17] In Chapman v. the United Kingdom (18 January 2001) the ECtHR considered enforcement proceedings against a Traveller family living in caravans on a site in a Green Belt area. The ECtHR found there was no breach of Article 8. It was common case that there had been interference with the applicant's right to respect for her home, disclosed by the refusal of planning permission to her to live in her caravan on her own land and the enforcement measures taken against her. The issue was whether the interference was necessary in a democratic society. This required the Court to be satisfied that the interference pursued a legitimate aim and was proportionate. The legitimate aim concerned the rights and freedoms of others in environmental protection. In the discussion of that which is necessary in a democratic society the Court stated that -

> "…. the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyles both in the relevant regulatory planning framework and in reaching decision in particular cases . . . To this extent, there is thus a positive obligation imposed on the contracting States by virtue of Article 8 to facilitate the Gypsy way of life…. " (paragraph 96)

[18] In furtherance of the positive obligation to facilitate the Traveller way of life the planning framework does provide for special consideration of Traveller needs and their different lifestyles in the manner referred to above in the policy documents. In the application of planning policy the Commissioner took account of the applicant's personal circumstances. This included the family background as Travellers, their medical circumstances, involvement with the local community, the availability of medical services and attendance of grandchildren at the local school. There was found to be no personal, medical or other circumstance that rendered it essential to secure planning permission for the site. However it is necessary to consider the manner in which the PAC dealt with the issue of alternative accommodation for the applicant and his family.

Alternative Accommodation.

[19] The applicant contends that the Commissioner had no regard for the absence of alternative accommodation for a Traveller family in the area. The

ECtHR in Chapman v UK had this to say in relation to alternative accommodation –

> "When considering whether a requirement that an individual leave his or her home is proportionate to the legitimate aim pursued it is highly relevant whether or not the home was established unlawfully. … if the establishment of the home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court would be slow to grant protection to those who, in conscious defiance of the prohibitions of law, establish a home on an environmentally protected site." (paragraph 102)
>
> "…. if no alternative accommodation is available the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation. " (paragraph 103)
>
> "The evaluation of the suitability of alternative accommodation would involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection." (paragraph 104)

[20] Thus the existence and the suitability of alternative accommodation is a material consideration in the balance of public and private interests that has to be undertaken by the decision maker in assessing the proportionality of any interference with the right to respect for private and family life and home. The Housing Executive assessment identified a need for Traveller accommodation and confirmed the absence of suitable alternative Traveller accommodation in the area. In setting out the applicant's case, the Commissioner noted at paragraph 4.9 of the report that it would not have been appropriate to house the applicant's family among other families of Travellers as their accent, which had a Welsh/English intonation, would set them apart from other families and render them unwelcome. At paragraph 4.11 the Commissioner referred to the applicant's claim that he and his wife were too old for travelling, that moving would be too much of a strain on the family and that, as there were no alternative sites, the family would have no alternative but to continue travelling if the proposal was refused permission.

[21] In reaching his conclusion the Commissioner stated, at paragraph 5.5, that the evidence did not establish that a serviced Travellers' site for the Boswell family was essential or was the only solution to the applicant's accommodation needs. I understand the decision to involve the conclusion that, although it was not Traveller accommodation, there was alternative

accommodation available to the applicant and thus the applicant's serviced site was not the only available solution to the applicant's needs. In his replying affidavit at paragraph 16 the Commissioner stated that there was no evidence at the appeal hearing that the applicant or his family had a cultural aversion to living in bricks and mortar accommodation. As stated above the applicant recited such an aversion in his grounding affidavit. The applicant's Counsel described as "a basic and fundamental error" the Commissioner's statement at paragraph 16 of his affidavit that there was no evidence at the appeal hearing that the applicant or his family had a cultural aversion to living in bricks and mortar accommodation. The applicant's Counsel stated that the application for planning permission and the appeal hearing were predicated on the fact that the only suitable accommodation for the applicant would be Traveller specific accommodation.

[22] Did the applicant make the case before the Commissioner that there was no suitable alternative accommodation? Judicial review is not an appeal in which new grounds can be introduced before the Court, but rather a review of the decision based on the grounds raised before the decision maker. Applicants may not make a new case before the Court when they find that the initial case has not been accepted by the decision maker, any more than a respondent may advance to the Court new grounds for the decision that has already been reached. While the applicant may not have stated in terms at the appeal hearing that his family had an abiding cultural aversion to bricks and mortar accommodation it is apparent that the applicant contended that, despite the personal reasons offered for no longer being able to travel, the family would have no alternative but to continue travelling if the proposal was refused permission. I treat this as the applicant making the case that there was no suitable alternative accommodation, by which the applicant meant Traveller accommodation.

[23] Did the Commissioner evaluate the suitability of alternative accommodation? It would appear that the Commissioner proceeded on the basis that there was alternative accommodation available to the applicant and his family in the form of non-Traveller accommodation in or around a settlement. I am satisfied that the applicant sought to make the case to the Commissioner that such accommodation did not represent suitable alternative accommodation. The balancing exercise to be conducted involves consideration of the suitability of the alternative accommodation. I have not been satisfied that the Commissioner conducted an evaluation of the suitability of alternative accommodation. In that regard he failed to take into account a material consideration. That is not to suggest that the absence of such accommodation would necessarily entitle the applicant to the proposed planning permission in an environmentally protected area. However it is one material consideration, along with many others, for the decision maker to take into account. Accordingly it is proposed to remit the matter back to the PAC so that this

aspect of the appeal may be reconsidered by the PAC in the light of this judgment.

Visibility.

[24] The second issue concerns the absence of visibility splays at the access to the site. The Commissioner applied DCAN 15 and policy AMP 2 of PPS 3. He concluded that the access was dangerous, that it was not in the public interest to permit inadequate site splays and that there were no medical or personal circumstances that outweighed the road safety concerns. It was common case that the applicant could not achieve the appropriate visibility splays as he had been unable to acquire the necessary adjoining land.

[25] The applicant contended that the Commissioner should have granted planning permission and imposed a condition requiring appropriate visibility splays, thereby affording the applicant the opportunity to meet the standard upon acquiring the necessary land. The applicant considered that the grant of planning permission would assist his negotiating position with the adjoining land owner. I do not consider it to be the business of the PAC to determine planning issues in a manner designed to facilitate the land acquisition interests of applicants for planning permission.

[26] The applicant further contended that the applicant's personal circumstances were a material consideration to be weighed in the balance against the road safety concerns. The Commissioner did undertake that exercise and concluded that the road safety concerns should prevail. However, again, the suitability of alternative accommodation was not taken into account. I am satisfied that the positive obligation to facilitate the applicant's way of life requires that the decision maker should take into account the suitability of alternative accommodation in the balance of public and private interests. Again this is not to suggest that the absence of such accommodation would necessarily entitle the applicant to the proposed planning permission in an environmentally protected area with an access giving rise to public safety concerns. Accordingly it is proposed that this aspect of the appeal should also be reconsidered by the PAC in the light of this judgment.