

**IN THE HIGH COURT JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**Central Craigavon Limited's Application [2010] NIQB 73**

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

**MORGAN LCJ**

[1] This is an application to quash a decision of the Department of the Environment (the Department) made on or about 15 January 2008 whereby it purported to adopt Draft Planning Policy Statement 5: Retailing, Town Centres and Commercial Leisure Developments (Draft PPS 5). The applicant is the owner of the Rushmere Shopping Centre, Central Way, Craigavon and the application comes against a background of disputed applications for development at Sprucefield Regional Centre.

[2] In June 1996 the Department published Planning Policy Statement 5: Retailing and Town Centres (PPS 5). At that time the Department had responsibility for strategic and other planning policy issues. Paragraph 35 of PPS 5 deals with regional shopping centres and identifies Sprucefield as the only purpose-built out-of-town regional shopping centre in Northern Ireland. It goes on to provide that the Department will continue to control the scale and nature of the Sprucefield Centre taking into account all relevant policies in PPS 5 and in particular the impact of any proposed development at Sprucefield on the environment generally, existing centres and traffic.

[3] After the Multi-Party Agreement in April 1998 responsibility for strategic planning passed to the newly created Department of Regional Development (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 DRD indicated that it would initiate consultation with key interests on draft regional planning policy statements including one on retailing and town centres. The work on the development of this planning

policy statement was carried out in conjunction with officials from the Department. The initial research and policy information was gathered by the end of 2001. Officials from DRD then began the drafting process during which comments and guidance were received from officials within the Department. In February 2004 a joint working group was established between the departments to oversee preparation and in late February 2005 Ministerial approval for the proposed Draft PPS 5 was obtained.

[4] In June 2004 Sprucefield Centre Ltd lodged an application for a major retail development at Sprucefield. In March 2005 the Department's officials recommended that the Sprucefield application be refused, in part because it was contrary to PPS 5. In June 2005 the Minister announced his intention to approve the application and in July 2005 the applicant and others challenged that decision. In May 2006 the court quashed the decision to approve and the application fell to be redetermined.

[5] Despite the fact that Ministerial approval for the issue of draft PPS 5 had been obtained in February 2005 it was not issued until July 2006 when this litigation had ended. Paragraph 42 of draft PPS 5 provided that planning policy for the Sprucefield regional shopping centre would be set through the development plan process. Policy RRP 2 dealt specifically with Sprucefield regional shopping centre and provided that individual planning applications within the designated centre would be judged on their merits including their contribution to Sprucefield's regional role, consideration of their impact on Belfast Centre and other retail centres and detailed policy in the prevailing development plan. The justification and amplification of the policy was contained in paragraphs 87 and 88. This asserted that recent research suggested the Sprucefield was performing below the level necessary to realise its appropriate position within the region hierarchy. The Department indicated a desire to ensure that Sprucefield could perform at a level appropriate to its regional role. The Belfast Metropolitan Area Plan in draft form set out detailed policy for the Sprucefield regional shopping centre.

[6] In September 2006 the applicant issued proceedings challenging the legal power of DRD to promulgate draft PPS 5. Despite this challenge in March 2007 the new Minister indicated his intention to grant the Sprucefield application taking into account draft PPS 5. In July 2007 Sprucefield Centre Ltd withdrew its application but indicated an intention to launch a further application in similar terms. In light of the withdrawal of the application the court dismissed the legal challenge on the basis that it was by then academic.

[7] In October 2007 judgment was given in Re Omagh District Council's Application [2007] NIQB 61. That was a challenge to a decision by the DRD Minister to introduce a new draft PPS 14 Sustainable Development in the Countryside. Gillen J held that a planning policy statement is a promulgation of planning policy which by virtue of article 3 (1) of the Planning (Northern

Ireland) Order 1991 (the 1991 Order) falls within the remit of the Department which is responsible for formulating and coordinating policy for securing the orderly and consistent development of land and the planning of that development. Accordingly the DRD Minister did not have power to issue the draft PPS. In a ruling delivered on 25 October 2007 Gillen J declined, however, to quash draft PPS 14 because of the significant environmental consequences which might follow. On the same day the Minister of the Environment made a statement to the Assembly indicating that her Department was assuming responsibility for PPS 14 and its ongoing review. She also reissued the existing draft PPS 14 and indicated she would hold a further round of public consultation prior to issuing a final rural planning policy document.

