

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **07/09/2004**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

WEATHERUP J

The application

[1] The applicant seeks Judicial Review of a decision of the Planning Appeals Commission ("the PAC") dated 3 May 2003, whereby it allowed an appeal by Triangle Housing Association Limited, as the developer, against the non-determination of an application for the construction of a four-bedroom bungalow for wheelchair users at 19 Ambleside Drive, Bangor, Co Down. The applicant lives near the premises and appeared before the PAC as an objector to the development. Mr McCloskey QC and Mr Scoffield appeared for the applicant and Mr Larkin QC and Mr Torrans appeared for the respondent, the PAC.

The Planning Appeal

[2] The developer applied for planning permission on 3 November 2000. The application was not determined by the Department of the Environment. On 2 October 2001 the developer appealed to the PAC under Article 33 of the Planning (Northern Ireland) 1991 in default of a planning decision. Elaine Kinghan, a Senior Commissioner of the PAC, conducted formal hearings on 28 February 2002 and 13 March 2002. Commissioner Kinghan's report was dated 15 April 2002. She recommended to the PAC that the appeal be allowed and planning permission be granted subject to two conditions. The first condition was that access should be completed and car parking provided in accordance with approved drawing 1646/05C and the second condition was that the development should be begun within 5 years from the date of permission. The PAC issued a decision on 3 May 2002 adopting Commissioner Kinghan's recommendation and allowing the appeal.

The applicant's complaints to the PAC

[3] In February and March 2002 the applicant had written a number of letters of complaint to the PAC in relation to the conduct of the appeal. John Warke, the Chief Commissioner of the PAC, replied by letter of 21 May 2002. He summarised the applicant's complaints under three headings. First, that the statements of case submitted by other parties had not been received by the applicant at least three weeks before the formal date of hearing, as provided for in the PAC's published procedures. Second, that as a consequence of information and advice given by PAC staff, further delay had resulted and caused prejudice to the applicant's preparations for the hearing. Third, that the Commissioner's conduct of the hearings on 28 February 2002 and 13 March 2002 had been unfair and not impartial.

[4] As to the first complaint, Mr Warke accepted that the applicant had not received the statements of case of other parties at least three weeks before the date set for the formal hearing. The applicant had received the statements of case on 15 February 2002 and the formal hearing was set for 28 February 2002. On the opening of the formal hearing on 28 February 2002, the applicant had applied for, and had been granted, an adjournment of the hearing until 13 March 2002. Mr Warke accepted that the applicant's complaint was justified in that the PAC had failed to send to the applicant a copy of the other parties' statements of case at least three weeks before the date for hearing. However, he considered that this complaint had been addressed by the Commissioner when the applicant had been granted a further two weeks for preparation by the adjournment of the hearing until 13 March 2002.

[5] As to the second complaint, Mr Warke stated that he had not been persuaded that the advice and information provided by the administrative staff had given rise to any delay.

[6] As to the third head of complaint, Mr Warke referred to the Commissioner having required the applicant to read his written submission to the hearing rather than adjourning the hearing to allow others to read the document. Further he referred to the introduction of drawing 05C and the examination of the amendments to the drawing, which the Commissioner had judged to be minor. In addition Mr Warke referred to contact having taken place between the Commissioner and a Mr Morgan of the Roads Service Division of the Department, which had involved a telephone conversation on 11 March 2002. This contact had been explained by the Commissioner at the hearing on 13 March 2002 and was described in the letter of 21 May 2002 as having related solely to whether the Department should make available to the developer a drawing that had been made available to the applicant. Mr Warke accepted that this complaint was justified as the contact between Mr Morgan and the Commissioner was a breach of PAC procedures.

[7] Accordingly the response to the applicant's complaints was that there had been two breaches of Commission procedures, namely that the applicant had not received the statements of case of the other parties at least three weeks before the

date set for the formal hearing and further that there had been contact between the Commissioner and a representative of the Department in connection with the appeal. Mr Warke's conclusion in relation to the two breaches of Commission procedures was that -

"Having looked into the background of the case as a whole, I am satisfied that matters were rectified and that you have not been prejudiced as a result of these or treated other than fairly or impartially."

[8] By way of further consideration of the applicant's complaints, and in accordance with the second stage of the PAC complaints procedure, a meeting took place between the applicant and Mr Warke and others on behalf of the PAC on 14 June 2002. The complaints were discussed and the applicant's right to challenge the PAC decision by way of an application for judicial review was considered.

