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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **12/1/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JOHN HILL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] This is an appeal from the decision of Morgan J refusing leave to the appellant, John Hill, to apply on certain grounds for judicial review of the decision of the Department of the Environment granting planning permission to Ballywalter Bowling and Recreational Club for the development of premises adjacent to the appellant's home at 14 Springvale Road, Ballywalter, County Down.

Factual background

[2] The proposed development comprises a games hall for indoor sports, a function room for public entertainment and associated ancillary accommodation. The initial application was made on 16 August 2004. In its original conception the proposal comprised new premises somewhat larger than 800 square metres with a maximum height of 7metres. This proposal involved an increase in dimension of the existing premises to something approaching two and a half times their original size.

[3] On 20 September 2004, the Roads Service of the Department advised the Planning Service that visibility splays of 4.5 metres by 100 metres in both directions would be required. On 4 May 2005, the Department's Landscape Architects Branch (LAB) stated that the building would adversely affect landscape character; that there were no adequate landscape proposals; and that there was little opportunity for mitigation of the impact of the development on the landscape by planting because of the harsh microclimate in which the development would take place.

[4] On 1 August 2005 the development control group met to consider the proposal. A case officer, Miss E Maguire recommended that the application be refused. This recommendation was accepted by the group which at that stage comprised Miss Maguire, a planning officer, Mr McIlwaine and another planning officer, James Coates. It was determined that, at that stage the application should not be granted. Three reasons were adopted from the case officer's report for this stance. They were: -

- The proposal was contrary to policies SP12/GB, CPA 1/GB, CPA 2of the Department's Planning Strategy for Rural Northern Ireland in that the site is located within a Countryside Policy Area as designated in the North Down and Ards Area Plan and no special or exceptional circumstances had been demonstrated to justify the scale of the development and a relaxation of the strict planning controls that applied;
- The proposal was contrary to Policies SP6/SP 19/DES 5 of the Department's Planning Strategy for Rural Northern Ireland in that the site was in a locality which did not have the capacity to absorb another building by reason of the land form and lack of vegetation because of its undue prominence;
- The proposal was contrary to Policies SP6/SP 19/HOU8 and DES 5 of the Department's 'A Planning Strategy for Northern Ireland' in that a building on this site would not integrate on the site due to the lack of sufficient boundaries or any other means of achieving satisfactory integration, and as a consequence would, if permitted, have an adverse impact on the landscape by reason of its undue prominence.

[5] The case officer's report had considered Planning Policy PPS 8. Miss Maguire had made the following observations in relation to the possible application of this policy to the proposed development: -

> "This policy has superseded the policies relating to recreation in PSRNI. The only reference made to sports facilities in this policy is under Policy OS 4 (intensive sports facilities). Although the floor area of this proposal is much greater than that existing I do not believe that it can be regarded as an intensive sports facility. However, there are parts of the criteria which may be of relevance to this case. This policy states that alternative sites within the settlement limit should be investigated before sites in the countryside should be considered. One of the principles of this proposal is to achieve a high standard of siting, design and landscaping. The proposed building would be a prominent feature of the landscape. The

> existing building is low level and screened behind a wall. The proposed building, however, is a larger scale, higher ridge height and more forward on the site. It would be more prominent from views from the road.
>
> The applicant/agent has provided no supporting information as to why this facility must be provided within this CPA area as opposed to within the settlement limits. The site is located close to Ballywalter however it appears the agent has not considered any sites here."

In a later section of her report Miss Maguire stated (in relation to an objection lodged on behalf of the appellant), 'The use of REC3 is inappropriate as this has been superseded by the new document PPS8'.

[6] The proposal was then submitted to the local authority for consultation on 9 August 2005. The council decided to defer consideration of the application and on 19 September 2005 a meeting of three local councillors, two members of the club, the club's agent and the planning officer, James Coates, took place at Ards Borough Council offices. The purpose of the meeting was to consider an amended scheme. At the meeting Mr Coates outlined the refusal reasons. The club's agent informed the planning officer that the scheme had been redesigned in three blocks. The first of these was a new function room to replace that which was currently in position; the second would accommodate various services such as toilets, a kitchen etc; and the third was a games hall for indoor sports.

[7] Mr Coates expressed the view that the amended scheme was better than that originally proposed because of the re-orientation and redesign of the building. Changes had been effected to the original design by reducing the footprint of the building; by setting the development back from the road and re-orienting it; by the redesign of its external appearance; and by the selection of new external finishes.

[8] On 2 November 2005 amended plans incorporating these proposed changes were submitted. The plans also showed a building that had increased in height from the original proposal of seven metres to 8.4 metres. In the appellant's view this has reinforced the negative effects of the proposal and so argued in a submission to the Department on 5 December 2005.

