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*(subject to editorial corrections)**

IN 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 HM A MINOR BY PM HER FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

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WEATHERUP J

The application.

[1] This is an application for Judicial Review of a decision of the Department of the Environment for Northern Ireland dated 15 August 2003 granting O2 UK Ltd (formerly BT Cellnet) planning permission to erect three O2 equipment cabinets and three flagpoles concealing three mobile phone antenna at offices at Forestview, Purdy's Lane, Castlereagh, Belfast being a location adjacent to the applicant's home. The applicant is the eldest of four children living with their parents at Newtownbreda, Belfast. The applicant was represented by Ms Higgins BL. The respondent was represented by Ms Loughran BL. The notice party, O2 UK Limited, was represented by Mr Beattie BL.

The background.

[2] O2 applied for planning permission on 22 November 2002. The application was advertised on 29 November 2002 and neighbour notices were issued on 6 December 2002. The applicant's father wrote a letter of objection on 18 December 2002. The respondent's development control group met in January 2003 and further information was required from O2. Further information was furnished by O2 and the application was re-advertised on 11 April 2003 with further neighbour notification on 9 April 2003. The respondent's development control group reconsidered the application at a meeting on 15 May 2003. Objections to the development were considered to fall into three principal categories namely, health concerns, visual amenity

and procedures. The development control group's opinion was to approve the application. At a meeting of Castlereagh Borough Council on 22 May 2003 a decision was deferred pending a site meeting. Further to a site meeting on 20 June 2003 Castlereagh Borough Council furnished a letter to the respondent expressing concern about the health implications of telecommunications equipment in the area of occupied property. The application was reconsidered by the respondent on 16 July 2003 and there was no change in the opinion to approve the application. The application was referred back to Castlereagh Borough Council, which at its meetings on 24 July 2003 expressed opposition to the proposed development. On 15 August 2003 Philip Arnold, Principal Planning Officer in the Divisional Planning Office in Belfast made the final decision on behalf of the respondent to approve the application for planning permission.

The applicant's grounds for judicial review.

[3] The applicant's grounds for judicial review are set out under six headings in the applicant's skeleton argument.

(i) Illegality of the application under the Planning (Northern Ireland) Order 1991 Article 20, the Planning (General Development) Order (Northern Ireland) 1993 Article 7 and Planning Policy Statement 10 (Telecommunications).

(ii) Unlawful fettering of discretion and delegation of powers in relation to the issue of public concern for health risks from telecommunication equipment.

(iii) Account being taken of an irrelevant consideration, namely a prior grant of planning permission for the site.

(iv) Failure to take adequate or any account of a number of relevant considerations.

(v) Failure to take into account the Human Rights Act.

(vi) Irrationality of the decision.

[4] I shall refer to the respondent and the notice party together as the respondent. The respondent raised three preliminary matters. First, the applicant's standing to bring the application. Second, the applicant's delay. Third, the alternative remedies available to the applicant.

Standing.

[5] On the issue of standing, Order 53 Rule 3(5) provides that the Court shall not grant leave to apply for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates. The respondent contends that the applicant, who is 16 years old, has been chosen as applicant in these proceedings in order to avail of legal aid and therefore to protect the applicant's father, who might otherwise have been the applicant, from an order for costs in the event of an unsuccessful application.

[6] In relation to a child making a challenge to a decision on transfer from primary to secondary education the Court of Appeal in Re Anderson and O'Doherty's Application [2001] NIQB 48 approved the approach of Kennedy LJ in R v Richmond upon Thames London BC ex parte JC (2001) LGR 146. In such a situation the rights in issue concern parental preference and as a general rule the parents rather than the child are the party to bring the application for Judicial Review, although there may be some cases in which the child may be the proper party to bring the application. The position stated by the Court of Appeal was that unless there were sufficient grounds for an exception to operate the Court should refuse leave on applications for Judicial Review of governors or tribunals decisions in relation to school admissions brought in the names of pupils. By the same token legal aid should be refused when sought for such applications to be brought in the pupil's name unless sufficient cause was shown why the pupil and not the parents should be the applicant.

