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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JAMES STEWART FOR JUDICIAL REVIEW

Before: Carswell LCJ, Campbell LJ and Kerr J

CARSWELL LCJ

[1] This is an appeal from an order made by Gillen J on 28 June 2002, dismissing the appellant's claim for judicial review of a decision of the Planning Appeals Commission, whereby it allowed a developer's appeal and granted planning permission for the erection of a building on ground beside the appellant's dwelling house in Carrickfergus and the carrying on therein of a motor factor's business.

[2] The appellant resides at 121 North Road, Carrickfergus, a detached dwelling house at the corner of North Road and Oakland Park, in a residential estate. Immediately to the north of the boundary to his property there is an irregularly shaped piece of ground, some 0.16 ha in size, which tapers towards the junction of Oakland Park with North Road. On the eastern half of this plot a development was built some 30 years ago, consisting of shop premises. The original planning permission cannot now be found, but it appears that four small shops were erected in pursuance of the permission, occupied by a butcher, a mini-market, a newsagent and a motor factor. It is not known whether any conditions were attached to the permission. Approximately three or four years ago the first three shops were combined into one of a type now familiar, constituting a grocery, newsagency and video shop. The western portion of the site, somewhat less than half of the whole, remained undeveloped open ground.

[3] On 9 December 1998 an application for full planning permission was received by the planning authority, the Department of the Environment. The owner of the site, Norris Brothers & Sons, sought permission to develop it by extending the existing convenience store into the motor factor's premises and

building a new and slightly larger motor factor's shop on the vacant land adjoining the appellant's boundary. It was also proposed to re-roof the existing building, which does not appear to have given rise to any objection.

[4] The proposal was originally favoured by the planning authority, but was opposed by Carrickfergus Borough Council and by a number of residents, including the appellant. Eventually on 16 June 2000 a notice of decision was issued by the Department, refusing permission on the following grounds:

> "1. The proposal is contrary to the Department's Planning Policy Statement 5, Retailing and Town Centres, in that the proposed development does not meet an existing deficiency in local shopping provision.
>
> 2. The proposal is contrary to the Department's Planning Policy Statements 1 and 5 in that the development would, if permitted, have a detrimental impact on the living conditions of residents of No. 121 North Road by reason of noise, nuisance and general disturbance likely to arise from the close proximity of the proposed service yard to this residential property."

[5] The developer appealed to the Planning Appeals Commission (PAC), which decided to hear the appeal by the procedure known as an informal hearing procedure, to which we shall refer in more detail in due course. The hearing was conducted on 11 April 2001 by the appointed member of the PAC, the Deputy Chief Commissioner Mrs Maire Campbell (the Commissioner), who gave a report to the PAC dated 5 June 2001, recommending that the appeal be allowed. By a decision dated 15 June 2001 the PAC accepted the recommendation and allowed the appeal. It granted full planning permission for the erection of the new building for the motor factor's business, subject to a number of detailed conditions. Condition 2 restricted the use of the new building to use solely as a motor factor's shop. Condition 8 restricted future use of the existing block 1-7 Oakland Park to the sale of convenience goods (as defined below). Several others were designed to keep to a minimum the impact on the appellant of the carrying on of the motor factor's business.

[6] The appellant applied on 20 July 2001 for judicial review of the decision of the PAC. Leave to apply was given by the single judge and the application was heard by Gillen J over several days in March 2002. He gave a detailed written judgment on 28 June 2002 dismissing the application, and the appellant appealed to this court on a number of grounds.

[7] Several issues were argued before the judge and dealt with comprehensively in his judgment, but on appeal before us they resolved into the following:

(a) whether the PAC properly had regard to the Department's Planning Policy Statement 5 (PPS 5) and the sufficiency of its reasons for departing from that policy;

(b) the fairness of the informal hearing procedure conducted by the Commissioner on behalf of the PAC;

(c) whether the Commissioner and the PAC properly had regard to the appellant's rights under the European Convention on Human Rights;

(d) the appellant's right to compensation for the effect which the development was likely to have on his property.