The applicant's grounds for Judicial Review

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

(a) The PAC and/or Commissioner acted with actual or apparent bias and did so in particular by -

(i) Permitting the applicant less time to consider the statements of case of other parties than those other parties were permitted to consider the applicant's case.

(ii) Granting the applicant an insufficient period of adjournment in respect of his application to adjourn the hearing of the appeal on 28 February 2002.

(iii) Refusing to accept written material from the applicant when written materials were accepted from other parties to the hearing and in particular failing to accept the applicant's written submission on 28 February 2002.

(iv) Refusing the applicant's further application to adjourn the hearing of the appeal on 13 March 2002.

(v) Admitting drawing 05C without permitting the applicant any adequate time to become acquainted with the same and to make representations in respect of the same.

(vi) Indicating to other parties at the appeal that they should not communicate directly with the applicant.

(vii) Failing to answer correspondence or enquiries from the applicant and/or failing to answer his reasonable queries in respect of procedural matters.

(viii) Adopting an aggressive, abrupt and/or adversarial stance towards the applicant.

(ix) Marginalizing or being dismissive in respect of the applicant and the contributions he made or wished to make in the course of the hearing of the appeal.

(x) Appearing conversational and exceptionally accommodating to parties at the appeal save for the applicant.

(xi) Engaging in a telephone conversation with a witness from another party to the appeal the subject matter of which was the appeal to which the applicant and other parties to the appeal were not party.

(xii) Finalising and determining the conditions of planning permission in an unfair manner and in particular without affording the applicant a reasonable opportunity to make representations.

(b) The Planning Appeals Commission acted in breach of its duty to act in a procedurally fair manner and did so in the manner set out at paragraph (a) above.

[10] In essence the applicant relies on the two complaints that had been accepted by the PAC, namely the contact between the Commissioner and the representative of the Department and the late provision of the statements of case, and further relied on a number of other matters concerning the hearings. These various complaints were classified under two judicial review headings, namely apparent bias and procedural unfairness.

Apparent bias

[11] It is common case that, in breach of PAC procedures, there was contact between the Commissioner and the representative of the Department in connection with the appeal. Counsel for the applicant did not allege actual bias on the part of the Commissioner and the issue concerns apparent bias.

[12] The test to be applied in relation to apparent bias has been redefined by the House of Lords in Porter v Magill [2002] 1 All ER 465. Having considered the test formulated by the House of Lords in R v Gough [1993] 2 All ER 724, and the more objective approach taken in Scotland and some Commonwealth countries and in the Strasbourg jurisprudence, Lord Hope suggested what he described as a modest adjustment of the test in R v Gough. Accordingly the Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. As stated by Lord Hope in Porter v Magill at paragraph 103 -

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.”

[13] First, the circumstances of the contact between the Commissioner and the Department. The contact concerned a drawing, the identity of which remains unclear. There are two drawings referred to by the parties, namely O5B and O5C. The applicant contends that Mr Morgan of the Department furnished to the applicant a copy of drawing O5B on 12 March 2002 and that in the course of the hearing on 13 March 2002 he, the applicant, was furnished with a copy of drawing O5C.

[14] In her affidavit Commissioner Kinghan describes the telephone call from Mr Morgan on 11 March 2002 as follows -

“When I realised that his call was in connection with the case I should have ended our conversation and I very much regret that this did not happen. Nonetheless the query was a procedural one in which Mr Morgan indicated that the Road Service had decided that it was appropriate to make a drawing available to Mr Moore and was seeking advice on whether it should be copied to the other parties.”

[15] At the hearing on 13 March 2002 the applicant applied for the Commissioner to disqualify herself from the case because of her contact with Mr Morgan. Commissioner Kinghan told the parties the content of her telephone conversation and refused to disqualify herself. In outlining these matters in her first affidavit Commissioner Kinghan does not identify the drawing in question but subsequent affidavits indicate that she believed the relevant drawing to be O5C.

