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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY HM, A MINOR, BY PM, HER FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

Before Kerr LCJ, Nicholson LJ and Campbell LJ

Introduction

[1] This is an appeal from the judgment of Weatherup J dismissing an application that challenged the decision of the Department of the Environment for Northern Ireland to grant O_2 UK Ltd planning permission to erect at Forestview, Purdy's Lane, Castlereagh three equipment cabinets and three flagpoles designed to conceal three mobile telephone antennae. These are located close to the appellant's home. She is the eldest of four children who live with their parents at Newtownbreda, Belfast.

Factual background

[2] O_2 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 appellant's father wrote to the department on 18 December 2002 objecting to the development. In January 2003 the development control group of the Planning Service of the department met and decided that further information was required from O_2. After this had been provided, the application was re-advertised on 11 April 2003. Further neighbour notification took place on 9 April 2003.

[3] The department's development control group considered the application again at a meeting on 15 May 2003. Objections to the development were deemed to fall into three principal categories, namely, health concerns, visual amenity and procedures. After considering these, the development control group concluded that the application should be approved. This opinion was

then considered at a meeting of Castlereagh Borough Council on 22 May 2003. It was decided that the council should postpone further consideration of the application until a site meeting had taken place. Following the site meeting, on 20 June 2003, the council wrote to the department expressing concern about the health implications of telecommunications equipment in an area of residential property. The department duly reconsidered the application on 16 July 2003 and confirmed its original view that permission should be granted. At a meeting on 24 July 2003, the council expressed its opposition to the proposed development. On 15 August 2003, Philip Arnold, the Principal Planning Officer in the Divisional Planning Office in Belfast, made the final decision on behalf of the department to approve the application for planning permission. An earlier grant of planning permission on 18 October 2001 was taken into account as establishing the acceptability of such a development on the application site.

Statutory Background

The Planning (Northern Ireland) Order 1991

[4] Article 3(1) of the 1991 Order specifies one of the general functions of the department in relation to the development of land: -

> "3.—(1) The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development".

[5] Article 20(1) requires that all applications for planning permission should observe the prescribed form and contain the prescribed particulars, as follows: -

> "(1) Any application to the Department 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".

[6] Article 22 provides that every application for planning permission must be served on specified persons and article 21(1) of the 1991 Order requires the department to publish notice of every planning application. It is in the following terms: -

> "21(1) …where an application for planning permission is made to the Department, the Department—
>
> (a) shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated; and
>
> (b) shall not determine the application before the expiration of 14 days from the date on which notice of the application is first published in a newspaper in pursuance of sub-paragraph (a)".

[7] Article 25(1) deals with the way in which the department must consider and determine applications for planning permission: -

> "(1) …. [The department must] have regard to the development plan, so far as material to the application, and to any other material considerations, and—
>
> ……
>
> (a) …. may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or
>
> (b) may refuse planning permission".

[8] Article 25A of the 1991 Order gives the department a power to decline to determine applications, as follows: -

> "(1) The Department may decline to determine an application for planning permission for the development of any land if—
>
> (a) within the period of 2 years ending with the date on which the application is received—
>
> (i) the Department has refused a similar application under Article 31; or

> (ii) the planning appeals commission has dismissed an appeal against the refusal of a similar application; and
>
> (b) in the opinion of the Department there has been no significant change since the refusal or, as the case may be, dismissal mentioned in sub-paragraph (a) in the development plan, so far as material to the application, or in any other material considerations".

[9] Article 25(2) provides that, in determining planning applications: -

> "…the Department shall take into account any representations relating to that application which are received by it before the expiration of the period of 14 days from the date on which notice of the application is first published in a newspaper".

The Planning (General Development) Order (Northern Ireland) 1993

[10] Article 7(1) of the 1993 Order requires that an application for planning permission shall: -

> "(a) be made on a form issued by the Department;
>
> (b) 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; and
>
> (c) be accompanied by 6 additional copies of the form, plans and drawings submitted with it, except where the Department indicates that a lesser number is required".

[11] Article 7(4) of the 1993 Order enables the department to obtain further information from an applicant in respect of an application: -

> "(4) The Department may by direction in writing addressed to the applicant require such further information as may be specified in the

> direction to enable it to determine any application".