[8] The learned judge set out the applicable planning legislation in detail in his judgment, and we need not repeat it here. PPS 5, applying to retailing and town centres, was prepared and issued by the Department in accordance with the duty laid upon it by Article 3 of the Planning (Northern Ireland) Order 1991. The section which commences with Article 49 is headed "Planning for Local Shopping" and Article 49 itself sets out the policy for such shopping in district and local centres. It provides as follows:

> "49. The primary role of this level of retailing is the provision of locally accessible convenience goods. District and local shopping centres will be retained and where possible enhanced. Proposals for the development of convenience retailing and shops whose primary function is to meet a local need, which are located in or adjoining existing district or local centres will be encouraged provided that:
>
> - the proposal meets existing deficiencies in local shopping provision;
>
> - the proposal would be unlikely to have an adverse impact on the vitality and viability of existing centres;
>
> - the development can be successfully integrated into the centre; and

- the development would not lead to a detrimental impact on amenity, traffic movements and road safety."

The term "convenience goods" is defined in PPS 5 as –

> "Broadly defined as food, drinks, tobacco, newspapers, magazines, cleaning materials, toilet articles."

The term "convenience retailing" takes its meaning from this definition.

[9] It is plain that the items sold in a motor factor's shop do not come within the definition of convenience goods. There was no evidence of a local need to be met by such a shop, nor did it meet an existing deficiency in local shopping provision. The use of premises for that purpose is accordingly not in accordance with Article 49 of PPS 5, as the Commissioner and the PAC recognised. Such planning policy statements are not, however, a straitjacket and do not have to be slavishly followed in all circumstances, As Woolf J observed in *EC Gransden & Co Ltd v Secretary of State for the Environment* [1986] JPL 519 at 521, the determining body must have regard to the policy but need not necessarily follow it. If it departs from it, it must give clear reasons so that persons affected may know why an exception is being made to the policy and the grounds for the decision. We would only add that those reasons must be material planning reasons.

[10] The Commissioner summarised her conclusion in relation to the proposal at paragraph 6.18 of her report:

> "6.18 The following matters weigh against the proposal
>
> - its primary function is not to meet a local need;
> - it does not meet existing deficiencies in local shopping provision;
> - the amenity of No 121 North Road will be affected.
>
> However the following are factors to be weighed in favour of the proposal
>
> - the other tests of paragraph 49 of PPS 5 are satisfied;
> - the proposal involves relocation and minimal expansion of an existing business and further

change within the Use Classes Order can be made subject to Departmental control;
- conditions can be applied to control the use of the existing centre and the appeal site;
- there are visual amenity gains in that the existing building will be improved and the site will be landscaped; and
- parking provision is more than required.

I judge that the dis-benefits of the proposal are outweighed by its benefits."

In its decision the PAC accepted the Commissioner's conclusions that "considered cumulatively, the benefits of the proposal outweigh its disbenefits".

[11] The factors ranked by the Commissioner as benefits require some examination to see whether they properly can be so classed or whether, as the appellant contended, she misdirected herself in counting them as benefits. The criterion for assessing a benefit in this context is to examine the present situation and compare it with that which would pertain if the development proceeded in accordance with the grant of permission.

[12] The fact that the other tests of Article 49 are satisfied is neutral and cannot be classed as a benefit in doing this calculation. Nor in our opinion is the facility of applying conditions a benefit: it is a mitigation of the disadvantageous impact of the development, but it does not make the appellant or the neighbourhood better off than if the development did not take place, which is the proper approach. The proposed parking provision may be more than is required, but that could only be a benefit over the existing situation if it were inadequate as matters stand, which does not appear to be the case (see paragraph 3.15 of the Commissioner's report).