[7] In the above instance the rights in question are generally those of parents. However in a case where the rights in question are those of a minor and the minor is affected by the outcome of the decision then that minor has sufficient interest and will have standing for the purposes of Judicial Review proceedings. That remains the position if the minor was entitled to be an objector to the proposal in question even though no objection was made by the minor. It is not an abuse of process for proceedings to be undertaken in the name of an applicant selected on the basis of entitlement to legal aid, provided that applicant has sufficient interest. It is a matter for the legal aid authorities to determine whether an applicant is entitled to legal aid and whether a proposed applicant represents an abuse of the legal aid system. I adopt and apply the approach of Keith J in R (On the Applicant of Edwards) v Environment Agency and Another (Rugby Limited Interested Party) (2004) 3 All ER 21.

[8] In the present case the applicant is a resident affected by the proposal. She has a "sufficient interest" in the subject matter of the application and has standing to make the application.

Delay.

[9] The second preliminary issue concerns delay. The decision was made on 15 August 2003 and the application for Judicial Review was lodged on 14 November 2003. Order 53 Rule 4 provides that an application for leave to apply for Judicial Review shall be made promptly and in any event within 3 months unless the Court considers that there is good reason for extending the period within which the application shall be made. The respondent contends that the application was not made promptly and there is no good reason to extend time. The notice party completed the site works for the development in September and October 2003 at a cost in excess of £200,000. The applicant has disputed some dates relied on by the notice party and also the make up of expenditure and of the additional losses it claims would arise if the completed works had to be removed. In addition the applicant points to what are described as substantial profits said to be earned by the notice party and the relatively minor extent of the expenditure in the present case in proportion to the scale of the notice party's business.

[10] It is in the interests of good administration that Judicial Review proceedings should commence promptly. The respondent relies on Re McCabe's Application (1994) NIJB 27 on the requirement to make a prompt application and the need for the applicant to offer a good reason for any delay. The applicant relies on R (Birkett) v Hammersmith LBC (2002) 3 All ER 97 and the discussion of promptitude by Lord Steyn at paragraph 53 and Lord Hope at paragraphs 59 to 66 where there is a question mark over the legal certainty of the requirement to apply promptly in Judicial Review proceedings.

[11] Such delay as occurred on the applicant's part related to the processing of legal aid applications. The demands of promptness depend on the circumstances. In view of the steps taken to secure legal aid the applicant acted promptly in the circumstances. In the event, contrary to my finding that the application was not made promptly I am satisfied that there is good reason to extend time. Good reason must take account of the reasons for the delay and any prejudice relied on by other parties. The notice party relies on prejudice arising from the financial implications of interfering with the decision and the operational impact arising from any removal of this part of the telecommunications network now established. I accept that there would be some measure of financial and operational prejudice if the decision to permit this development were to be set aside, but I consider that such prejudice is limited when account is taken of the scale of the notice party's operation and the undertaking of the works while aware of the opposition to the proposed development and the possibility of statutory objection or proceedings for Judicial Review.

Alternative remedy.

[12] The third preliminary issue concerns the applicant's statutory remedy. The respondent contends that the applicant should have applied under the Telecommunications Act 1984 to challenge the grant of planning permission and failed to do so. Schedule 2 to the 1984 Act contains The Telecommunications Code. Paragraph 16 provides for compensation payable by operators for injurious affection to neighbouring land with disputes determined by the Lands Tribunal. Paragraph 17 provides for objections to apparatus by a person who is an occupier of, or owns an interest in, any land, the enjoyment of which, or any interest in which, is capable of being prejudiced by the apparatus. The County Court may uphold the objection and direct the alteration of the apparatus or authorise a different installation in a specified manner and position. Notice under the Telecommunications Act 1984 was affixed to the premises by the operator and no action was taken under the Act by any objector.

