Neutral Citation no. [2003] NIQB 54 | *Ref:* **KERC3996**

Judgment: approved by the Court for handing down | *Delivered:* **05/09/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICK JOSEPH GREEN

FOR JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Patrick Joseph Green for judicial review of a decision of the Planning Appeals Commission dated 29 March 2002 refusing his appeal against the refusal of planning permission in respect of lands at Drumnaconagher Road, Crossgar, County Down. Planning permission was refused because a company called Thales Air Defence Ltd operates an explosive assembly and test facility near the lands for which Mr Green sought planning permission. By way of alternative to his challenge to the decision of PAC, therefore, he also seeks an order of certiorari to quash the decision of the Department of the Environment for Northern Ireland not to award him compensation because he is unable to obtain planning permission.

[2] The applicant claims that the failure to pay compensation to him is unlawful and in breach of his rights under the European Convention on Human Rights. He therefore claims that the Planning (Northern Ireland) Order 1991 is incompatible with article 1 of the First Protocol to the Convention in that it fails to provide for compensation in circumstances where he is prevented from using his land for a lawful purpose *viz* development. He also seeks a declaration of incompatibility in respect of the Explosives Act 1875, as amended, whereby the Secretary of State may issue a factory licence in relation to activities carried on by Thales which, the applicant claims, has the effect of preventing him from obtaining planning permission, a deprivation for which he is denied compensation.

Background

[3] In Northern Ireland the Secretary of State is the licensing authority in respect of explosives factories or magazines under the 1875 Act. Central to the control of the manufacture and sale of explosives is the licensing system. A licence may be issued for the manufacture and storage of explosives under the 1875 Act and it is unlawful for any person to manufacture or store explosives except on premises that have been so licensed.

[4] Applications for a licence are made under section 6 of the Act. An applicant for a licence is required to submit to the Secretary of State the draft of a licence accompanied by a plan of the proposed factory; if granted the licence incorporates the plan. The draft license must contain certain terms dealing with a number of matters specified in the legislation. These include details of the boundaries of the land forming the site of the factory and any belt of land surrounding the site which is to be kept clear. The object of this provision obviously is to ensure the safety of those beyond the area of the factory itself, should there be an accident such as an explosion at the factory. The dimensions of this buffer area are calculated according to guidelines provided by the Health and Safety Executive.

[5] Under section 7 of the Act the Secretary of State, when application is made for a licence, is to require notice of the application to be published by the applicant in the manner directed by the Act. This should specify when the application is to be heard. Objectors are given the opportunity to register and pursue their opposition to the grant of the licence. Under regulation 2 (1) of the Explosives Act 1875 (Exemptions) Regulations (Northern Ireland) 1983 the Secretary of State may exempt himself from the requirement contained in section 7 of the Act if satisfied under regulation 2 (2) that the health and safety of persons who were likely to be affected by the exemption will not be prejudiced in consequence of it and that the security of the explosives will not be prejudiced.

[6] A factory licence was granted to Thales in 1989 and amended in 1999. On both occasions the Secretary of State signed certificates of exemption under regulation 2 (1) of the 1983 Regulations. According to Eric Kingsmill, a principal in the firearms and explosives branch of the Northern Ireland Office, the Secretary of State signed the certificate in each instance "to ensure the security of the information in respect of the explosives manufactured and stored on the site because the dissemination of such information might be of value to terrorists or others whose action could subsequently place the public in danger".

[7] The applicant applied for planning permission on 3 March 2000 for the erection of a dwelling house 200 metres south east of 55 Drumnaconagher

Road, Crossgar. The application was refused on 12 April 2001 for the following reason: -

> "The proposed development is contrary to Planning Policy Statement 4, paragraph 31 in that the proposed development, if approved would jeopardise employment and may prejudice the continued existence of an existing industrial enterprise of an existing industrial enterprise in the vicinity."

[8] Commissioner E Kinghan of the Planning Appeals Commission heard an appeal by the applicant against the refusal of planning permission on 21 February 2002. On 15 March 2002 she reported on the appeal, recommending that it be refused. She outlined the history of the site, recording that it was originally a Ministry of Defence establishment. Between 1940 and 1971 it was used as a naval depot and in 1971 it was leased to Shorts plc (which now operates as Thales). From 1971 onwards it has been used for the assembly and painting of missiles. The company currently employs 570 people in Northern Ireland with the employment level anticipated to rise to 640. Most of these are based at a site in Castlereagh but the Crossgar site is used for the final assembly and testing of missiles. The facilities at this site are considered to be world class.