[8] Although the decision in Re Omagh District Council's Application did not directly affect the validity of draft PPS 5 it was clear that the same legal power issue arose. On 30 November 2007 the DRD Minister wrote to the Minister of the Environment suggesting that it would be appropriate if draft PPS 5 and other planning policy statements similarly affected were transferred to the Department. On 12 December 2007 a joint letter signed by both Ministers was sent to all members of the Executive indicating that they had agreed to transfer to the Department PPS 5 and other relevant planning policy statements. It is common case that the transfer involved the transfer of appropriate staff and files. That issue was not raised before the Executive at any of its meetings at that time by the Ministers of either of the departments involved and no issue was raised by any other Minister or Department. The Executive was not asked to approve the transfer of responsibility until its meeting on 20 November 2008. By letter dated 14 February 2008 to the applicant's solicitors the Department confirmed that it had assumed responsibility for draft PPS 5 on 15 January 2008 when the document was adopted by the Department under the powers conferred by article 3 of the 1991 Order.

### **Legislative Scheme**

[9] This general functions of the Department with respect to the development of land have been set out in paragraph 7 above. Part 3 of the 1991 Order deals with development plans. By virtue of article 4 of the 1991 Order the Department is given power to make a development plan for any area or alter, repeal or replace a development plan adopted by it for any area. Where it proposes to make, alter, repeal or replace a development plan it is required to proceed in accordance with the provisions of article 5 of the 1991 Order. That provides for consultation with the district council for the area to which the proposed plan relates, the provision of adequate publicity in the area to which it relates and the need to ensure that there is adequate opportunity for representations. The Department shall then prepare the relevant documents and ensure that they are advertised so that objections

may be made. Article 6 provides that a shorter period for publicity and consultation may be used and article 7 provides that a public local inquiry may be held by the planning appeals commission to consider objections. At the end of the process the Department may adopt the plan.

[10] The Strategic Planning (Northern Ireland) 1999 (the 1999 Order) provides that DRD shall formulate a Regional Development Strategy for Northern Ireland. As a result of amendments made by the Planning (Amendment) (Northern Ireland) Order 2003 and the Planning Reform (Northern Ireland) Order 2006 any policy brought forward by the Department pursuant to article 3 of the 1991 Order must be in general conformity with the regional development strategy and any development plan for an area must also be in general conformity with the regional development strategy. It is further provided that where regard is to be had to the development plan on making any determination under the 1991 Order the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

### **The applicant's challenge**

[11] The first ground upon which the applicant bases its challenge is that the promulgation of draft PPS 5 by DRD was unlawful. By virtue of article 4 of the 1999 Order DRD is required to provide policy guidance and advice in relation to its regional development strategy and the implementation thereof. That does not in any way, however, undermine the function which is reserved to the Department under Article 3 of the 1991 Order to formulate and coordinate planning policy. It is indeed common case that it is only the Department which is empowered to make a planning policy statement.

[12] Prior to the adoption by the Department of draft PPS 5 officials from the Department met officials from DRD during December 2007 to discuss the transfer of files, materials and staff as well as financial adjustments. Staff from the Department also carried out a review of files within DRD in order to obtain a full understanding of all the work which had been carried out. As a result of the earlier co-operation between DRD and the Department in the preparation of the PPS the policies which had influenced its content were extremely familiar to the Department. Responses which had been received in the public consultation process for draft PPS 5 and the work carried out by DRD since its publication were made available. As a result of that consideration the Department was satisfied that the existing draft PPS five was a suitable basis from which to work towards the preparation of a final policy. It was against that background that the document was accorded the status of a draft planning policy statement.

[13] 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 PPS 5

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 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 coordinate planning policy. I do not consider, therefore, that this ground of challenge invalidates the adoption by the Department of draft PPS 5.

### **Directive 2001/42/EC**

[14] The second ground of challenge concerns the extent to which the respondent was in breach of Directive 2001/42/EC. This imposes obligations on member states in relation to the assessment of the effects of certain plans and programmes on the environment. The scope of the directive is set out in article 3.

"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.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require

an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."

The Directive is implemented in Northern Ireland by the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004. The Directive and the Regulations require the responsible authority to carry out an environmental assessment during the preparation of a plan or programme and before its adoption. There is no dispute that the Department did not in fact carry out an environmental assessment as part of its consideration of draft PPS 5. It is further accepted that the projects caught by article 3(2)(a) of the Directive include the construction of shopping centres and car parks in locations such as Sprucefield.

[15] Guidance has been published by the European Commission on the implementation of the Directive. The first question concerns the meaning of "plans and programmes". The Commission advises that member states should adopt a wide scope and a broad purpose in answering this question. The extent to which an act is likely to have significant environmental effects is the yardstick. At paragraph 3.5 of the guidance it is suggested that a plan is a document which sets out how it is proposed to carry out or implement a scheme or policy. The example given is a land use plan setting out how land is to be developed or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas. It is significant to note first the distinction between policy and plan and secondly to note the relationship between the plan and a particular area.