[12] Article 15(a) of the 1993 Order requires consultation with the district council in relation to applications for planning permission: -

> "15. Before determining an application for planning permission the Department shall –
>
> (a) consult the district council for the area in which the land to which the application relates is situated and shall, in determining the application, take into account any representations received from the council….".

Planning Policy Statements

Planning Policy Statement 1 – General Principles

[13] PPS1, issued in March 1998, contains the general principles which the department observes in carrying out its planning functions. Paragraph 3 sets out the purpose of the planning system: -

> "3. The town and country planning system exists to regulate the development and use of land in the public interest. The public interest requires that all the development is carried out in a way that would not cause demonstrable harm to the interests of acknowledged importance. It is important to distinguish those matters which planning can influence from those which are outside its control. The central concerns of the planning system are to determine what kind of development is appropriate, how much is desirable, where it should best be located and what it looks like".

[14] Paragraphs 8 and 9 deal respectively with the role of the district councils and public participation of individuals and groups at key stages of the planning process: -

> "8. The Department has a statutory duty to consult the relevant Council about every planning application it receives and to consult the Council during the preparation of a development plan. This consultation forms an

> important part of the Department's decision making process……
>
> 9. The Department recognises that individuals and groups have important contributions to make at key stages in the planning process. ….In addition to advertising applications as required by law, the Planning Service will continue to implement a neighbour notification scheme. The Planning Service will continue to examine ways of improving public consultation and participation".

[15] Paragraph 59 of PPS1 reiterates the department's guiding principle in determining planning applications: -

> "59. The Department's guiding principle in determining planning applications is that development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance. In such cases the Department has power to refuse planning permission. Grounds for refusal will be clear, precise and give a full explanation of why the proposal is unacceptable to the Department".

Planning Policy Statement 10 Telecommunications

[16] PPS10, issued in April 2002, 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. Paragraph 6.16 states: -

> "In order to limit visual intrusion the Department attaches considerable importance to keeping the numbers of radio and telecommunications masts, and the sites for such installations to a minimum, consistent with the efficient operation of the network".

[17] Paragraphs 6.17 and 6.18 of PPS10 encourage the sharing of masts if that is the best environmental option: -

> "6.17 The sharing of masts will be strongly encouraged where it represents the best environmental option in a particular case….
>
> 6.18 Depending upon the characteristics of the location, site sharing (both rooftop and ground based sites) as opposed to mast sharing may represent a more appropriate solution. A second installation located alongside or behind the principal location may, for example, provide a more beneficial solution in environmental and planning terms".

[18] Paragraph 6.19 provides that evidence in relation to alternative options must accompany applications for new masts: -

> "All applications for new masts will need to be accompanied by evidence that the possibility of erecting antennae on an existing building, mast or other structure has been explored and should outline the 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".

[19] PPS10 also addresses health issues associated with telecommunications development. Paragraphs 6.28 to 6.31 of PPS10 provide: -

> "6.28 Health considerations and public concern can in principle be material considerations in determining applications for development proposals. Whether such matters are material in a particular case is ultimately a matter for the courts. It is for the decision-maker (normally the Department) to determine what weight to attach to such considerations in any particular case.
>
> 6.29 However, it is the Department's firm view that the planning system is not the place for determining health safeguards. It is for the Department of Health, Social Services and Public Safety (DHSSPS) to decide what

measures are necessary to protect public health.

6.30 As regards health concerns raised about emissions associated with mobile telecommunications, DHSSPS while conscious of the need for further research and contributing financially towards the same, considers that the guidelines of the International Commission on Non-Ionising Radiation Protection (ICNIRP) for public exposure to electromagnetic fields, as accepted by the World Health Organisation, are based on the best evidence available to date. Accordingly where concern is raised about the health effects of exposure to electromagnetic fields, it is the view of DHSSPS that if the proposed mobile telecommunications development meets the ICNIRP guidelines in all respects it should not be necessary for the Department to consider this aspect further.

6.31 All new mobile phone base stations in the UK are expected to meet the ICNIRP public exposure guidelines……..".

[20] In relation to the control of telecommunications development, Policy TEL 1 of PPS10 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 telecommunications development, having regard to technical and operational constraints, have been sited and designed to minimise visual and environmental impact.

Proposals for the development of a new telecommunications mast 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 feasible; or
(b) a new mast represents a better environmental solution than other options.