[9] Thales contended that approval of the applicant's application for planning permission would have an adverse effect on the maintenance of existing employment and the creation of future employment. The immediate effect would be the closure of the factory with the loss of 15 jobs. The product line would cease and the company would not be able to fulfil a contract worth £50 million. There would be a reduction in the number of jobs at Castlereagh and a knock on effect on local suppliers. Projected growth from collaboration with another defence company would not take place, as Thales' involvement in this project is dependent on their being able to offer a facility for missile assembly, component testing and painting. Existing contracts could not be fulfilled and the company would face breach of contract claims. In sum the company's future would be very bleak indeed.

[10] It was further submitted that the applicant's proposal was inconsistent with the existing industrial complex; the presence of that complex was a material planning consideration; and the notion of a *cordon sanitaire* around such industrial complexes was well recognised.

[11] Commissioner Kinghan concluded that the proposal would have significant implications for employment and the company's ability to continue in the type of business that it currently undertakes. She considered that the economic consequences of granting planning permission were an

important material consideration and that they should prevail over the applicant's interests. It had been contended for the applicant that the restriction on the applicant's use of his lands was in breach of his rights under articles 2 and 8 of ECHR and article 1 of the First Protocol. Commissioner Kinghan dealt with this argument in the following way: -

> "Whilst I appreciate the rights accorded to the applicant under the HRA, these are qualified rights to be weighed with the rights and interests of others. In view of my conclusion that the grant of planning permission would have a significant adverse effect on the operation of the adjoining site with resulting job losses and effect on the viability of the business, I consider that refusal of the proposal would not represent a disproportionate contravention of the appellant's rights under the HRA."

[12] PAC accepted the Commissioner's recommendation. In its decision, it stated: -

> "The Commission agrees with Commissioner Kinghan that the evidence presented establishes that the proposal would be incompatible with and would jeopardise ongoing operations at the Thales Crossgar site and could have serious implications as a whole. The Commission acknowledges an effect on the appellant's use of his land but finds the protection of employment in Thales Air Defence Ltd to be in the public interest and in line with policy in PPS4. The Commission accordingly concludes that the effect on the appellant's rights is not disproportionate."

The judicial review application

[13] For the applicant, Mr Michael Lavery QC made two principal criticisms of the approach of the PAC. He suggested that PAC ought to have taken account of the failure of the Department of the Environment to insist, before granting a licence to Thales, that it should have or that it should acquire a sufficient parcel of land around the facility for which the licence was sought, to provide for the *cordon sanitaire* that such a facility required. Secondly, he suggested that PAC should not have had regard to the economic consequences for Thales in deciding whether planning permission should be granted.

[14] On the human rights points, Mr Lavery submitted that, although this was not a case of complete expropriation, it nevertheless came within article 1 of the First Protocol. It was for the member state to strike a fair balance between the interests of the community as a whole in devising and enforcing a system of planning control and the interests of an individual such as the applicant whose property rights were being interfered with by the denial of the right to develop land and the refusal to pay compensation for the withdrawal of that right.

The failure to take account of the Department's omission to require Thales to acquire sufficient land for the safeguarding zone

[15] The argument that the Department ought to have required Thales to acquire sufficient land to provide for the safeguarding zone did not feature in the hearing of the applicant's appeal before the Commissioner nor in the original Order 53 statement but no objection was raised to it being canvassed on the hearing of the judicial review application. In any event I do not consider that it is viable. In the first place, the amount of land required to provide this zone is not an immutable entity but is calculated according to guidance which reflects the changing nature of the activity carried on within the factory. Secondly, there is no authority for the proposition that such a condition ought to have been imposed on Thales. It would be incongruous that a condition of ownership of land beyond its premises be contingent on the grant of planning permission when, generally, it is not necessary for an applicant for planning permission to show that he is the owner of land in respect of which the application is made. I do not consider therefore that the PAC was obliged to take it into account.

The economic consequences of granting planning permission

[16] PPS 4 paragraph 31 provides that developments that are incompatible with existing industrial enterprises operating in the vicinity may be refused planning permission because of such incompatibility. It is clear that this development would be incompatible with the factory operated by Thales. Mr Lavery argued that it was not automatic that an adjustment to the safeguarding zone would have been required. It is possible, he suggested, that planning permission could have been granted and then revoked by PAC and then revoked by the Department. In that way, at least, Mr Green would have been entitled to compensation.