[9] The matter was reconsidered by the Department on 22 December 2005. On this occasion the development control group consisted of Mr Coates and Mr Hillan. It considered that new material factors had been raised by the fresh application that called for a different planning judgment. The proposal was

now "better in the landscape due to its re-orientation and redesign". The group commented that the proposal complied with planning policy and identified the relevant policies as GB/CPA3 and REC3. It considered that there was compliance with these policies "as [the proposal] was for use associated with outdoor sports *e.g.* football and bowling**.** It decided that approval of the application should be recommended.

[10] The application was returned to the council on 10 January and the council approved it. Planning permission was granted on 27 January 2006. LAB had not been consulted before this. It appears that the amended landscape plan was not received until the date on which planning permission was granted and the appellant therefore contends that no proper consideration of the impact that the development would have on the landscape can have been undertaken. The amended scheme permitted a visibility splay of 2.4 metres by 80 metres, as opposed to that which the Roads Service had specified as necessary for safety reasons. In an affidavit filed on behalf of the appellant, Mr Douglas Black, a roads engineer with some thirty years' experience deposed that a visibility splay of 4.5 metres by 160 metres on both sides was required.

The judge's decision

[11] Morgan J grouped the appellant's grounds of challenge into three categories describing them as follows: -

- There was inadequate landscaping layout by reason of insufficient detail and lack of further consultation with Landscape Architects' Branch.
- The Department misunderstood and misapplied its own policies, in particular applying a policy (REC 3) which had been superseded by another (PPS8) in February 2004.
- The Department failed to have regard to the advice of Roads Service as to the size of visibility splay required for safety reasons, granting permission for one much smaller.

[12] The judge refused leave on the first two of these grounds. As to the first, he said that the Planning Service, when it came to make its decision in January 2006, still had a detailed consultation note from LAB that had been supplied in relation to the first application for planning permission. It could balance this advice against the fact that the proposal was for a recreational and community use building. It was free to consult LAB again but was not obliged to do so.

[13] On the second ground Morgan J said that "the application of REC 3 could not in any way have advanced the prospects of the application" for leave to apply for judicial review. He reached this conclusion because, he said, REC 3

had imposed a restrictive test (*viz* that facilities for indoor or primarily indoor recreation would not normally be permitted in the open countryside) and with the removal of this restrictive test, there was now "no hurdle for the application to jump".

Arguments on the appeal

[14] For the appellant Mr Beattie argued that the learned trial judge was wrong to conclude that the appellant did not enjoy an arguable case that the respondent had failed to follow the proper approach to the landscape issue. He argued that the only conclusion that one could reach was that the development control group, when it considered the application on 22 December 2005, either forgot the report of LAB or totally ignored it. Alternatively, it reached a wholly irrational decision in concluding that the concerns about the effect on the landscape had been allayed since there was no new material on which such a conclusion could be reached. The judge, Mr Beattie said, had rejected the arguments presented to him on this ground because he concluded that the planners were not obliged to consult LAB again but the criticism was not simply based on the fact that they had failed to take further advice from LAB; there was no change in the impact that the development would have on the landscape and there was therefore no basis on which a different view on this could be taken.

[15] For the respondent Mr Maguire QC disputed this claim, pointing out that the revised plans had reduced the footprint of the development and re-orientated it so that from the viewpoint of those travelling by road the intrusion of the development was significantly altered. It was open to the Planning Service to conclude that this was now acceptable and that decision could only be challenged on *Wednesbury* grounds. Moreover, the fact that the landscape plan was not received until the morning of the issue of the planning permission did not mean that it had not been considered. It had been considered by the Development Control Group before a final decision was taken.

[16] On the second ground Mr Beattie argued that the judge had failed to advert to paragraphs OS 3 and OS 4 of PPS8 which, he suggested, set out a series of criteria, all of which must be met if development is to be permitted. It was clear, he submitted, that the Planning Service did not consider the policies in PPS 8. Mr Maguire accepted that there was a mistaken reference to Policy REC 1 in the note of the decision making process but claimed that this factor has no bearing on the outcome of the application. He pointed out that the case officer had correctly stated that REC 1 did not being apply and that PPS8 was considered by Miss Maguire to have been complied with.