Applications for telecommunications 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 operator's or broadcaster's wider network;
(2) details of the consideration given to measures to mitigate the visual and 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."

The European Convention on Human Rights and Fundamental Freedoms

[21] Article 8 of ECHR 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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The judgment at first instance

[22] The respondent had contended before Weatherup J that the application should be dismissed because it had not been made promptly. The judge did not agree. He was satisfied that the applicant had acted promptly in making the application for judicial review and that, in any event, there was good reason to extend time to make the application for judicial review. Such delay as had occurred he considered was caused by difficulties in the processing of legal aid applications. The judge accepted that there would be some measure of financial and operational prejudice if the decision to permit the development was quashed but decided that, such was the scale of O_2's operations, this could not be regarded as significant. Moreover, the notice party had proceeded with the application and the erection of the masts while aware of the opposition to the proposed development and the possibility of statutory objection or proceedings for judicial review.

[23] An issue in the case (as we shall discuss below) was whether the department was legally empowered to consider amendments to planning applications. The judge found that such a power was implicit in the legislation. He held, however, that where the amendments were substantial a fresh application was required. In the present case he considered that the amendments did not fall into that category. The only obligation that arose, therefore, was one of procedural fairness. This required that interested parties be afforded the opportunity to respond to amendments to the application. Depending on the particular circumstances of the case, the opportunity to respond might require re-advertising of the application, further neighbourhood notices, or for the objector to have the opportunity to refer to the planning file.

[24] The judge held that since in this instance there had been re-advertising and further neighbour notification this was sufficient to satisfy the

requirements of procedural fairness. He concluded, therefore, that O_2 was entitled to furnish additional information and to amend their application and that the procedural requirements associated with that amendment had been satisfied.

[25] Another argument advanced by the appellant before the judge at first instance was that the department had failed to take the requirements of PPS 10 into account. On this point Weatherup J said: -

> "[24]…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 … In the absence of any express provision to the contrary, compliance with the requirements of the application remains 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".

[26] A separate argument was mounted about the application of PPS10 to the development. It was suggested that there had been an unlawful fettering of the department's discretion and an unlawful delegation of powers in relation to health issues to the Department of Health and Personal Social Services (DHPSS). This argument had been prompted by the evidence of Mr Arnold, the principal planning officer in the Department of the Environment, that it had taken into account the view of DHPSS as to the dangers of the erection of mobile telephone masts. The judge held that the respondent could not do other than take advice on health issues from the appropriate experts. It was appropriate to have regard to the advice of DHPSS.

[27] On the issue of the earlier grant of planning permission, Mr Arnold stated that the department had taken this into account as establishing the acceptability of such a development on the application site. He also said, however, that the department had regard to the differences between the development that had been permitted by the prior approval and the development for which permission was sought. Weatherup J commented on this in the following passage: -

> "[37]…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".

[28] The appellant had also argued that the department failed to take into account a number of relevant considerations including, objections raised by Castlereagh Borough Council, the concerns about risks to health, alternative locations for the proposed development and the need to discover the best position for the proposed development. In paragraphs [38] to [44] of his judgment, Weatherup J dealt with these arguments. He rejected the claim that the burden was on the respondent to demonstrate that all relevant matters had been considered. He said that the burden was on the applicant to make good these assertions and that "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". He found that no such basis had been demonstrated. On the specific allegation that the respondent had failed to consider public concern about the health risks posed, as opposed to the objective evidence in relation to these, the judge said that it had not been shown that the department had failed to distinguish between these and that it had taken the concern of the public into account.

[29] In relation to the appellant's contention that the respondent had failed to properly consider alternative locations Weatherup J referred to Mr Arnold's affidavit and correspondence from the operator which, he found, showed that mast site sharing and alternative sites had been considered and that the alternatives were either considered unavailable or unsuitable. Weatherup J concluded that the department's decision on the matter of alternative sites could not be challenged: -

> "[44]…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".

[30] The appellant alleged that the respondent had failed to act in compliance with her right to respect for private and family life under article 8 of ECHR. Weatherup J dealt with this argument in the following passage:

> **"**[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 is an inherent part of the planning process in which the planning authorities balance public and private interests.

> [48]…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".