[16] The example of what might comprise a programme is 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 "programme" in that sense would be quite detailed and concrete. The Commission goes on to suggest that the word "programme" is sometimes used to mean the way it is proposed to carry a policy in the same way that "plan" was used at paragraph 15 above.

[17] Article 3 (4) of the Directive imposes an obligation on member states to determine whether plans and programmes other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects. Both paragraph 2 and paragraph 4 of Article 3 of the Directive require the plan or programme to set the framework for future development consent. At paragraph 3.23 of

the Commission guidance it is suggested that these words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent.

[18] There is in my view no doubt that the Directive applies to development plans. This is the mechanism by which the planning authority indicates what kind of development is appropriate for particular locations. It is also the means by which the planning authority sets out the framework for future development consent. In September 2005 the Office of the Deputy Prime Minister published A Practical Guide to the Strategic Environmental Assessment Directive which contained an indicative list of plans and programmes in the United Kingdom to the Directive. In Northern Ireland the only land use plans listed were development plans. The list also included the RDS which has a regional spatial role. Of course the fact that development plans are included does not mean that other plans might not be included. It is, however, important to bear in mind on this issue recital 9 of the Directive.

“(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. 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 a hierarchy of plans and programmes.”

[19] In this case the relevant development plan is the draft Belfast Metropolitan Area Plan. That plan contains specific policies in relation to Sprucefield. Any proposals must not adversely impact on the vitality and viability of existing city and town centres. The type of goods to be sold are restricted to bulky comparison goods. That floor space of any individual unit must be of a minimum size and certain site requirements must be observed. The papers before me indicate that environmental assessment work has been carried out in connection with the bringing forward of that plan. All of these factors point strongly against the proposition that there is some requirement that draft PPS 5 which applies to a wide range of retailing and town centre activity across Northern Ireland should be separately subject to environmental assessment. I am conscious that when DRD published draft PPS 5 in July 2006 it considered that the Directive applied. For the reasons set out I consider that DRD was in error and that neither the Directive nor the Regulations imposed any obligation on the Department to carry out an environmental assessment in the preparation of draft PPS 5.

## **The Development Plan**

[20] The legislative background set out above demonstrates the important role played by an adopted development plan in the determination of planning applications. There are also detailed provisions in relation to the involvement of the public in the development of the plan. The plan for the Belfast Metropolitan Area is in the course of being prepared. Before it can be adopted the Department will have to consider the report of the planning appeals commission. Draft PPS 5 itself is subject to a consultation process and PPS 1 makes it clear that its draft status is material to the question of what weight should be applied to it. There has been no interference with the process by which the development plan has emerged and there is in my view no basis for contending that the publication draft PPS 5 has improperly affected the emergence of the development plan which is continuing. In accordance with paragraph 50 of PPS 1 draft BMAP and draft PPS 5 can be taken into account in the determination of planning applications for the time being although it must be a matter of judgment as to what if any weight to give them.

## **Executive Approval**

[21] The last point on which the applicant challenges the decision of the Department concerns the compliance of the Minister with the Ministerial Code. The Northern Ireland Act 1998 provided a legal framework within which the Executive Committee, Ministers and the Assembly operate. That framework was significantly altered by the Northern Ireland (St Andrews Agreement) Act 2006. Section 20 of the 1998 Act as amended deals with the Executive Committee.

“20. - (1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.

(2) The First Minister and the deputy First Minister shall be chairmen of the Committee.

(3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement.

(4) The Committee shall also have the function of discussing and agreeing upon-



- (a) significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of that Agreement;
- (b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee."

[22] The 2006 Act introduced new responsibilities in respect of compliance with the Ministerial Code by adding section 28 A to the principal Act.

*"28A Ministerial Code*

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

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

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

[23] The relevant provision of the Ministerial Code for the purpose of this application is paragraph 2.4.

*"2.4 Any matter which:-*

- (i) cuts across the responsibilities of two or more Ministers;
- (ii) requires agreement on prioritisation;
- (iii) requires the adoption of a common position;
- (iv) has implications for the Programme for Government;

- (v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement;
- (vi) is significant or controversial and which has been determined by the First Minister and deputy First Minister acting jointly to be a matter that should be considered by the Executive Committee; or
- (vii) relates to a proposal to make a determination, designation or scheme for the provision of financial assistance under the Financial Assistance Act (Northern Ireland) 2009 shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee.

Regarding (i), Ministers should, in particular, note that:-

- the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, EU issues, economic policy, human rights, and equality. Matters under consideration by Northern Ireland Ministers may often cut across these responsibilities.
- under Government Accounting Northern Ireland, no expenditure can be properly incurred without the approval of the Department of Finance and Personnel.”