[17] Mr Beattie objected to the judge having confined the grounds on which leave to apply for judicial review to three groups only. He suggested that two

of the grounds contained in the original Order 53 statement but which were not referred to by the judge (paras 5(vi) and (vii)) are relevant to the road safety issue on which leave has been granted. The first of these was the failure of the traffic impact assessment to deal with the fact that the club now advertised its premises to the public for functions. This, it was suggested, undermined the claim made in the planning application that the premises would be used by only six visitors and two members of staff at any one time. The second was that the Department failed to have regard to the fact that the premises are used for overnight parking for motor homes.

[18] Mr Maguire's riposte to these arguments was that there was no reason why the Planning Service should not accept the traffic impact information provided to them by the applicant for planning permission. It did not act in an improper way in basing its approach to the planning application on that information. As to the issue of overnight parking of motor homes on the site, this was a matter which was relevant only to the enforcement of the existing permissions. It could not be an issue in respect of the grant of the permission that had been applied for. The Planning Service was obliged to decide the application on the information before it, not on any speculation about possible difficulties with enforcement.

[19] Mr Beattie also claimed that the appellant was entitled to maintain the case adumbrated in grounds (ii) and (iii) (that the increased height of the building created an insupportable impact on the landscape) which he asserted was an example of Planning Service contradicting its own earlier refusal. It was, he said, simply not enough to contend that the issue of the increased height was an example of Planning Service applying its planning judgment when that judgment ran directly counter to its specific reasons for refusal of planning permission on 1 August 2005.

Delay

[20] Both the respondent and the notice party argued that leave should not be granted because of the delay of the appellant in applying for leave. Order 53 rule 4 of the Rules of the Supreme Court (Northern Ireland) 1980 requires that an application for leave to apply for judicial review should be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made. In this case the application for leave was made two days before the expiry of the three month period.

[21] Although the judge had concluded that delay should not operate to prevent the appellant from pursuing an application for judicial review on the single ground on which he granted leave, Mr Maguire argued that he had been influenced to this decision because public safety considerations were

arose. These did not apply to the other grounds on which the appellant sought leave and the full rigour of Order 53 rule 4 should be applied to those grounds, he submitted.

Conclusions

[22] It is well settled that, in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision – see, for instance, *R v Secretary of State for the Home Department ex parte Cheblank* [1991] 1 WLR 890.

[23] It is equally well settled that the weight to be attached to a particular planning consideration is (subject to *Wednesbury* irrationality) a matter that is uniquely within the province of the planning authority. As Lord Hoffmann put it in *Tesco Stores Ltd v Secretary of State for the Environment* , [1995] 1 WLR 759: -

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

[24] On the first of the arguments presented by the appellant we are not satisfied that an arguable case has been raised that the planning service failed to have regard to the report of LAB when it came to consider the application on 22 December 2005 or when planning permission was granted. True it is that many of the concerns expressed by LAB had not been directly addressed but it is well to remember that it had not opposed the development as a matter of fundamental principle. The report had raised concerns about the impact that the original proposal would have on the landscape. The amended plans contained elements that were relevant to that issue. We simply cannot accept that there is a tenable argument that the contemporaneous evidence points inexorably to a conclusion that the LAB report was ignored. Likewise we feel that it is impossible to say that a departure from the original stance of the development control group on this issue was irrational. It may be regarded as surprising but we cannot accept that it can be characterised as

perverse. We therefore confirm the learned judge's refusal to grant leave on this ground.

[25] In relation to the respondent's avowed failure to have regard to the relevant parts of PPS 8 we have reached a different view. In order to set this in context it is necessary to quote some passages from the policy. Policy OS 3 states: -

> "The Department will permit the development of proposals for outdoor recreational use in the countryside where all the following criteria are met:
>
> (i) there is no adverse impact on features of importance to nature conservation, archaeology or built heritage;
>
> (ii) there is no permanent loss of the best and most versatile agricultural land and no unacceptable impact on nearby agricultural activities;
>
> (iii) there is no adverse impact on visual amenity or the character of the local landscape and the development can be readily absorbed into the landscape by taking advantage of existing vegetation and/or topography;
>
> (iv) there is no unacceptable impact on the amenities of people living nearby;
>
> (v) public safety is not prejudiced and the development is compatible with other countryside uses in terms of the nature, scale, extent and frequency or timing of the recreational activities proposed;
>
> (vi) any ancillary buildings or structures are designed to a high standard, are of a scale appropriate to the local area and are sympathetic to the surrounding environment in terms of their siting, layout and landscape treatment;
>
> (vii) the proposed facility takes into account the needs of people with disabilities and is, as far as possible, accessible by means of transport other than the private car; and

> (viii) the road network can safely handle the extra vehicular traffic the proposal will generate and satisfactory arrangements are provided for access, parking, drainage and waste disposal."