The issues and the arguments of the parties

(i) The planning policy statements

[31] Two principal issues arise in relation to PPS1 and PPS10 TEL. It was argued firstly that the material stipulated in these policies (particularly PPS10) must accompany the planning application at the time that it is submitted to the planning authority. On that basis Mr Michael Lavery QC, who appeared for the appellant, suggested that the planning service could not lawfully entertain the application for planning permission in this case as, at the time it was submitted, much of the required material had not been supplied. Failure to provide information required by PPS10 gave rise, he said, to a breach of article 20(1) (b) of the 1991 Order and article 7(1) (b) of the 1993 Order. Secondly, Mr Lavery contended that the department had failed to have proper regard to the requirements of both policies. It was submitted that, in the present case, the absence of any detailed evidence that the department had paid anything other than cursory attention to these policies brought about a transfer of the onus of proof to the department. It had failed to discharge the evidential burden of showing that proper consideration of the policies had taken place, Mr Lavery claimed.

[32] For the respondent Mr McCloskey QC submitted that the contention that the statutory requirements were mandatory could not be sustained in light of the contemporary rejection of the former mandatory/directory dichotomy approach to issues of statutory interpretation in, for example, *Re Robinson's Application* [2002] NI 390 and *R v Soneji* [2005] UKHL 49. He suggested that *Soneji* in particular heralded a more flexible approach to this question. In any event, he argued, *Inverclyde District Council v Lord Advocate* [1981] 43 P and CR 375, laid this particular argument to rest in the planning context. In that case Lord Keith held that the requirement for particulars, plans and drawings was directory and that, in respect of amendments to the application, the planning authority must deal with the application procedurally in a way that was just to the applicant in all the circumstances. Mr McCloskey claimed that the legislature had clearly intended to create a fair, sensible and viable arrangement where there was some evolution of the planning application. He accepted, however, that this was subject to the public interest and the interest of objectors but suggested that these could be properly catered for in appropriate cases by re-advertising the application or permitting those who might be affected by the development to respond on an informal basis.

[33] In relation to the argument that the planning authority had failed to have regard to the planning policies Mr McCloskey referred to Mr Arnold's statement that PPS10 had been considered by the development control group in determining the application. In reliance on *Inland Revenue Commissioners -v- Coombs* [1991] 2 AC 283, counsel argued that, in the absence of proof to the contrary, where a public officer swears that he or she has done or considered something, it should generally be accepted by the court that such officer has done so with honesty and discretion. The respondent also relied on the decision of this court in *Re SOS* [2003] NIJB 257, where it was held that it was incumbent on an applicant in judicial review proceedings to establish by "… evidence or a sufficient inference …" that the respondent failed to consider a specified material factor.

(ii) The power to amend

[34] The arguments on this issue focused primarily on the question whether it was implicit in the legislation that a planning application could be amended. Mr Lavery accepted that a statutory power carried with it all incidental powers necessary for its operation but suggested that such powers could only be implied in limited circumstances. This was permitted where it was necessary to do so in order to give effect to the expressed intention of the legislature. In the absence of clear evidence of Parliament's intention, the court was not entitled to reach its own conclusion as to what powers the legislature must have or would have intended. A power to amend a planning application should not be implied, therefore.

[35] By way of alternative, counsel submitted that, if there was power to amend the application, the planning service should not be permitted a discretion to determine when amendments were to be allowed or when a new application was required. The proper approach was that if the errors in the original planning application were more than trivial, a fresh application should be required which embodied the agreed revised plan and fresh notices should be given to relevant third parties. This, it was asserted, promoted one of the primary objectives of the legislation, namely that any third parties or objectors who might be adversely affected by the revised planning proposals would have an opportunity to make representations.

[36] Relying on such decisions as *McClurg and Spiller -v- DOE* [1990] 2 NIJB 68, *Re Nelson's Application* [1997] 9 BNIL 102 and *Re Rowsome's Application* [2004] NI 82 Mr McCloskey countered these arguments suggesting that it was now well settled that a planning application could lawfully be amended. He referred in particular to what he described as "the pertinent observation" in *British Telecom -v- Gloucester City Council* that it was in the public interest that planning applications should be susceptible of modification and improvement during the decision-making process. In respect of the present

case, it was submitted that the department's judgment that the revisions to the planning applications did not constitute an overwhelming change in the planning application could be upset only on the ground of *Wednesbury* irrationality.