[13] Three of the benefits propounded by the Commissioner are accordingly wrongly so classed. The remaining two are the visual amenity gain of the new roof and the landscaping and the planning gain consisting of the condition restricting future development of the site. It is a matter for the PAC to assess the extent and the usefulness of the visual amenity gain, not for the court, though it hardly seems a matter which would bulk very large. As matters stand the site on which the existing shops stand could be used for any of the purposes specified in Class 1 of the Planning (Use Classes) Order (Northern Ireland) 1989, which are:

"*Class 1: Shops*

Use for all or any of the following purposes –

(*a*) for the retail sale of goods other than hot food,
(*b*) as a post office,
(*c*) for the sale of tickets or as a travel agency,
(*d*) for hairdressing,
(*e*) for the display of goods for retail sale,
(*f*) for the hiring out of domestic or personal goods or articles,
(*g*) for the reception of goods including clothes or fabrics to be washed, cleaned or repaired either on or off the premises

where the sale, display or service is to visiting members of the public."

Condition 8 restricts this to the sale of convenience goods, so preventing its use for any of the other uses specified in Class 1. This somewhat modest degree of restriction constituted the planning gain regarded by the Commissioner and the PAC as a benefit.

[14] The Commissioner and the PAC accordingly misdirected themselves by taking into account as benefits three matters which at best are neutral and do not in our judgment rank as benefits in the calculation which has to be carried out. The amount of benefit accruing from the remaining two matters may appear exiguous, though we bear in mind that the assessment of weight is a matter for the planning judgment of the determining authority rather than the court: see, eg, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657, per Lord Hoffmann. The issue is whether the misdirection is sufficiently material to vitiate the decision. We have given careful consideration to this, and regard the case as falling very near the line, but on balance we are not prepared to strike down the decision on this ground.

[15] The method of procedure known as the informal hearing has been developed by the PAC as an alternative to the formal adversarial hearing traditionally adopted for planning appeals. Article 32(5) of the Planning (Northern Ireland) Order 1991 does not prescribe any method of appeal, so it is open to it to fix its own procedure, so long as it satisfies the requirements of fairness laid down by the common law and the Convention. The Commissioner stated in paragraph 27 of her affidavit that one objective in introducing the procedure was to address the concerns expressed by unrepresented applicants and third parties about the adversarial nature of formal hearings, which they found to be intimidating. In deciding whether to hold a formal or informal hearing, the PAC, according to paragraph 4 of the Commissioner's affidavit –

> "takes account in the first instance of the views of the Appellant and the Department taking into account the complexity of legal, technical and policy issues involved in the case, the nature and scale of the appeal proposal, the type of appeal, and the level of third party interest."

At an informal hearing the procedure is more inquisitorial than adversarial. Parties may participate in discussion and ask informal questions through the Commissioner, but there is no formal questioning or cross-examination. The Commissioner conducting the hearing appears to place some considerable reliance on statements of case submitted by the parties.

[16] The PAC decided to hold an informal hearing, although the developer had requested a formal hearing. The hearing was held on 11 April 2001, occupying, according to the Commissioner, some two hours. In paragraphs 23 to 32 of his affidavit sworn on 20 July 2001 the appellant set out his complaints about the conduct of the hearing, which may be summarised as lack of opportunity for him to make relevant comments, lack of structure to the proceedings, lack of opportunity to question the developer and the manner of the Commissioner, which he claims to have found "very abrupt and quite intimidating". This was not accepted by the Commissioner in her affidavit sworn on behalf of the PAC. The appellant's counsel claimed that the informal hearing procedure was inherently unfair in the lack of opportunity given to present a case and question witnesses and that the particular hearing was on its facts unfairly conducted and in breach of the appellant's rights to a fair hearing under Article 6(1) of the Convention.