[17] I do not think that it can be correct for PAC to grant planning permission on the assumption that the Department would revoke it. PAC must surely proceed on the basis that planning permission, if granted, would be capable of being acted on by the person to whom it was granted. To grant planning permission in the hope or expectation that this would then be revoked would be, in my view, an improper use of its powers.

[18] Mr Lavery pointed out that the Explosives Act is not designed to protect the economic interests of the factory owner but to safeguard the public. He suggested that it was not therefore appropriate to take into account purely economic consequences that may accrue to Thales by the grant of planning permission to Mr Greene. But the imperative to consider the effect that the proposed development would have on Thales does not derive from the 1875 Act but from the application of PPS 4. I do not consider that the decision of the Commissioner and PAC to have regard to and apply PPS 4 can be criticised.

The failure of the Commissioner to accept further evidence

[19] Although it was not advanced with any force on the hearing of the application, Mr Lavery did not abandon an argument that featured prominently in the Order 53 statement and the skeleton submissions. This was to the effect that the Commissioner should have allowed the applicant to make further submissions after the appeal hearing had been finalised.

[20] The applicant acknowledged that the Commissioner had a discretion whether to allow such material to be submitted. The hearing had been held on 21 February. The request to submit the further material was made on 6 March. If the Commissioner had admitted this material, she would have had to allow the Department and Thales to comment on it. This would have postponed the outcome of the appeal considerably. There is nothing in the material before me that suggests that the Commissioner's decision not to admit this further submission was unreasonable.

Article 1 of the First Protocol

[21] Article 1 to the First Protocol provides: -

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[22] This is a qualified right, however. The second paragraph of the article provides: -

> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or

> to secure the payment of taxes or other contributions or penalties."

[23] Mr Lavery relied on the decision of ECtHR in *Pine Valley Developments v Ireland* [1991] 14 EHRR 319 in support of the proposition that planning rights may constitute a possession for the purposes of article 1 of the First Protocol. In that case, however, the applicant had purchased property with permission registered in a public document kept for that purpose. Subsequently the Supreme Court in Ireland declared the permission a nullity. I do not consider that this case establishes that the possibility that planning permission might be granted will necessarily attract the protection of article 1 of the First Protocol. In *Re Stewart's application* [2003] NICA 4 the Court of Appeal dealt with a claim that a neighbour whose property was allegedly devalued as a result of the grant of planning permission for the erection of a building associated with a motor factor's business. At paragraph 26 the court said: -

> "It appears clear enough in principle and also consistent with the European jurisprudence that both [article 8 and article 1 of the First Protocol] may be engaged if a person is particularly badly affected by development carried out in consequence of a planning decision made by the State: see, eg, *S v France* (Application no 13728/88) and cf the discussion by Sullivan J in *R (Malster) v Ipswich Borough Council* [2002] PLCR 251."

[24] Although in the *Stewart* case the court was concerned with whether the grant of planning permission to a neighbour could give rise to a breach of article 8 and article 1 of the First Protocol, it is clear that it considered that the effect on an applicant's property would have to be exceptional before either provision would be engaged and one might say, *mutatis mutandis,* that a similar exceptional effect would be required where the applicant claims that the denial of planning permission engaged these provisions.

[25] Mr Lavery relied on *Pialopoulos and others v. Greece* [2001] 33 EHRR 977, which, he said, established that interference with planning rights can constitute a breach of article 1 of the First Protocol. In that case, however, the decision under challenge was a decree that the applicants' land could only be used as a park and for underground parking. There was an effective and precise control of the use to which the applicants could put their property. I am not persuaded therefore that article 1 of the First Protocol is engaged in this case but since it is unnecessary for me to decide this finally, I will refrain from expressing a concluded view on it.

[26] If the article is engaged, it is necessary to examine whether the Department may rely on the saving provision contained in the second

paragraph of article 1 of the First Protocol. It is well settled that in order to rely on this paragraph the state must demonstrate that it has carried out a balancing exercise, weighing the respective public and private interests and ensuring that the measures that it has adopted are proportionate to the aim that it seeks to achieve. In dealing with this subject the Court of Appeal in *Stewart* said: -

> "This type of balancing is an inherent part of the planning process, in which the determining authorities carry out a scrutiny of the effect which the proposal will have on other persons and weigh that against the public interest in permitting appropriate development of property to proceed. In the vast majority of cases this will suffice to satisfy the requirements of [article 1 of the First Protocol], bearing in mind that the authorities are entitled to the benefit of the "discretionary area of judgment" referred to by Lord Hope of Craighead in *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801 at 844."