[13] The applicant contends that she does not have a remedy under the 1984 Act as she does not have an interest in the premises where she resides that would entitle her to move under paragraphs 16 or 17 of the Code. Further the applicant contends that an objector under paragraphs 16 or 17 would not be entitled to secure the relief that is sought in this application for Judicial Review. In those circumstances the applicant contends that there is no effective alternative remedy available. I am satisfied that the applicant does not have the standing and would not be entitled to remedies under the 1984 Act that would provide an effective alternative remedy to the public law complaints raised in these proceedings for Judicial Review.

Illegality.

[14] First of all the applicant challenges the legality of the application. Reference is made to the statutory requirements in respect of planning applications and it is contended that O2, in its original application, did not comply with those requirements. Further it is contended that there is no power to amend an application for planning permission and accordingly the respondent had no power to approve the amended application.

[15] The Planning (NI) Order 1991, Article 20, requires that any application for planning permission -

> "(a) shall be made in such manner as may be specified by a development order;
>
> (b) shall include such particulars, and be verified by such evidence, as may be required by a development order or by any directions given by the Department thereunder."

[16] The Planning (General Development) Order (NI) 1993, Article 7(1)(b) requires that an application for planning permission shall:

> "include the particulars specified in the form and be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the development which is the subject of the application."

[17] It is common case that the original application was deficient and that additional information had to be furnished to the respondent. In particular it was necessary to supplement the plans and drawings and the information provided so that the amended application was re-advertised and there was additional neighbour notification before approval was granted to the altered proposal.

[18] It has been the practice for many years to proceed on the basis of amended applications rather than requiring a new application to be made when amendments are required or proposed, but the applicant contends that this practice is not lawful.

The point was addressed directly by Kerr J in Re Nelson's Application (1997) 9 BNIL 102 where he considered Article 7(1)(b) of the 1993 Order in relation to an amended plan for a proposed development and found that a fresh planning application was not required every time a plan supporting a planning application was amended. It was stated that such a requirement would be onerous and futile and would go well beyond the purpose of Article 7(1)(b), which is to ensure that the site and dimensions of the proposed development are adequately identified for the benefit of the planning authority and other interested persons.

More recently in Re Rowsome's Application (2004) NI 82 an objector's application for Judicial Review related to the grant of planning permission based on an amended proposal. The Judicial Review proceeded on the basis of a consideration of the requirements of procedural fairness in the light of the amendments that had resulted in an amended preliminary opinion from the Department. The application for Judicial Review proceeded on the basis that the Department had power to consider amended applications.

British Telecommunications PLC(2) v Gloucester City Council [2001] EWHC Admin 1001 concerned the amendment of planning applications made under the equivalent English legislation. Elias J stated that it is inevitable in the process of negotiating with officers and consulting with the public that proposals will be made or ideas will emerge which will lead to a modification of the original planning application. It was considered to be plainly in the public interest that proposed developments should be improved in that way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter

developers from being receptive to sensible proposals for change (para. 33). In the particular case there were some changes of substance but they were not such as to compel the conclusion that a fresh application should have been submitted (para. 36).

[19] I agree with the basis on which the above cases have proceeded, namely that there is power to make amendments and that the Department has power to make a decision in respect of amended applications. It is implicit in the legislation that there is power to make amendments and to receive amended applications. In any event Article 7(4) of the 1993 Development Order entitles the Department to direct further information to enable it to determine any application. To require a fresh application for every amendment serves no purpose. On the other hand there comes a point at which the amendments are so substantial that a new application is required. When amendments are made that do not require a new application the essential issue is one of procedural fairness in that interested parties must be afforded the opportunity to respond to amendments. Whether the amendments are of such a nature as require the amended application to be readvertised or further neighbour notices to be issued or some other procedural step to be taken, or whether it is sufficient for the objector to have had the opportunity to refer to the planning file are all possible responses in the outworking of the requirements of procedural fairness in the particular case. In the present case the alterations were not such as required a new application. There was readvertising and further neighbour notification. I am satisfied that O2 were entitled to furnish additional information and to amend their application. The respondent had power to make a decision on the basis of the further information and the amended application.

[20] The applicant's additional ground of illegality concerns compliance with Planning Policy Statement 10 (Telecommunications). PPS10 states that it sets out the Department's planning policies for telecommunications development. It embodies the Government's commitment to facilitate the growth of new and existing telecommunications systems whilst keeping the environmental impact to a minimum. The PPS also addresses health issues associated with telecommunications development.