(iii) Consideration of alternative locations and previous grants of planning approvals

[37] On the issue of alternative location Mr Lavery relied on the approach of the High Court in England in *Phillips v Secretary of State* [2003] EWHC 2415 (Admin) which, he said, had determined that the planning authority was required to decide whether the proposed location was the best possible site for the development rather than merely acceptable. He claimed that the planning service had failed to follow this approach and that the judge ought to have quashed its decision on that account alone.

[38] Mr McCloskey disputed the appellant's interpretation of the decision in *Phillips*, suggesting that the "best location" test espoused in that case related to the several locations considered in the submission and processing of the planning application involved. Every planning application must be determined by reference to the practicalities and realities associated with its particular circumstances.

[39] In relation to the previous planning approval Mr Lavery argued that, in finding that the earlier grant of planning permission for radio masts on the Forestview site was relevant, Weatherup J had wrongly relied on the decision in *Re Foster's application* [2004] NI QB 1. In that case, Mr Lavery suggested, the relevant planning guidelines had not been changed in the three years between the two grants of permission whereas, in the present case, the prior approval related to equipment approved before the introduction of PPS10 standards.

[40] Mr McCloskey's riposte to this argument was that that PPS10 did not exclude consideration of the previous grants of planning permission and that Article 25(1) of the 1991 Order obliged the department to have regard to the development plan and "any other material considerations". The previous planning approval was plainly a material consideration. Whether to have regard to this matter was a question of planning judgment. As such, it was entirely proper that the respondent should take it into account, provided all other material considerations were also considered. In any event it was, Mr McCloskey said, clear from Mr Arnold's affidavit that the prior approval was considered only to the extent that it established the acceptability, in principle, of telecommunications development on the site.

(iv) Duty to consult and taking into account the views of the council

[41] It was submitted that the planning service had not complied with its statutory duty to consult the local council before reaching a decision pursuant

to article 15(a) of the 1993 Order. It had failed to comply with the basic requirements of consultation as propounded in *Devon CC ex p Baker* [1995] 1 All ER 73, these being that consultation must take place at a time when proposals were still at a formative stage; that the proposer must give sufficient reasons for any proposal in order to allow intelligent consideration and response; that adequate time must be given for such consideration and response; and that the product of any consultation must be conscientiously taken into account in finalising any statutory proposals.

[42] On the issue whether the views of the council had been taken into account it was submitted that the learned trial judge had misdirected himself on the onus of proof by determining that the burden was on the appellant to disprove Mr Arnold's assertion that the council's views had been properly taken in to account.

[43] Once again the respondent relied on the affidavit evidence filed on its behalf which, it was claimed, established clearly that the exercise of consultation with the council was a serious and effective one, with both the department and the council actively and assiduously discharging their respective duties. The respondent also relied again on the principle enunciated in *Re SOS* to resist the claim that the onus of establishing that it had taken the views of the council into account lay with the planning authority.

(v) Fettering of discretion

[44] In advancing the case that the respondent had unlawfully fettered its discretion Mr Lavery relied on the decisions in *R v Hampshire CC ex p W* [1994] ELR 460, 476B and *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble Fisheries (Offshore) Ltd* [1995] 1 All ER 714 in which Sedley J stated that a policy should not be applied rigidly; instead each case should be considered in light of the policy designed to deal with decisions of the type under challenge. The policy should not be applied in an inflexible manner so that its terms automatically determined the outcome. It was argued that the planning service had adopted a rigid approach in respect of PPS10 by leaving health issues to the Department of Health, Social Services and Personal Safety. This was not only an unlawful fettering of discretion but also an unwarranted and illegitimate delegation of powers.

[45] In resisting this argument, Mr McCloskey drew our attention to the decision in the English Court of Appeal in *T-Mobile UK Limited, Hutchinson 3G UK Limited and Orange Personal Communications Services Limited v The First Secretary of State and Harrogate Borough Council* [2004] EWCA Civ 1763 where, it was claimed, Laws LJ espoused an interpretation of the English equivalent policy PPG8 which supported Weatherup J's approach to PPS10. In any event, said Mr McCloskey, it was plainly wrong to suggest that the policy could

operate as a fetter on discretion since all planning policy statements derived from the function conferred on the department by article 3(1) of the 1991 Order. A broad discretion was bestowed and, potentially, a very wide range of factors could be properly considered by the department in the formulation of planning policy statements. The appellant's attack on this issue partook of a challenge to PPS10 itself and leave to promote such a challenge had neither been sought nor given. It was not open to the appellant, Mr McCloskey claimed, to advance this case.

