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(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 RONALD FOSTER FOR

JUDICIAL REVIEW

KERR J

Introduction

[1] Ronald Foster lives with his wife at 6 Bowens Manor, Lurgan. A neighbour, Kenneth Belshaw, lives at No. 2. Another neighbour, James Bell, lives at No. 4. All three houses are close to a site known as Bowens Close. Planning permission to develop three houses at the Bowens Close site was granted on 19 January 2001. By this application, Mr Foster challenges the grant of planning permission.

Background

[2] A firm known as Nesbitt Brothers acquired a possessory title to the Bowens Close site in 1989. At that time the only building on the site was a labourer's cottage and an associated store. Originally the cottage was one of a terrace of three dwellings. The remaining cottage was close to the western boundary of the site and some 1 to 2 metres from the southern boundary (which is the boundary with Nos 2, 4 & 6 Bowens Manor). Between 1989 and 1995 various applications for planning permission were made, some of which were successful. In 1995 an application for planning approval of development of the site by the erection of three chalet bungalows and three garages was made by Nesbitt Brothers. It was granted by the Craigavon Divisional Planning Office of the Department of the Environment for Northern Ireland on 19 April 1996, despite opposition from local residents including Mr Foster, Mr Belshaw and Mr. Bell.

[3] The general tenor of the objections by Mr Belshaw and others to the 1995 application was that the site was too small to accommodate the proposed development; that it would be out of keeping with the area; that it would have an adverse impact on the value of surrounding properties; that the privacy of residents in Bowens Manor would be compromised; and that the increase in traffic generated by the development would create a hazard.

[4] The 1995 planning application was for the erection of three dwellings. On plans submitted with the application, however, broken lines marked three locations with a legend describing the foot print as "future garage" or "site for future garage". The planning permission granted on 19 April 1996 was for the erection of three houses but no reference was made to garages. Mr Patrick McBride, the divisional planning manager for the Craigavon planning division of the Department of the Environment, has expressed the view that "it would have been reasonable for the developer and others to regard the site as having been approved in principle by Planning Service for three houses with suitable garages". Mr McBride has further claimed that the erection of three houses and associated garages was "achievable on paper".

[5] Some time between 1996 and 1999 Nesbitt Brothers sold the Bowens Close site to Tullyheron Developments Ltd. When the developer (Tullyheron) began work in the latter part of 1999 it became apparent that it was not physically possible to accommodate all three houses and garages on the site. Mr McBride has explained that this was due to "a discrepancy in the width of the houses". The Department received strong representations from local residents at this stage, particularly from Mr Belshaw, that the building work did not comply with the plans. A site meeting was held at which the developer was warned that the development was being carried out 'at risk'. In other words, if the development proceeded it might not be authorised by the permission granted and could therefore be liable to enforcement proceedings. An amended application was then submitted on 20 September 1999.

[6] Many site meetings took place thereafter at which the residents registered their firm objection to the development and much correspondence was exchanged between Mr Belshaw and various officers of the Department. A complaint of maladministration on the part of the Planning Service was made to the Ombudsman's office and rejected in April 2000. Craigavon Borough Council considered the application on many occasions. Eventually, on 19 January 2001 planning permission was granted in respect of the application that had been made on 20 September 1999.

[7] One of the issues raised by the residents was whether the buildings at the site could properly be classified as 'dwellings' since the local health trust and a housing association intended that two of the houses should be occupied by persons with a disability. Having investigated the matter with the trust, the

Planning Service concluded that the buildings fell within the appropriate class for the purposes of the Planning (Use Classes) (Northern Ireland) Order 1989.

The statutory framework

[8] Article 21 of the Planning (Northern Ireland) Order 1991 requires the Department to publish notice of an application for planning permission in at least one newspaper circulating in the locality in which the land to which the application relates is situated and not to determine the application before the expiration of 14 days from the date on which the notice of the application is first published in the newspaper. Article 22 sets out the persons who must be notified of an application for planning permission.

[9] Article 25 (1) requires the Department of the Environment in determining an application for planning permission to have regard to the development plan so far as it is material to the application and to any other material considerations.

[10] Article 25 (2) specifically requires the Department to take into account any representations relating to the planning application under consideration which are received before the expiration of the 14 days from the date on which the notice of the application was first published in the newspaper.