[21] Under the heading "Mast and Site Sharing" PPS10 provides that in order to limit visual intrusion the Department attaches considerable importance to keeping the number of radio and telecommunication masts and the sites for such installations to a minimum consistent with the efficient operation of the network (para 6.16). The sharing of masts will be strongly encouraged where it represents the best environmental option in a particular case. Additional equipment should be designed and positioned as sensitively as possible though technical constraints may limit the possibilities. In some circumstances the shared use of an existing mast might require an increase in the height and therefore the visibility of that mast. The Department will

therefore seek to ensure that the cumulative visual impact of antenna on masts is kept to an acceptable level (para 6.17). Depending upon the characteristics of the location, site sharing (both roof-top and ground-based sites) as opposed to mast sharing may represent a more appropriate solution (para. 6.18). All applications for new masts will need to be accompanied by evidence that the possibility of erecting antenna on an existing building mast or other structure has been explored and should outline specific reasons why this course of action is not possible. Where the evidence regarding the consideration of alternative options is not considered satisfactory planning permission may be refused (para 6.19).

[22] Policy Tel 1 - Control of Telecommunications Development – provides:

> "The Department will permit proposals for telecommunications development where such proposals together with any necessary enabling works will not result in unacceptable damage to visual amenity or harm to environmentally sensitive features or locations.
>
> Developers will therefore be required to demonstrate that proposals for telecommunication development having regard to technical and operational constraints have been sited and designed to minimise visual and environmental impact.
>
> Proposals for development of new telecommunications masts will only be considered acceptable by the Department where the above requirements are met and it is reasonably demonstrated that (a) the sharing of an existing mast or other structure has been investigated and is not viable or (b) a new mast represents a better environmental solution than other options.
>
> Applications for telecommunication development by code system operators or broadcasters will need to include:
>
> 1. information about the purpose and need for the particular development including a description of how it fits into the operators or broadcasters wider network;

2. details of the consideration given to measures to mitigate the visual environmental impact of the proposal; and
3. where proposals relate to the development of a mobile telecommunications base station a statement – indicating its location, the height of the antenna, the frequency and modulation characteristics, details of power, output and – declaring that the base station when operational will meet the ICNIRP Guidelines for public exposure to electromagnetic fields.

Where information on the above matters is not made available or is considered inadequate the Department will refuse planning permission."

[23] Policy Tel 1 therefore requires that developers will be "required to demonstrate" that developments have been "sited and designed to minimise visual and environmental impact"; with new masts it must also be "reasonably demonstrated" that mast sharing is not viable or a new mast is a better environmental solution; applications need to include information on purpose and need, measures to mitigate visual and environmental impact, and specified particulars of a base station. Planning permission will be refused if adequate information is not provided.

[24] Planning Policy Statements are material considerations to which the Department must have regard in reaching decisions on planning applications - In Re Belfast Chamber of Commerce and Others Application [2001] NICA 6 per Carswell LCJ at page 3. There is no requirement in the PPS that the required information must only accompany the original application, nor do I consider it to be a necessary implication. If the applicant is entitled to amend the original application, as I have found to be the case, then I am satisfied that the applicant is entitled to furnish further information in purported compliance with the requirements of the PPS. The application remains to be amended until a decision has been made on the application. Similarly, in the absence of any express provision to the contrary, compliance with the requirements of the application remain to be satisfied until the decision has been made.

[25] It is not in issue that the applicant made significant amendments on several occasions in purported compliance with PPS 10. To the extent that the applicant purported to achieve compliance with PPS 10 by way of amendment to the planning application and the supply of additional information, I am satisfied that the applicant was entitled to do so, and that the respondent could properly consider the applicant as being entitled to

achieve compliance with PPS 10 by amendment of the application and the supply of additional information.