(vi) Human rights

[46] The appellant submitted that her rights under article 8 of ECHR had been interfered with because of the intrusion into home, in particular her bedroom, of electro-magnetic radiation and because of her anxiety due to her genuine concerns in respect of the risks to her health from such radiation. In considering the appellant's convention rights the department failed to address the question whether her genuine fear gave rise to a possible breach of article 8. On account of that failure alone, the decision should be quashed.

[47] An interference with the appellant's article 8 rights could only be justified if the grant of planning permission was necessary and proportionate. This required the department to conduct a balancing exercise. Such an exercise was, Mr Lavery argued, very different from that conventionally required in article 8 cases where the affected individual's rights were customarily pitted against the public interest. Here the competing interest was that of a commercial undertaking

[48] The respondent, relying on the decision of this court in *Re Stewart's Application* [2003] NI 149, suggested that article 8 was only engaged in the planning context where the person claiming to have been the victim of a violation of that provision could show that she had been "particularly badly affected by development carried out in consequence of a planning decision made by the State …". In relation to alleged adverse effects of environmental pollution, the governing principle was that there must be a certain minimum level of interference - *Fadeyeva -v- Russia* [Application No. 55723/00 - 9 June 2005]. It was argued that the evidence adduced on behalf of the appellant failed to establish either of these requirements.

[49] Alternatively, it was submitted that, if there had been an interference with the appellant's article 8 rights, such interference was justified under article 8 (2). In particular, the economic well-being of the country and the protection of the rights and freedoms of others warranted the grant of planning permission. The balancing exercise to be conducted under this provision required the pitting of the purely private interests of the appellant against the broader public interests at play in permitting the development.

Viewed thus, there could be no dispute that such interference as may have occurred was plainly justified.

Conclusions

Delay

[50] Weatherup J's approach to this issue was, we consider, impeccable. It is clear that much of the delay could be accounted for by the processing of legal aid applications. Given the time that these required we agree with the judge that there was no real lack of promptitude on the appellant's behalf. Moreover, for the reasons that he gave, we are satisfied that no prejudice accrued to the respondent or the notice party.

The planning policy statements and the power to amend the application

[51] Must all of the material described in PPS1 and PPS10 TEL accompany the planning application on its first submission to the planning authority? We have concluded that to impose such a rigid requirement would defeat the purpose of the planning legislation in relation to development. Developmental control in the public interest lies at the heart of the legislation. The department has a statutory duty to determine every planning application and, as indicated in paragraph 59 of PPS1, the guiding principle is that development should be permitted unless it will cause demonstrable harm to interests of acknowledged importance. Against this background, many applications are organic, subject to alteration and modification as a result of exchanges of information between the planning service and the applicant and to meet objections to the application.

[52] The mandatory and directory debate does not therefore, in our opinion, find a ready place in the field of planning law where unyielding, technical rules are inappropriate. If it is necessary that information be obtained in order to determine a planning application, it is inconceivable that Parliament would have intended that there should be a once-only opportunity to provide it. We consider that the proper construction of article 20 (1) (b) of the 1991 Order is that outlined by Lord Keith of Kinkel in *Inverclyde District Council v Lord Advocate and Others* (1981) 43 P.&C.R. 375 at 395/6 where he said: -

> "…as regards the requirement of particulars, plans and drawings, I am of the opinion that this is clearly directory in nature, and not mandatory, in the sense that if it is not complied with the proceedings are invalid. It is not necessary to the achievement of any of the purposes of the relevant legislation that all such particulars, plans and drawings as may

> be required to enable the application to be dealt with should be submitted at the same time as the application itself. The nature of the requirement is that it can be seen to be concerned with administrative convenience only. It can readily be envisaged that in many cases the authority may require further particulars in addition to those originally made available, and there is no good reason why these should not be allowed to be proffered at a later stage …"

[53] We have concluded therefore that the planning service was right to solicit and to receive further information from O_2 and to consider this in dealing with the planning application. No other sensible approach to the transaction of planning applications is feasible. PPS10 does not expressly or by implication prohibit the provision of further material or information after the planning application has been submitted and it should be construed in a way to reflect the primary purpose of the legislation. That purpose is to permit decisions on planning applications to be taken on a properly informed basis. To deny a developer the opportunity to submit further material that was relevant to the planning decision and, perhaps more importantly, to prohibit the planning authority from seeking such material would frustrate the obvious policy behind the legislation and the planning policy statements. It is moreover quite obviously in the public interest that planning applications should be susceptible of modification and improvement during the decision-making process.