[26] If this part of the policy applies to the planning application, it is beyond question that an arguable case exists that the criteria outlined have not been met. But Mr Maguire submits that OS 3 does not apply since it relates only to 'proposals for outdoor recreational use in the countryside' and the application deals only with the replacement of existing premises.

[27] We are of the view, however, that it is arguable that the policy does apply to this development. We express no final conclusion on this issue and will deliberately refrain from dilating upon it but it appears to us to be clear that the applicability of the policy to this development is a matter on which lively debate may be engaged. Moreover, as we observed in the course of oral submissions, it is arguable that the planning service should have considered the question whether the policy should be applied – that this was, in itself, a matter for planning judgment. We are sustained in this view by the approach of Miss Maguire to OS 4 which we have cited above at paragraph [5] where, although she did not consider that the application came four square within the terms of the policy it nevertheless should be examined lest any of its criteria were found to be relevant to the planning decision to be made.

[28] Policy OS 4 provides: -

> "The Department will only permit the development of intensive sports facilities where these are located within settlements.
>
> An exception may be permitted in the case of the development of a sports stadium where all the following criteria are met:
>
> (i) there is no alternative site within the settlement which can accommodate the development;
>
> (ii) the proposed development site is located close to the edge of the settlement and can be clearly identified as being visually associated with the settlement;
>
> (iii) there is no adverse impact on the setting of the settlement; and

(iv) the scale of the development is in keeping with the size of the settlement.

In all cases the development of intensive sports facilities will be required to meet all the following criteria:

• there is no unacceptable impact on the amenities of people living nearby by reason of the siting, scale, extent, frequency or timing of the sporting activities proposed, including any noise or light pollution likely to be generated;

• there is no adverse impact on features of importance to nature conservation, archaeology or built heritage;

• buildings or structures are designed to a high standard, are of a scale appropriate to the local area or townscape and are sympathetic to the surrounding environment in terms of their siting, layout and landscape treatment;

• the proposed facility takes into account the needs of people with disabilities and is located so as to be accessible to the catchment population giving priority to walking, cycling and public transport; and

• the road network can safely handle the extra vehicular traffic the proposal will generate and satisfactory arrangements are provided for site access, car parking, drainage and waste disposal."

[29] Mr Maguire again submitted that this policy did not apply to the development but again we do not consider that the contrary proposition is unarguable. If the policy applies, there is no question but that it is arguable that many of the criteria adumbrated in it are in conflict with the development and on that basis alone we consider that leave to apply for judicial review under this heading must be granted. Once more, however, the argument is available to the appellant that the planning service should have considered whether it ought to apply the policy to its consideration of the application either because it was directly relevant or because it might be applied by way of analogy as indeed Miss Maguire appears to have suggested.

[30] We are satisfied that the appellant has passed the threshold of arguability on the issue of whether PPS 8 was considered at all by the development group at the meeting on 22 December. It appears to us that its failure to advert to Miss Maguire's earlier references to it and the quite erroneous statement in relation to REC3 raise the inference that it failed to recognise the possible application of PPS 8.

[31] The arguments presented on traffic impact were wisely not pressed by Mr Beattie and we do not believe that it is necessary to say a great deal about them. We do not consider that the evidence sustained the claim that the Department did not take these matters into account. As this court said in *Re SOS Ltd's application* [2003] NICA 13, there must be some evidence or a sufficient inference that a decision maker failed to have regard to a relevant consideration before a case can be deemed to have been made out for leave to apply for judicial review. There was no such evidence in the present case.

[32] The grounds outlined in paragraphs (ii) and (iii) of the Order 53 statement concerning the increased height of the building must fall with the rejection of the appeal in relation to the Department's deliberations on the impact of the amended scheme on the landscape.

[33] We accept Mr Maguire's argument that the issue of delay should be considered separately in relation to each of the canvassed grounds for judicial review. There will be occasions when it is appropriate to allow an application for judicial review to proceed on some grounds notwithstanding the existence of delay while refusing leave on other grounds because of the same delay. We do not consider that this is such a case, however. While we wish to reiterate the need for great expedition in the presentation of applications for leave to apply for judicial review in planning cases, we are of the view that there were sufficient grounds in the present case to extend the time within which to allow an application to proceed on the basis that the Department had failed to properly apply, or alternatively to consider the possible application of, PPS 8 to the decision on whether to grant planning permission.

[34] We will therefore grant leave to the appellant to apply for judicial review on the following ground: -

> "The Department failed to apply Planning Policy PPS 8 to the Notice Party's planning application; alternatively it failed to consider whether PPS 8 applied to the application or whether its terms were relevant to the decision whether to grant planning permission."