[27] The Commissioner in dealing with the applicant's claim to be entitled to the benefit of various provisions of ECHR said in her report: -

> "Whilst I appreciate the rights accorded to the appellant under the HRA, these are qualified rights to be weighed with the rights and interests of others. In view of my conclusion that the grant of planning permission would have a significant adverse effect on the operation of the adjoining site with resulting job losses and effect on the viability of the business, I consider that refusal of the proposal would not represent a disproportionate contravention of the appellant's rights under the HRA."

[28] This implies that the Commissioner concluded that the applicant's rights under the Convention were engaged, although she cannot have accepted that all the rights canvassed on the hearing of the appeal were in play since she described the rights "accorded" to the applicant as qualified and he had argued before her that his article 2 rights had been violated. It would have been helpful if the Commissioner had been somewhat more specific in dealing with the human rights points made on the applicant's behalf. As the Court of Appeal said in *Stewart* "it is certainly desirable that determining authorities should spell out with a degree of precision the effect of planning

proposals on established Convention rights and then carry out an appropriate exercise in order to decide if any of those rights has been infringed".

[29] Be that as it may, I do not consider that the applicant has established that there has been a violation of his article 1 First Protocol rights. (Mr Lavery acknowledged that it would be difficult to make a "freestanding case" for breach of article 8 although he did not formally abandon it).

[30] In dealing with the circumstances in which the effect of a planning decision on an individual applicant would give rise to a claim for compensation, the Court of Appeal said, in paragraphs 29 and 30 of its judgment: -

> "**[29]** The height of the threshold which a claimant has to cross in order to qualify for compensation may be seen from the cases relied on by Mr McCloskey QC for the Department, *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35 and *James v UK* (1986) 8 EHRR 123. In the *Sporrong* case the ECtHR held that the adverse effect on the applicants of long-term expropriation permits and prohibitions on construction in Stockholm –
>
> > "created a situation which upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest."
>
> It accordingly declared that there had been a breach of Article 1 of the First Protocol. In *James v UK,* on the other hand, it held that the effect of the Leasehold Reform Act 1967, permitting leasehold enfranchisement against the wishes of the lessor, which had a serious financial effect on the Westminster Estates, was not such as to amount to a breach of Article 1 of the First Protocol. The means adopted by the Government to achieve its object of allowing leasehold enfranchisement did not bear so inappropriately or disproportionately upon the applicants as to give them a right to compensation.
>
> **[30]** Mr McCloskey was prepared to accept as a theoretical position that in a very extreme case the failure to provide compensation could constitute a breach of Article 1 of the First Protocol. We

> consider that it is correct to admit the possibility that in some cases the effect on an individual of a planning decision may constitute such a breach, though we see considerable difficulties in making provision for claiming, assessing and paying such compensation."

[31] In *Baner v Sweden* Application No. 11763/85 ECmHR recognised that, for the purposes of article of the First Protocol a distinction should be drawn between, on the other hand, legislation involving control of use of property and on the other hand expropriation. It said, at page 140: -

> "Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 (Art. 1-2) shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.
>
> The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the "control of use" rule (cf. *Mellacher and others v. Austria*, Comm. Rep. 11.7.88, at present pending before the European Court of Human Rights)."

[32] The scrutiny that must be applied to a "control of use" case is therefore commensurately less rigorous than that which obtains in a case where property has been expropriated.

[33] In the present case the Department relied on and applied one of its published planning policies in refusing the applicant planning permission. The Commissioner and PAC also relied on the same planning policy in upholding the refusal of planning permission. The policy pursues a self-evidently legitimate aim *viz* the protection of employment. The impact on the

applicant, while not inconsiderable when viewed solely from his personal perspective, is not such as to make the decision to refuse him planning permission or the right to claim compensation disproportionate. His is clearly not one of those exceptional cases which the Court of Appeal in *Stewart* found difficult to envisage where the payment of compensation would be necessary to make the refusal of planning permission proportionate.

Conclusion

[34] None of the grounds advanced by the applicant has been made out and the application for judicial review must be dismissed.