[17] The requirements of Article 6(1) in relation to the planning process was considered by the English Court of Appeal in *R (Adlard) v Secretary of State for the Environment* [2002] JPL 1379. The applicants claimed that they were entitled to have the Secretary of State call in the planning application for a new stadium for Fulham FC, which would have afforded them an oral hearing. He had left the decision to the local planning authority, which did not permit oral representations, although it carried out a very thorough investigation of the issues and the responses to consultation. The Court of Appeal held that the procedure, taken with the remedy of judicial review, satisfied the requirements of Article 6(1).

[18] Simon Brown LJ, giving the leading judgment, cited a portion of the judgment of Laws LJ in *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668, where the issue was the procedure of adjudication by a local authority officer in a homelessness case constituted a breach of Article 6(1). Laws LJ, with whom Lord Woolf CJ and Dyson LJ agreed, expressed the following views at paragraphs 40 and 43 of his judgment:

"40. As I have shown, the extent to which the first instance process may be relied on to produce fair and reasonable decisions is plainly an important element. But it is not to be viewed in isolation. The matter can only be judged by an examination of the statutory scheme as a whole; that is the necessary setting for any intelligent view as to what is fair and reasonable. Where the scheme's subject-matter generally or systematically involves the resolution of primary fact, the court will incline to look for procedures akin to our conventional mechanisms for finding fact; rights of cross-examination, access to documents, a strictly independent decision-maker. To the extent that procedures of that kind are not given by the first instance process, the court will look to see how far they are given by the appeal or review; and the judicial review jurisdiction (or its equivalent in the shape of a statutory appeal on law) may not suffice. Where however the subject-matter of the scheme generally or systematically requires the application of judgment or the exercise of discretion, especially if it involves weighing of policy issues and regard being had to the interests of others who are not before the decision-maker, then for the purposes of Article 6 the court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expert than a judge (I use the term loosely), and the second instance appeal is in the nature of a judicial review. It is inevitable that across the legislative board there will lie instances between these paradigms, sharing in different degrees the characteristics of each. In judging a particular scheme the court, without compromise of its duty to vindicate the Convention rights, will pay a degree of respect on democratic grounds to Parliament as the scheme's author.

…

43. I should indicate moreover that although there were sharp issues of primary fact falling for determination in the present case, that is not a necessary feature in a s.202 review, and certainly not a systematic one. As often as not there will be no real question of fact, and the decision will turn on the weight to be given to this or that factor against an

> undisputed background … Now, clearly the statutory scheme is either compliant with Article 6 or it is not. Its compliance or otherwise cannot vary case by case, according to the degree of factual dispute arising. That would involve a wholly unsustainable departure from the principle of legal certainty. In my opinion, judged as a whole, this statutory scheme lies towards that end of the spectrum where judgment and discretion, rather than fact-finding play the predominant part."

[19] In the *Adlard* case Simon Brown LJ continued at paragraph 17 of his judgment:

> "17. What, then, of the planning process? Where in the spectrum does this statutory scheme lie? To my mind there can only be one answer to that question and it is the same answer as *Runa Begum* gave with regard to the homelessness legislation, namely 'towards that end of the spectrum where judgment and discretion, rather than fact-finding, play the predominant part.' Accordingly (see paragraph 40 of *Runa Begum*) 'the court will incline to be satisfied with a form of inquisition at first instance at which the decision-maker is more of an expert than a judge … and the second instance appeal is in the nature of a judicial review."

[20] In considering this issue we do not overlook that the court in *Adlard* was dealing with a planning application and not an appeal from a refusal, and that the procedure provided for in English law for planning appeals differs from ours. Nevertheless, as appears from the discussion in *Dyason v Secretary of State for the Environment* [1998] JPL 778, there is an appeal procedure comparable with the informal hearings held by the PAC. We respectfully agree with the reasoning in *Adlard* and consider that it applies to the present case. In our opinion the issues in planning decisions lie at the judgment and discretion end of the spectrum. We do not consider that the use of the informal hearing procedure is in itself unfair or a breach of the Article 6 rights of an objector. There may be cases where there is such a need to establish the correct facts in a conflict of evidence or test the validity of certain types of evidence that an informal hearing would not suffice to satisfy Article 6, but this was not in our opinion such a case. In the absence of such factors, we do not regard the resort to informal hearings as being *per se* in breach of the parties' Article 6 rights.