[26] The applicant further contends that the respondent failed to treat the PPS as a material consideration in failing to assess the operator's compliance with PPS. While the respondent states that the requirements of the PPS were a material consideration and compliance with those requirements was taken into account, the applicant contends that it is insufficient for a respondent to so state and that evidence of such consideration must be adduced. I do not accept that such a burden is placed on respondents, but rather the applicant is obliged to point to evidence or a basis for a reasonable inference that a matter has not been considered.

Fettering of discretion.

[27] The applicant's second ground of challenge concerns unlawful fettering of discretion and delegation of powers. By this ground the applicant advances the case that the respondent made no decision on health issues but rather left the matter to another Department, which it was not entitled to do. PPS 10 was issued in April 2002. From paragraph 2.16 it deals with health issues and indicates that in 1999 the Government asked the National Radiological Protection Board to set up the independent expert group on mobile phones under the chairmanship of Sir William Stewart. The Stewart Report on "Mobile Phones and Health" was published on 11 May 2000. In respect of base stations the Stewart Report recommended a precautionary approach. It had concluded that the balance of evidence indicated that there was no general risk to the health of people living near to base stations on the basis that exposures were expected to be small fractions of the International Commission on Non-Ionizing Radiation Protection (ICNIRP) Public Exposure Guidelines. The Government accepted the recommend precautionary approach, which included the recommendation that emissions from mobile phone base stations should meet the ICNIRP Guidelines for Public Exposure. Paragraph 2.20 of PPS 10 states that the Department would continue to liaise closely with the Department of Health and Social Services and Public Safety and other government departments and agencies concerning the public health issues associated with telecommunications development and would keep the whole area under review in the light of further research and advice.

[28] The issue of planning and health considerations is dealt with from paragraph 6.28 of PPS 10. It provides that health considerations and public concern can in principle be material considerations in determining applications for development proposals (para 6.28). It was the Department's firm view that the planning system was not the place for determining health safeguards and that it was for the Department of Health, Social Services and Personal Safety to decide what measures are necessary to protect public health (para 6.29). The Department of Health, Social Services and Personal

Safety considered that the guidelines of ICNIRP were based on the best evidence available and accordingly where concern was raised about health effects of exposure to electromagnetic fields it was the view of Department of Health, Social Services and Personal Safety that the proposed mobile communication developments should meet ICNIRP Guidelines in all respects and it should not be necessary for the Department to consider that aspect further (para. 6.30).

[29] The applicant contends that PPS 10 represents an unlawful fettering of discretion and delegation of powers by leaving health issues to the Department of Health, Social Services and Personal Safety. In so doing it is said that the respondent is not considering the circumstances of each case and is not taking into account emerging evidence on health risks. Mr Arnold, on behalf of the respondent, distinguishes between the issue of health risks, which is regarded as a matter of assessment and expert opinion by the Department of Health, Social Services and Personal Safety, and the issue of public concern about health risks, which is regarded as a material consideration in planning applications and a matter for the respondent. Mr Arnold in his affidavit further states that the concern for health risks, as expressed by the applicant and the applicant's father and other objectors and Castlereagh Borough Council, was a material consideration which could count against the development. In addition he states that there was no evidence that caused the respondent to reject the view of the Department of Health, Social Services and Personal Safety.

[30] John Lindon is a Principal Planning Officer in Planning Service Headquarters, Belfast and a member of the team that drafted PPS 10. He refers to research programmes that have been undertaken since the Stewart Report and his responsibility to liaise with other government departments and agencies including the Department of Health, Social Services and Personal Safety. A joint Government/industry research programme has been set up, known as the Link Mobile Telecommunications and Health Research Programme (MTHR), and it is described as a key part of the precautionary approach. It is designed to ensure that this area is kept under review and that Government and the public are kept up to date with new research findings. Mr Lindon states that he has not become aware of any development that has led him to recommend any change to the approach set out in PPS 10. The applicant and her father have also kept abreast of developments in relation to health risks, and it is clear that the evidence remains inconclusive on the issue.