[54] On the specific issue of the amendment of a planning application the following passage from the speech of Lord Keith in the *Inverclyde District Council* case remains pertinent: -

> "Finally, it is necessary to consider the question whether it was within the powers of the first respondent to call for the submission of further detailed plans and information, which would have the effect of amending the original application…This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that

> should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry of the period limited for application for approval of reserved matters…an amendment which would have had the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent [pp 396/7]".

[55] More recently, in *British Telecommunications Plc & Anor v Gloucester City Council* [2001] EWHC Admin 1001, Elias J dealt with the question whether amendments to planning applications required the submission of a fresh planning application: -

> "33. It is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this 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…
>
> 34. I would add that of course the interests of the public must also be fully protected when an amendment is under consideration. They were, however, fully protected in this case by the detailed consultation that took place in respect of the amendments".

[56] We are in complete agreement with the opinions expressed in these passages. We are satisfied that the planning service's decision to consider further material from O_2 and to permit the amendment of its application did not have the effect of 'altering the whole character of the application' nor did it create any disadvantage for the appellant or other objectors. As Mr Arnold has made clear, the revised planning application was re-advertised; fresh neighbour notifications were made, the statutory consultees were consulted again and all the representations about health matters were considered.

[57] The claim that the department had failed to take the relevant planning policies into account must be rejected. As this court said in *Re SOS*, such a claim cannot be sustained by mere assertion. It is incumbent on the person who asserts a failure to have regard to a relevant consideration to establish that claim by evidence or sufficient inference. In the present instance, the claim is in direct conflict with the contrary averment in Mr Arnold's affidavit. We can find no reason to discount his statement that PPS10 was taken into account.

Consideration of alternative locations and previous grants of planning approvals

[58] We do not accept Mr Lavery's characterisation of the decision in *Phillips v Secretary of State* as requiring the planning authority to reject a proposed location unless it is shown to be the best possible site for the development. It is true that in paragraph 39 of his judgment Richards J said: -

> "The question, as it seems to me, is not just "is this an acceptable location?", but "is this the best location?", and for the purpose of answering that question one can and should look at whatever alternative possibilities there may be."

But we do not interpret this passage as meaning that every suitable location for a development must be rejected unless it is also demonstrably the best. If, contrary to our view, this was what Richards J intended, we would not be disposed to follow it.

[59] The relevant dispute in *Phillips* focused on the significance of alternative sites to the planning debate. Richards J attached particular importance to the final sentence of the planning policy PPG8 which provided that "local planning authorities and operators should seek together to find the optimum environmental and network solution on a case-by-case basis". It does not appear to us that this injunction requires of a planning authority that it be satisfied that there are no feasible alternative sites that could be said to be superior in planning terms to the proposed location.

[60] It is clear that the department in the present case was alive to the question of alternative locations and concluded that no acceptable alternative had been identified. We consider that this conclusion cannot be challenged.

[61] On the issue of previous grants of planning permission we are satisfied that the department was entitled to take these into account. They were not precluded from doing so by the terms of PPS10 and the fact that this policy was not in force at the time that the earlier permissions were granted cannot, of itself, rob them of their potential relevance. We agree with Mr McCloskey's submission that they were plainly material considerations

within the terms of article 25 of the 1991 Order. The weight to be attached to them – or indeed whether any weight whatever be given to them – was a matter for the department. As it happens, they were considered only to the extent that they established the acceptability in principle of telecommunications development on the site. This was plainly a relevant consideration but it did not alone determine the outcome of the application for it is clear from Mr Arnold's affidavit that the differences between the development permitted by the prior approvals and that in O_2's application were recognised and considered.