[21] It is necessary, however, to sound a note of caution. Where a person or body has the function of conducting an inquisitorial type of proceeding of the type of the informal hearing of planning appeals, it is of particular importance that care is taken to ensure that all reasonable expressions of opinion are received and that sufficient opportunity is given to the participants in the proceeding to present their case in an effective fashion. We would draw attention to the remarks of Pill LJ in *Dyason v Secretary of State for the Environment* [1998] JPL 778, in the course of which he said:

> "The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden on an inspector."

[22] We have considered as carefully as we can the way in which the proceedings were conducted by the Commissioner, bearing in mind that we do not have a transcript and that we are not in a position to resolve any conflicts of fact contained in the affidavits. The appellant did not at any stage request a formal hearing, and has made the point that he was not informed at the hearing that he could still have made a request at that stage. The nature of the issues was such, however, that there was little ground on which he could have sought a formal hearing: there was no technical evidence and the statement of evidence in support of the developer's appeal does not contain an appreciable amount of material which it might have been important to challenge in cross-examination. We need hardly say that Commissioners holding informal hearings should not do so in a manner which unrepresented parties might find brusque or intimidating, but we could not conclude on the evidence before us that that was the case. We therefore consider that this ground of challenge fails.

[23] The final issue with which we have to deal concerns the impact of the European Convention on Human Rights on the planning process and the decision of the PAC in this case. We were assisted by careful and thoughtful arguments from all counsel, and it is no reflection on the helpfulness of these arguments if we deal with the issue fairly shortly.

[24] It was contended first that the Commissioner and the PAC failed properly to address the appellant's Convention rights when dealing with his objection as a person affected by the proposed development. The Commissioner adverted to the issue of human rights in two places in her report. In paragraph 4.8 she said:

> "The issue of the Human Rights Act and the 'peaceful enjoyment of property' was also of concern with a

> consequent under valuation of properties in the area if the proposal is to go ahead."

In paragraph 6.17 she said:

> "The effect on residential amenity generally which includes issues raised under the Human Rights Act does not justify rejection. I am not persuaded by the evidence presented or by my observations at site visits of significant problems with litter, noise or general disturbance. That the appeal site is located at a junction of the busy North Road must be taken into account."

Mr RG Weir QC for the appellant submitted that the path of reasoning in such a case should follow six steps:

(a) identify the Convention right engaged;

(b) identify the aim for which the right is being interfered with;

(c) judge whether this aim is legitimately permitted within the terms of the relevant Convention right;

(d) determine the nature and extent of the interference;

(e) determine whether the interference is in accordance with law;

(f) determine whether the interference is proportionate in the circumstances.

This may well be a counsel of perfection, but it is certainly desirable that determining authorities should spell out with a degree of precision the effect of planning proposals on established Convention rights and then carry out an appropriate exercise in order to decide if any of those rights has been infringed. The judge rightly said at page 17 of his judgment that a slavish recitation was not required, but the treatment of the issue in the Commissioner's report was exiguous in the extreme. Since we have determined, however, for the reasons which we shall set out, that the appellant's Convention rights have not been infringed, it ceases to be material whether the Commissioner gave them adequate specific consideration.

[25] The two provisions of the Convention on which the appellant relied were Article 8 and Article 1 of the First Protocol. Article 8 of the Convention provides:

> "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 preservation of disorder or crime, for the protection of health or morals or for the protection of other rights and freedoms of others."

Article 1 of the First Protocol reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of public international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with a general interest or to secure the payment of taxes or other contributions or penalties."