[31] The respondent cannot do other than take advice on health issues from the appropriate experts. Mr Arnold indicates that there have been no grounds not to accept the DHSSPS view, thereby indicating the absence on any absolute position on the advice received. There is monitoring of developments on health issues so the respondent is kept up to date and

receives advice on current research. Mr Lindon has not seen fit to recommend any change to the present approach to the issue, thereby indicating the absence of any absolute position on the present structures and a preparedness to seek a change of approach if that were to be thought appropriate. The circumstances of the applicant and the developing research have been considered. I am satisfied that the approach to health issues does not involve any unlawful fettering of discretion or delegation of powers.

[32] The applicant questions the position of the Department of Health, Social Services and Personal Safety on health risks from telecommunication masts in view of its own practice in relation to such masts. By letter to the applicant from Robert Richardson, Estates Services Manager of Greenpark Healthcare Trust, dated 4 March 2004 it was stated that the Trust had been approached by mobile phone companies in relation to the placing of masts and equipment on its sites and buildings and that the Department of Health, Social Services and Personal Safety had issued a "directive" that in the light of no clear evidence on the long term impact on health and safety, Department of Health, Social Services and Personal Safety estates should not be used to site such equipment.

[33] By affidavit Nigel McMahon, Chief Environmental Health Officer in the Department of Health, Social Services and Personal Safety stated that the Department had not at any time issued a directive containing such advice. It was confirmed that the present Department policy in relation to health risks associated with mobile telecommunication masts was set out at paragraph 6.30 of PPS 10. Mr Richardson by affidavit stated that the "directive" to which he had referred was a executive information service press release dated 18 July 2000, which did not contain any reference to Department of Health, Social Services and Personal Safety's estates not being used to site mobile telephone masts and equipment. Mr Richardson referred to his use of the word "directive" as a misuse of language. He did confirm that Greenpark Healthcare Trust does not permit its estate to be used for the siting of mobile telephone equipment.

[34] I am satisfied that no directive has been issued by Department of Health, Social Services and Personal Safety in relation to the siting of telephone masts and equipment on the property of healthcare trusts. It appears that Greenpark Healthcare Trust has made its own decision not to permit its estate to be used for the siting of mobile telephone equipment.

Prior grant of planning permission.

[35] The applicant's third ground is that account was taken of an irrelevant consideration, namely the prior grant of planning permission. As appears from Mr Arnold's affidavit there were two extant prior approvals. One prior approval dated 18 October 2001 was for the erection of telecommunications

equipment comprising six pole-mounted antenna at roof-top level on the plant room of Forestview and an internal equipment cabinet and ancillary equipment at ground level. The other prior approval was dated 10 June 2002 for a telecommunications radio equipment cabinet on a site south of Forestview. Mr Arnold stated that the first prior approval was relevant in that it demonstrated the acceptability in principle of telecommunications development on the site and as it was extant it could be implemented as a fall back position if the new application were to be refused.

[36] The issue of planning "fall back" was addressed by Kerr J in Re Foster's Application [2004] NI QB1. The applicant challenged the grant of planning permission to develop three houses on property owned by a neighbour. Planning permission had been granted three years earlier for housing development on the site although there was a challenge to the validity of the earlier grant of permission on the basis that the development permitted could not be physically accommodated in the space available. Kerr J at paragraphs 59 to 65 considered that the prior approval was a material consideration and its significance lay in showing that the site had previously been considered suitable for housing and the Planning Service were bound to take that conclusion into account. Further, in the absence of a challenge to the prior grant it had to be treated as valid. The applicant accepts that in general the planning fall back would be a material consideration. However, it was contended that, where there was no actual fall back because the prior approval would not or could not be proceeded with, it ceased to be a material consideration. In the present case the prior approval related to second generation equipment that had been approved prior to PPS 10 standards whereas the industry has now moved to third generation equipment and had to comply with PPS 10 standards. Accordingly the applicant contends the prior approval would never be implemented.