[11] Article 32 deals with appeals against planning decisions. So far as is material it provides: -

> "32. - (1) Where an application is made to the Department-
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> (a) for planning permission to develop land; or
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> (b) for any consent, agreement or approval of the Department required by a condition imposed on a grant of planning permission; or
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> (c) for any approval of the Department required under a development order;
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> then if that permission, consent, agreement or approval is refused or is granted subject to conditions, the applicant may by notice in writing under this Article appeal to the Planning Appeals Commission.
>
> …

> (4) Where an appeal is brought under this Article from a decision of the Department, the planning appeals commission, subject to paragraphs (5) and (6), may allow or dismiss the appeal or may reverse or vary any part of the decision whether the appeal relates to that part thereof or not and may deal with the application as if it had been made to it in the first instance.
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> (5) Before determining an appeal under this Article, the Planning Appeals Commission shall, if either the applicant or the Department so desires, afford to each of them an opportunity of appearing before and being heard by the commission."

[12] Article 15 of the Planning (General Development) Order (Northern Ireland) 1993 (GDO) sets out the requirements of consultation by the Department of district councils and the obligation to take account of representations received from the councils.

Published Policy

[13] Planning Policy Statement 1 (PPS1) is part of the published policy guidance which supplements the legislative requirements imposed by the 1991 and 1993 Orders.

[14] Paragraph 8 of PPS 1 emphasises the important role of the democratically elected district councils in the decision-making process on planning applications and indicates that it is the Department's practice to involve them in that process to an extent beyond that which is strictly required by the statutory provisions. It states: -

> "As a matter of policy, the Department regularly consults councils on a wide range of matters [other] than those required by statute. It has established consultation mechanisms designed to ensure that elected representatives have an input to the decision-making process."

[15] Paragraph 9 acknowledges the importance of the participation of the public in the decision-making process. It refers to the Planning Service's neighbour notification scheme which, in addition to public advertisement, brings planning applications to the specific attention of those individuals who are most directly affected by them. This paragraph also records the

Department's commitment to continue to examine ways of improving public consultation and procedures.

Guidance for Third Parties

[16] The Planning Service has published a leaflet, '*Commenting on a Planning Application'* to assist third parties to participate in the decision-making process. The leaflet is provided to those who are notified under the neighbour notification procedure and its stated aim is to give clear guidance as to what to expect from the process.

[17] The leaflet states that publicity for planning applications, linked with opportunities for public comment and council consideration are important parts of the process. It claims that staff at local Divisional Planning Offices are willing to provide further assistance and it sets out the steps taken to facilitate third parties in the planning process.

The involvement of Third Parties – the Department's case

[18] The Department has described how third parties' objections are handled in an affidavit filed of John Cleland, director of professional services within the planning service. This takes the form of a number of stages.

[19] Each planning application is allocated to a case officer who initiates the consultation process. At first this will involve relevant statutory bodies such as the Water Service and the Roads Service of the Department of the Environment and the Environmental Health department of the local council. Depending on the nature of the application, it may also be appropriate to consult bodies such as the Environment and Heritage Service, where, for example, nature conservation is an issue.

[20] Although the statutory stipulation is for advertisement in at least one newspaper circulating in the locality, in practice the advertisement will be placed in two or three newspapers.

[21] For the purposes of the neighbour notification process 'neighbouring land' is taken to mean land which adjoins the boundary of the application site or land that would adjoin the boundary but for an entry or road less than 20 metres wide. Occupiers of premises on neighbouring land that are within ninety metres of the boundary are notified under the scheme of the application for planning permission. These are identified in the first instance by requiring the applicant for planning permission to list them in a form that must accompany the application. The case officer then checks the accuracy of the form on a site visit.

[22] Anyone interested in a particular planning application may view the application papers at the local planning office or, in areas that are remote from the planning office, a planning clinic held by divisional offices each week. Planning officers are available to discuss specific planning applications. Documents that the public may inspect include: a copy of the application form; land development certificates; submitted plans; and, ultimately, the decision notice and approved drawings. If amended plans have been submitted these will also be available for inspection. Likewise, if Environmental Statements on such matters as retail and traffic impact assessments have been provided, these may be examined. According to the Department, consultation replies will also be made available provided there is no objection from the consultees.