[26] These provisions are intertwined to an extent and can be considered together. It appears clear enough in principle and also consistent with the European jurisprudence that both may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the State: see, eg, *S v France* (Application no 13728/88) and cf the discussion by Sullivan J in *R (Malster) v Ipswich Borough Council* [2002] PLCR 251. Under each provision there is a saving permitting the State to act in the public interest. It has to carry out a proper balancing exercise of the respective public and private interests engaged in order to satisfy the requirement that it act proportionately. This type of balancing is an inherent part of the planning process, in which the determining authorities carry out a scrutiny of the effect which the proposal will have on other persons and weigh that against the public interest in permitting appropriate development of property to proceed. In the vast majority of cases this will suffice to satisfy the requirements of the two provisions, bearing in mind that the authorities are entitled to the benefit of the "discretionary area of judgment" referred to by Lord Hope of Craighead in *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801 at 844.

[27] Mr Weir submitted on behalf of the appellant, however, that he is so directly and particularly affected by the proposed development that unless he was entitled to compensation for the effect on the value of his property he was deprived of his Convention rights. The judge permitted him to amend his statement to make this case and to adduce affidavit evidence that the appellant's house will suffer a marked drop in value if the development goes ahead and also that the very grant of permission will affect its value adversely by the blighting effect. The other parties did not attempt to controvert the valuer's evidence so introduced, but did not concede that it would inevitably occur or that it would be on the scale that he estimated. For present purposes we are content to assume that some reduction in value may occur, without attempting to assess the amount.

[28] Mr Weir contended that the loss which the appellant will sustain is disproportionate and that accordingly he can seek compensation against the PAC as a public authority for acting in breach of Article 8 of the Convention and Article 1 of the First Protocol. Most of the decided cases on payment of compensation stem from compulsory acquisition of property, which directly engages Article 1 of the First Protocol. It was contended that such cases as *S v France* and *Rayner v UK* (Application no 9310/81), both decisions of the Commission dealing with extremely adverse effects of State action on the complainants, recognised that a claim might be admissible. Both claims failed, but in *S v France* this was only because the complainant had received compensation which the Commission regarded as reasonable. In *Rayner v UK,* which concerned aircraft noise at Heathrow Airport, the Commission was prepared to accept that Article 8 may cover "indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals." It also accepted that in principle severe noise nuisance "may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property", contrary to Article 1 of the First Protocol. In order so to qualify, however, the effect on an individual complainant had to be considered "intolerable and exceptional compared with the situation of a large number of people living within the vicinity of an airport."

[29] The height of the threshold which a claimant has to cross in order to qualify for compensation may be seen from the cases relied on by Mr McCloskey QC for the Department, *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35 and *James v UK* (1986) 8 EHRR 123. In the *Sporrong* case the ECtHR held that the adverse effect on the applicants of long-term expropriation permits and prohibitions on construction in Stockholm –

> "created a situation which upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest."

It accordingly declared that there had been a breach of Article 1 of the First Protocol. In *James v UK,* on the other hand, it held that the effect of the Leasehold Reform Act 1967, permitting leasehold enfranchisement against the wishes of the lessor, which had a serious financial effect on the Westminster Estates, was not such as to amount to a breach of Article 1 of the First Protocol. The means adopted by the Government to achieve its object of allowing leasehold enfranchisement did not bear so inappropriately or disproportionately upon the applicants as to give them a right to compensation.

[30] Mr McCloskey was prepared to accept as a theoretical position that in a very extreme case the failure to provide compensation could constitute a breach of Article 1 of the First Protocol. We consider that it is correct to admit the possibility that in some cases the effect on an individual of a planning decision may constitute such a breach, though we see considerable difficulties in making provision for claiming, assessing and paying such compensation. It seems clear to us, however, both in principle and in accordance with the European jurisprudence, that the present case is far from sufficiently extreme to qualify. We hold accordingly that there has not been a breach of either Article 8 of the Convention or Article 1 of the First Protocol.

[31] For the reasons which we have given we therefore affirm the judge's decision and dismiss the appeal.