[24] It seems clear that the transfer of staff, files and resources in connection with draft PPS 5 from DRD to the Department must have cut across the responsibilities of the two Ministers involved and accordingly placed a responsibility on them to bring the matter to the Executive to be considered. There was some debate before me as to whether the letter of 12 December 2007 might have achieved that but in any event I do not now have to deal with that point as the Executive has expressly approved the transfer at its meeting on 20 November 2008.

[25] The second aspect of the arrangements entered into between the DRD and Department Ministers was effected on 15 January 2008 with the taking on by the Department of responsibility for draft PPS 5. That could not, of course, have been a transfer as responsibility for planning policy matters always resided with the Department and the DRD had no authority to transfer any

responsibility to it. In other words the transfer related solely to the staff and materials.

[26] The question, therefore, is whether the adoption of draft PPS 5 by the Department gave rise to an obligation under the Ministerial Code to refer the matter to the Executive for decision. The first basis upon which this was argued was that the decision was clearly significant and controversial. At this time there was no agreed programme for government and an issue arose as to whether it could be said that the decision to issue the policy was clearly outside the agreed programme. The statutory scheme deprives a Minister of the executive authority which they would otherwise be entitled to exercise. In those circumstances any ambiguity ought to favour giving validity to the Ministerial decision. Not every significant or controversial decision was automatically to be referred to the Executive. I do not accept, therefore, that even if this decision was significant or controversial that it was within subparagraph 5 of paragraph 2.4 of the Code since it cannot be said that it was clearly outside any agreed programme. I am also inclined to the view that in any event the adoption of the policy was not of itself significant or controversial. This policy had been promulgated by DRD in July 2006 and had not apparently raised any interest at Executive level. When the letter from the two Ministers was sent to Executive colleagues there was no enquiry or suggestion of controversy. Whether or not something is controversial or significant in this context must refer to those matters which members of the Executive might believe to be so. The evidence does not indicate that this draft PPS raised any such concern.

[27] Another basis upon which it was argued that the Ministerial Code might apply was the requirement to adopt a common position. In particular it was contended that the requirement to ensure that planning policy was in general conformity with the Regional Development Strategy rendered the adoption of this policy an issue on which a common position was required. I do not accept that this argument is well founded. The Department is given a policy power which has to be exercised within the confines imposed by the RDS. That does not make the issue of the planning policy a matter on which a common position must be held. It simply acts as a constraint on the freedom of the Minister to exercise executive power. Within the area of policy making left the Minister is free to act as they choose.

[28] The final issue is whether the issue of this policy was cross cutting. I entirely accept that there are planning policy statements which clearly cut across the responsibilities of other Departments and must, therefore, go to the Executive before they can be issued. In some cases the nature of the cut across responsibilities is clear but the complexity of government often means that such issues arise in a multitude of less obvious circumstances. In this case for instance one sees within the document reference to the requirements of targeting social need and the guide to rural proofing. That tends to suggest

that this policy has a wider context which involves the responsibilities of the ministers who must cater for those matters at least. It is also apparent that in the preparation of the draft in the period from 2001 until 2005 there was considerable joint work done by the Department and DRD. It is hardly surprising that a policy which deals with a common economic and social activity throughout Northern Ireland should cut across the responsibilities of Ministers on the Executive. I consider, therefore, that the adoption of this policy was a cross cutting issue and the decision to adopt the policy should have been brought to the Executive for its approval.

### **Remedy**

[29] I have no doubt that the breach of the Ministerial Code in this case was entirely inadvertent. It was caused by the perfectly proper desire to secure a practical outcome to the difficulties caused by the misunderstanding within the departments about their respective responsibilities. The Executive was at all times informed of the steps that the Ministers intended to take and no objection or issue was raised by any other member. Against that background I consider the breach to be technical.

[30] The question arises as to whether such a breach is a contravention of the Ministerial Code for the purposes of section 28A (10) of the Northern Ireland Act 1998. I consider that the use of the word "contravention" was intended to convey the meaning that the loss of executive power would only arise in the event of some act on the part of the Minister in respect of which the Minister was conscious that he or she was or might be contravening the Code. Contravention generally connotes a conscious act of opposition or violation which in my view is not an appropriate characterisation of what occurred here. I do not, therefore, consider that the Minister acted without executive power. I consider that his interpretation also caters for other inadvertent breaches which may not even have been picked up by the Ministers concerned. Such breaches ought not under this legislation to give rise to a loss of executive power.

[31] Given that there was no evidence of any dissent within the Executive about the issue of the policy I consider that the appropriate remedy is to declare that the adoption of draft PPS 5 should have been brought to the Executive for approval as a cross cutting issue. I decline to quash the adoption of the policy in light of the circumstances I have set out and leave any further action in relation to this to the Minister and the Executive as they see fit.