[37] Mr Arnold, at paragraph 10 of his affidavit, states that account was taken of the acceptability of the principle of telecommunications development on the same three corners of the Forestview plant room which formed the application site, as indicated in the prior approval. Account was also taken of the differences between the development permitted by the prior approval and the development for which permission was sought. Where a previous permission will not be put into effect, for whatever reason, the weight to be attached to the existence of the permission will be limited and may be nil. However the weight to be attached to the principle of prior permission is a matter for the decision maker and in the present case it has not been established that inordinate weight was accorded to that consideration. It is the principle of telecommunications development on site that was a material consideration. The differences between the prior approval and the application were taken into account. I do not accept that the prior approval was an irrelevant consideration.

Relevant considerations.

[38] The applicant's fourth ground concerns the failure to take adequate or any account of relevant considerations in four respects. The first relates to the objections raised by Castlereagh Borough Council. The second relates to the concerns about risks to health. The third relates to alternative locations for the proposed development. The fourth relates to the identity of the best location for the proposed development.

[39] The first relevant consideration concerns the objections of Castlereagh Borough Council. Mr Arnold states on affidavit that the views of Castlereagh Borough Council were taken into account. The applicant contends that such a statement is insufficient and that it is necessary for the respondent to demonstrate that relevant matters were taken into account. However the burden is on the applicant to make out the grounds of challenge. Mere assertion that a material consideration has not been taken into account does not satisfy the applicant's burden of making out the ground of challenge. Where the decision maker asserts that a material consideration has been taken into account there must be some basis in evidence or by reasonable inference that such has not been the case for the applicant to make out the ground of challenge. In Re SOS (NI) Limited Application [2003] NIJB 252 at paragraph 19 sets out the Court of Appeal's consideration of the position in relation to an application for leave to apply for judicial review. In the present case there is no basis in the evidence or by reasonable inference that the decision maker has failed to take into account the objections of Castlereagh Borough Council. Nor can it be contended that the decision maker has accorded those objections manifestly insufficient weight.

[40] The second relevant consideration relates to the genuine concerns of the residents in relation to health. The applicant contends that the respondent did not treat those genuine concerns as a material consideration but rather acted on an assessment of the objective justification for the concerns about public health. In so doing the applicant contends that the respondent made the same mistake as that identified in Newport NBC v Secretary of State for Wales [1998] JPL 377. In an appeal concerning public concern about an application for planning permission for a chemical waste plant the Court of Appeal held that it was a material error of law to find that public concern, unless objectively justified, could not be a valid ground of refusal. The planning authority must take account of genuine concerns about public health, as distinct from the evidence of risk, as a basis for refusal.

[41] It appears from the affidavit of Mr Arnold that the respondent did treat the issue of public concern about health risks as a material consideration separate from the issue of evidence of health risks. Further, as appears from the affidavit of Mr Arnold, the treatment of public concern for health risks as

a material consideration was not limited to cases where the national guidelines on emissions were exceeded.

[42] The applicant contends that genuine public concern on the health risks is a material consideration counting against the application. Accordingly the applicant contends that the respondent was in error in stating that genuine public health concerns "could" count against the application and further stating that there was no evidence causing the respondent to reject the view of the Department of Health, Social Services and Personal Safety. I am satisfied from a consideration of all the correspondence and all the affidavits that the respondent treated public concern for the health issues as a material consideration counting against the application. The respondent took into account the advice received on the evidence in relation to health risks as well as the public concern about health risks and the respondent did not fail to distinguish between the objective evidence of health risks and the genuine public concern about health risks. These separate matters were taken into account with other material considerations. The respondent did not fall into the error that occurred in Newport NBC and did not fail to take into account genuine public concerns about health risks as a ground for refusal and did not apply manifestly inadequate weight to consideration of public concern.

[43] The third relevant consideration concerns the possibility of alternative locations being used for the proposed development. Related to that issue is the fourth relevant consideration that the applicant alleges was not taken into account, namely a determination as to whether the development site was the best location for the proposed development. Reliance was placed on Philips v Secretary of State [2003] EWHC 2415 (Admin) where, on consideration of comparable planning guidance in England, Richards J found that as a general proposition consideration of alternative sites is relevant to a planning application only in exceptional circumstances (para 37); such an exceptional circumstance will arise where the development plan or policy guidance makes alternative sites a relevant consideration (para 38); the English Planning Policy Guidance on "Mast and Site Sharing" provides that applicants for new masts are expected to show that they have explored the possibility of sharing existing structures as an alternative to a new site; alternative new sites also fall within the scope of the guidance; the emphasis is on the importance of searching in each case for the optimal location and the question is not just "Is this an acceptable location?" but "Is this the best location?" (para 39).