[23] Representations received from third parties are considered by the case officer in his initial assessment of the planning application. Although a 14-day time limit is suggested for receipt of objections, as a matter of practice all objections received up to the time of the decision are considered. If necessary, the Planning Service will correspond with the objector to clarify any particular points that are not clear. Objectors are informed of amendments to the plans and are given the opportunity to have the process explained to them.

[24] The case officer always undertakes a site visit. A specific aspect of this is the consideration of third party objections. The Department claims that it is aware of the need "to view the proposal from the third party perspective". If the third party raises a specific objection this is investigated and considered at the site visit.

Consideration of the planning application

[25] In the affidavit of Mr Cleland a description was given of how a planning application is considered and dealt with. After the site visit the case officer submits his report to the development control group. He will be expected to record and comment on all representations including third party objections. He will also make a recommendation as to whether the application should be granted. His report is then considered by the group and a decision on his recommendation is taken which then becomes the opinion of the planning service.

[26] The opinion of the planning service is then referred to the local authority. The Department has averred that local councillors frequently promote third party interests and ensure that they are taken into account in the decision making process. Planning officers attend council meetings to advise on the planning process and to hear and respond to objections. The District Council can defer consideration of a planning application at the request of an individual councillor to allow for the case for objectors to be put more

effectively. When consideration of an application has been postponed in this way there is usually a further site meeting or a meeting between objectors and planning representatives in the planning office. In some controversial cases the council may give the parties an opportunity to make representations to its planning committee.

[27] The final decision on the planning application is not taken until discussion with the district council has been concluded. In difficult cases this can involve a number of deferrals by the council; site and office meetings involving the council, the Department and third parties; and in cases where the council opposes the application, referral to the Planning Service Management Bord for review. The Board, which comprises the Chief Executive of the Planning Service, the Professional Services Director and the Corporate Services Director, then takes the decision on the planning application. It may also convene meetings with third party objectors and council representatives.

[28] If the Planning Service remains of the view that planning permission should be granted and if this view is not shared by the local authority, the council is informed in detail of the reasons for the decision. This information is given before the final decision issues and, frequently at that stage representations are made to the relevant Minister. Planning Service may be required to further explain its decision to the Minister.

The applicant's arguments

[29] The applicant claims that his objection to the grant of planning permission constitutes a dispute requiring a determination of his civil rights and that this attracts the protection of article 6 of the European Convention on Human Rights. In particular he argues that the decision on the planning application concerns his rights in private law in that it has affected the value of his property and his peaceful enjoyment of it. He claims, moreover, that the dispute about the propriety of granting planning permission is highly fact specific. He is therefore entitled, he claims, to have this dispute adjudicated upon by an independent tribunal such as the Planning Appeals Commission. If an appeal to the Planning Appeals Commission had been available to him, it would have ranged over a wide variety of factual matters such as the impact that the development would have had on his privacy; whether the pitch of the roofs of the development were out of keeping with houses in the vicinity; whether the Department in granting planning permission had departed from proposals in the Area Plan; whether the standards required by DCAN15 – Vehicular Access Standards could be achieved; and the differences between the 1995 permission and that granted in 1999. These are matters, the applicant argues, that are outwith the court's competence in a judicial review hearing. He claims that, absent a right of appeal against the grant of planning

permission, there is a gap in the court's supervisory jurisdiction over the determination of his rights.

[30] The applicant further claims that many of the safeguards outlined in Mr Cleland's affidavit (see paragraphs 15 to 25 above) were not in place in relation to this particular application. Specifically, he says, the third party representations were not referred to in the case officer's report and these were not conveyed effectively to the council. This omission undermined significantly the consideration given to the objectors' case.

[31] In advancing the claim that a right to a third party appeal should be recognised, Mr Hutton (who appeared for the applicant) acknowledged the argument that article 32 of the 1991 Order could be construed in a way that would permit such an appeal. He submitted, however, that such an interpretation would place an unacceptable strain on the language of the provision. He contended, therefore, that this court should declare that the failure of the state to make provision for an appeal by the applicant against the grant of planning permission was in violation of his rights under article 6 of the Convention.