[16] In her second affidavit Commissioner Kinghan refers to the introduction of drawing O5C as including a number of amendments to the layout in relation to access and sewer details. Commissioner Kinghan records that the applicant had stated at the hearing that he had not seen this drawing when he had inspected the Department’s file but had received it the previous day. Commissioner Kinghan ruled that it was appropriate to consider drawing O5C as part of the application and she was satisfied that the amendments were of a minor nature and that the objector understood the nature of the amendments and that matters detailed in the amendments could be fully explored at the hearing. It is apparent that there are differences on this issue between the applicant and Commissioner Kinghan as to whether the document being considered was drawing O5B or drawing O5C.

[17] At the hearing of the application for judicial review Counsel for the applicant queried the identity of the drawing being referred to by Mr Morgan and queried why he should ask the Commissioner about forwarding a developer’s drawing to the developer. Counsel for the respondent intervened to state that the proposed disclosure concerned a drawing that was to be furnished to the applicant. As it transpired later, this was not a correct statement of the respondent’s position and

may have resulted from confusion between the applicant for planning permission and the applicant for judicial review.

[18] In submissions to the Court, Senior Counsel for the respondent stated that the drawing being referred to by Mr Morgan was drawing O5B and that this drawing had been annotated by the Department and sent to the applicant. Accordingly, it was said, Mr Morgan had telephoned the Commissioner to enquire whether the annotated copy of drawing O5B should be forwarded to the developer. However drawing O5B was an exhibit in the papers and inspection of that drawing revealed that it did not appear to contain any annotations. The hearing was adjourned for further inquiries to be made.

[19] By a fourth affidavit filed for the resumed hearing Commissioner Kinghan refers to the above statement of Senior Counsel for the respondent and states – “Although senior counsel had been instructed to this effect this is incorrect and arose from a misunderstanding.”

Her affidavit then proceeds to recount that when she received Mr Morgan’s call she was unaware of the identity of the drawing being referred to; that when the architect referred to drawing O5C at her subsequent hearing the applicant indicated that he had seen it for the first time the previous night (this is not the applicant’s version of events as he was referring to drawing O5B); that the Commissioner inferred that the drawing referred to by Mr Morgan during the telephone conversation was drawing O5C.

[20] The above circumstances present a wholly unsatisfactory explanation of events surrounding the telephone conversation between Mr Morgan and the Commissioner. The identity of the drawing that was being referred to by Mr Morgan has not been established. The explanation for the telephone call remains unclear. The explanations that have been given have in some cases been shown to be incorrect and in all cases have only added to the confusion.

[21] On the issue of apparent bias this Court’s first task is to ascertain all the circumstances that have a bearing on the suggestion that the Tribunal was biased. The immediate circumstances were that a representative of a party to the appeal spoke to the Commissioner about the case. The relevant circumstances include the explanation offered for that contact and accordingly the confused and contradictory explanation that has been advanced represents a part of the circumstances to be taken into account.

[22] This Court’s next task is to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. This is an objective assessment. Private contact between the adjudicator and a representative of a party during the course of a hearing would not of itself indicate to an objective observer the real possibility of bias. When it is confirmed that the contact is concerned with the subject matter of the contest between the parties then an explanation is to be expected. A fair-minded and

informed observer who considered the confused and contradictory explanation for the contact between the Commissioner and the representative of the Department would inevitably be dissatisfied with the explanation. In all the circumstances I am satisfied that the fair-minded observer, presented with the facts and the unsatisfactory explanation, would conclude that there was a real possibility of partiality on the part of the Tribunal. This is not to find any actual bias on the part of the Commissioner, which was not alleged by Counsel for the applicant, but it is to find that in the circumstances the objective observer could expect to receive an explanation consistent with impartiality and on finding an inability to furnish such an explanation would conclude that there was a real possibility of partiality.

[23] Mr Warke on behalf of the PAC rejected the applicant's complaint in this regard on the basis that the applicant had not been prejudiced or treated other than fairly or impartially. By affidavit he states that in all the circumstances there were no substantive grounds to question Commissioner Kinghan's integrity or impartiality. The question of prejudice to the applicant is not relevant. There is no question over Commissioner Kinghan's actual integrity or impartiality. The issue of apparent bias does not concern these matters. Apparent bias is an objective assessment. Apparent bias is a term born of the maxim that justice must be seen to be done. I find the applicant's complaint on the ground of apparent bias to be well founded.

Late disclosure of the statements of case

[24] It is common case that the statements of case of the other parties were not provided to the applicant at least three weeks before the date for formal hearing on 28 February 2002. The applicant applied to Commissioner Kinghan for an adjournment on 28 February 2002 and the Commissioner acceded to that application and adjourned the matter until 13 March 2002. The applicant emphasises the difficulties he faced as a lay man with limited experience and resources and that he also required time to pursue procedural matters with the PAC.