Consulting and taking into account the views of the council

[62] This claim must be rejected for essentially the same reasons as that made in relation to the avowed failure of the department to take account of the relevant planning policies *viz* that there is simply no evidence to support it. On the contrary there is contemporaneous material in the form of correspondence passing between the council and the department about the various concerns that had been raised. Moreover, it is positively asserted by Mr Arnold that these concerns were conscientiously and scrupulously addressed. Unless we were persuaded that the department had cynically resolved to ignore the representations made by the council while creating the false impression that they had done so, it is impossible to accept the appellant's arguments on this issue. There is no basis on which we could possibly reach such a conclusion.

Fettering of discretion

[63] A similar argument to that advanced on behalf of the appellant in the present case was dealt with by the Court of Appeal in England in *T-Mobile UK Ltd, Hutchinson 3G UK Ltd, Orange Personal Communications Services Ltd v The First Secretary of State and Harrogate Borough Council* [2004] EWCA Civ 1763. In that case, the court considered the provisions in PPG8 regarding the planning authority's responsibility in respect of health risks due to telecommunication, (the English counterpart of paragraph 6.30 of PPS10). At paragraphs 18 *et seq* Laws LJ said: -

> "18…in [paragraph] 98 the policy is expressed that if in any given case the ICNIRP guidelines are met the planning authority should not have to look further in relation either to an actual health risk or perceived health risks. The rationale of the policy is the first sentence which, to my mind, is important for an understanding of the whole. There, the Secretary of State says this:

> "... it is the Government's firm view that the planning system is not the place for determining health safeguards."
>
> 19. What follows is drawn in the light of that first statement. It seems to me plain that that is as much policy as anything else in the document. Certainly the text leaves open the possibility…that there might be a case in which the planning authority would be justified in looking further and, to that extent, departing from the policy. But that would be an exceptional course which would have to be specifically justified, as the judgment of Woolf J (as he then was) in *Gransden v Secretary of State for the Environment* [1986] JPL 519…amply demonstrates.
>
> 20…Once one recognises the thrust given to paragraph 98 by its first sentence, this is simply a classic piece of planning policy.
>
> 21…Thus there is, as I have indicated, nothing in paragraphs 11-14 to show why, on the facts of this particular case, compliance with the ICNIRP guidelines was insufficient to allay perceived fears about health issues".

[64] We agree with this analysis. The department was entitled – indeed obliged - to apply the policy enunciated in the words of paragraphs 6.29 and 6.30 of PPS10 that the planning context was not the forum for debate on the overall health risks represented by the erection of mobile telephone masks. An alternative and more appropriate arena for the assessment of those risks exists. We are satisfied that the department was not required, in the particular circumstances of this case, to depart from the policy as set out in PPS10.

[65] Weatherup J dealt with the issue in the following passages of his judgment: -

> "[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."

[66] We consider that the judge correctly recognised that this challenge was not so much based on the claim that the department had fettered its discretion as on an attack on the propriety of PPS10 itself. In fact the appellant had not sought or been granted leave to mount such a challenge but we are in any event satisfied that it must fail. There is nothing impermissible – or even untoward – in government allocating to a particular sphere debate about an issue such as the threat posed to health by the erection of mobile telephone masts and excluding it from the planning context.

Human rights

[67] The arguments based on the appellant's convention rights were somewhat differently pitched from the way in which they had been presented to Weatherup J. Before him it had been argued that there had been a violation of both articles 2 and 8 of ECHR. On the appeal, the appellant concentrated on the proposition that the failure of the department to consider whether her apprehension that the mobile telephone mast *might* have a deleterious effect on her health gave rise to a possible violation of her rights under article 8 and rendered its decision unlawful.

[68] Properly understood, therefore, the appellant's argument on this issue is not strictly speaking a claim based on a convention right. Rather it is a contention that the department failed to have regard to a relevant consideration *viz* the appellant's fear that her health may be affected by the proximity of the mast. But there is nothing in the jurisprudence of ECtHR which suggests that something imperceptible, intangible and having no effect on the senses can potentially infringe article 8. It is a prerequisite of such a violation that it be shown that there was an actual interference with the appellant's private sphere and that a level of severity was attained (the test in

Fadeyeva v Russia). The appellant has failed to establish that there was such an interference and the department cannot be faulted for having failed to take an apprehension that there might have been into account.

[69] The appeal is dismissed.