[44] The applicant contends that the operator has not specified, and the respondent has not considered, existing sites or alternative new sites for the proposed development. After receipt of the application for planning permission the respondent raised this issue with the operator and received a written account on 2 April 2003. At paragraph 23 of his affidavit Mr Arnold sets out the information on alternative sites and states the conclusion that

there had been compliance with the PPS and there was no feasible alternative. The correspondence from the operator and the respondent's affidavit sets out that the respondent was satisfied that information had been provided by the operator to satisfy the requirements of PPS 10 and that mast and site sharing had been considered and that alternative sites had been considered and that the alternatives were either considered unavailable or unsuitable. Further the respondent took account of all permitted future O2 coverage including the coverage by the Belvoir Mast. While the respondent did not in terms ask "Is this the best location?" it is apparent that the respondent was satisfied that there was no alternative location. I am not satisfied that the respondent's conclusion in relation to any alternative should be set aside. I have not been satisfied that the information supplied or the respondent's assessment of that information or the respondent's conclusion is other than in accordance with PPS 10.

Human Rights Act 1998.

[45] The applicant's fifth ground of challenge alleges a failure to act in compliance with Article 8 and Article 2 of the European Convention on Human Rights. Article 8 provides for the right to respect for private and family life as follows -

> "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 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".

[46] In Re Stewart's Application [2003] NI 149 at para 26 Carswell LCJ in the Court of Appeal stated that Article 8 may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the State. It is necessary to carry out a proper balancing exercise of the respective public and private interests engaged in order to satisfy the requirement to 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 Article 8 bearing in mind that the authorities are entitled to the benefit of the "discretionary area of judgment" (para 26).

[47] It is doubtful if the applicant can be said to be "particularly badly affected" by the proposed development in the present case so as to engage Article 8. However on the assumption that Article 8 is engaged I am satisfied that there is no breach of the applicant's right to respect for private and family life. As stated by Carswell LCJ in Re Stewart's Application the type of balancing exercise that is required to satisfy Article 8 it is an inherent part of the planning process in which the planning authorities balance public and private interests.

[48] To the extent that the applicant has a particular genuine concern on health grounds this may more readily be an instance where the applicant's right to respect for private and family life is engaged. In that event it would be necessary for the planning authorities to act proportionality in relation to the applicant's particular concern on health grounds. For the reasons discussed above I am satisfied that the planning authorities have taken into account the genuine concerns that arise in respect of health issues and have addressed that concern in an appropriate and proportionate manner.

[49] Further the applicant contends that the respondent has acted in breach of the Article 2 right to life. Article 2 provides for the right to life in terms that "everyone's right to life shall be protected by law". The right to life imposes upon the State a positive obligation to protect life which requires the authorities to "do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". Osman v United Kingdom [1998] 29 EHRR 245. The obligation arises where there is a real and immediate risk to life. There is no evidence in the present case that there is any real and immediate risk to life. Article 2 is not engaged.

Irrationality.

[50] The applicant's sixth ground of challenge concerns irrationality. The particular point relied on by the applicant concerns the amendment of drawings resulting in the submission that it was irrational to grant planning permission in accordance with the drawings submitted. It was conceded that this point stands with the applicant's contention that there is no power to make amendments of an original application. As that ground has been rejected as set out above the challenge on the ground of irrationality does not stand.

[51] The development of telecommunication systems in areas immediately adjacent to occupied premises gives rise to particular public concern on the

part of those affected. That concern is understandable when the research in relation to health risks is ongoing and an official precautionary approach continues to be warranted. However the scope for legal intervention is limited by the character of proceedings for Judicial Review and I have not been satisfied that any of the applicant's grounds of challenge can be sustained. Accordingly the application for Judicial Review is dismissed.