[25] These appeals must be conducted in a manner which is procedurally fair. Procedural fairness requires that a party to the proceedings has the right to know, and to respond to, an opposing case. The right to know and to respond requires disclosure of the opposing case within such reasonable time as is required for a party to make an informed response. Unrepresented parties may require greater latitude than those with professional representation. In the present case the PAC procedures required a party to receive the statements of case of the other parties at least three weeks before the formal hearing. That ought to be sufficient time in virtually every case for lay or professional representatives, although there may always be exceptional circumstances relating to the case or the parties involved that would warrant extended time. The applicant had the materials for a period prior to 28 February 2002 and for a further period of two weeks prior to 13 March 2002. I take account of the matters relied on by the applicant but in all the circumstances I am not satisfied that the irregular procedure that undoubtedly operated in the furnishing of the statements of case to the applicant prevented the applicant from having

reasonable time to prepare his case or visited any procedural unfairness on the applicant. Nor am I satisfied that steps taken in this regard provide any added foundation for the complaint of apparent bias.

The applicants further particulars

[26] The applicant makes a number of other complaints. In the light of the finding on the issue of apparent bias I do not propose to examine the other issues in detail. Particulars (i) and (ii) concern the late submission of the statements of case and for the reasons set out above I have not been satisfied that there was any procedural unfairness. Accordingly I am satisfied that there was no impropriety in the adjournment from 28 February 2002 to 13 March 2002. In relation to particular (iv) I am satisfied there is no impropriety in the refusal to further adjourn the hearing on 13 March 2002.

[27] In relation to particular (iii) I am satisfied that the Commissioner did not refuse to accept written materials from the applicant and that she required the applicant to read his written submission on 28 February 2002 as she was entitled to do.

[28] In relation to particular (v) it remains unclear at what point drawing O5C was admitted in evidence. The Commissioner was entitled to admit drawing O5C and to afford the parties a reasonable opportunity to address issues arising. The applicant had the opportunity before the close of the hearing to deal with all issues arising on the appeal.

[29] In relation to particular (vi) the Commissioner gave directions that sought to curtail the introduction of new evidence in the course of the appeal. The Commissioner was obliged to regulate the conduct of the appeal and to control the introduction of new evidence. It was perhaps unnecessary to intervene in relation to the requests for information that the applicant might make directly to other parties, but I am not satisfied that in the circumstances such intervention involved any procedural unfairness.

[30] In relation to particular (vii) it has not been established that there was any failure to respond to the applicant's enquiries.

[31] In relation to particulars (viii), (ix) and (x) there exists in the affidavits charge and counter-charge in relation to the conduct of the applicant and the Commissioner. The applicant has not established any impropriety in the manner of the Commissioner's treatment of the applicant.

[32] Particular (xi) relates to the issue of apparent bias considered above.

[33] In relation to particular (xii) the proposed conditions of the planning permission were circulated to the developers and not to the applicant. In Jory v

Secretary of State for Transport Local Government in the Regions (unreported November 12, 2002) a planning inspector sent draft planning conditions to a developer and planning authority for their comments following an informal hearing and before issuing his final decision. It was held by Sullivan J that the rules of natural justice required that the same opportunities to comment on the draft should have been extended to any other party whose interests were affected and who had made submissions. It was noted that the likely effectiveness of planning conditions was, uncharacteristically, central to the inspector's decision to grant planning permission. In the present case there were two routine conditions. The first condition was concerned with matters of access and parking and sought to secure compliance with the drawings and the second condition imposed a time limit for development. While it would be desirable that there should not be one sided consultation on conditions I am satisfied that the character of the conditions in the present case was not such as to render it procedurally unfair to the applicant that he was not given notice of the conditions.

[34] The above particulars have also been considered as aspects of the complaint of apparent bias. I have found for the applicant on the matter of the contact between the Commissioner and the Department but I do not find that any of the other particulars provide any added foundation for the complaint of apparent bias.

Conclusion.

[35] I have found for the applicant on the issue of apparent bias by reason of the contact between the Commissioner and the Department. This development has now been completed. I will hear Counsel on the appropriate form of relief and the issue of costs.