[32] Although the applicant relied principally on the arguments founded on article 6 of the Convention, Mr Hutton also advanced a number of subsidiary challenges to the Department's decision. He claimed that at a meeting held on 22 September 2000 the Planning Service had given undertakings that the applicant would be consulted further in relation to the planning application before it was referred to the Council. This further consultation was to have been an office meeting. No such meeting had in fact taken place but the undertakings given had, it was claimed, created a legitimate expectation on the part of the applicant that such further consultation would take place.

[33] The applicant also claims that a number of the matters raised at the meeting of 22 September 2000 were not addressed by the Planning Service and therefore did not form part of the ultimate submission to the council. In particular, the Planning Service failed to deal with the objectors' claim that it ought to have ignored the fact that planning permission had been granted in 1995. That permission could not have been implemented, the applicant argues; it was therefore irredeemably flawed and should have played no part in the decision to grant planning permission in 2001. A number of other concerns raised by the objectors about planning aspects of the development were not addressed by the Planning Service, the applicant claims. If these had been fully explored and explained to the council, there is a real prospect, the applicant suggests, that the council would have opposed the grant of planning permission.

[34] Another claim made by the applicant is that the planning authorities were biased in favour of the grant of planning permission and against the

objectors. It is suggested that this is evidenced by (among other matters) "the fact that the Department had previously granted the 1995 application without properly considering the objections of the residents, particularly in relation to the over development of the site"; that the Department felt obliged to grant permission in 2001 because of the "erroneous granting of the 1995 application"; the fact that the planning application received a "less than favourable response from the local council"; the breach of the undertaking given at the meeting of 22 September 2000; and the failure to give reasons for the decision.

[35] A further challenge to the decision is made on the basis of *Wednesbury* unreasonableness. It is suggested that the decision is irrational and it is founded on a failure to take account of a number of relevant considerations such as "the fact that the minimum required standards for service roads … have not been met"; the "privacy aspect of the decision"; and the lack of validity of the 1995 permission.

[36] The applicant also claims that the decision to grant planning permission violates his rights under article 8 of ECHR. In an information leaflet issued by the Department it is stated that the Planning Service, in deciding on an application for planning permission, will not take into account disputes about boundaries or access. This policy, the applicant suggests, betrays a failure on the part of the Department to have respect to the right to a private life of householders whose property is affected by a proposed development.

[37] Finally the applicant suggests that the decision making process was unfair because the Department did not disclose that two of the three bungalows in the development were to be occupied by a total of six persons suffering from mild to moderate learning disabilities.

Article 6 of ECHR

[38] So far as is material article 6 of the Convention provides: -

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[39] Lord Hoffmann has observed in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23 that "as a matter of history it seems likely that the phrase 'civil rights and obligations' was intended by the framers of the convention to refer to rights created by private rather than by public law" (para 78). ECtHR has not, however, restricted article 6(1) to the

determination of rights created by private law. But the historical context remains important in understanding the evolution of the contemporary position of the Strasbourg court on the question of the reviewability of administrative or policy decisions. As Lord Hoffmann pointed out, the court has traditionally accepted that the expression 'civil rights' meant rights in private law. The departure from the traditional position began with ECmHR and ECtHR applying article 6(1) to administrative decisions where they considered that such decisions determined or affected rights in private law (para 79). As Lord Hoffmann makes clear, this was quite different from the approach of a lawyer in the public law field in this jurisdiction. Here one might say that an individual is entitled to a lawful decision taken in the administrative context because of the public law precepts that govern such decision-making. By contrast in Europe administrative decisions were immune from review unless they determined or affected private law rights.

[40] This remained the position until *König v Germany* (1978) 2 EHRR 170. In that case the majority of the court held that article 6 (1) applied to disciplinary proceedings where a doctor was charged with unprofessional conduct, since private law rights such as his goodwill and his right to sell his services to members of the public were affected. In what Lord Hoffmann in *Alconbury* described as a "powerful dissent" Judge Matscher said that it was unwise to try to apply the pure judicial model of article 6(1) to the decisions of administrative or domestic tribunals. But the judgment of the majority led to the development of a line of authority in ECtHR to the effect that administrative decisions should be subject to some form of judicial review. Lord Hoffmann believed, however, that Judge Matscher's dissent has been vindicated to some extent in that the court has recognised that "the application of article 6 to administrative decisions has required substantial modification of the full judicial model". Relying principally on the decision in *Zumtobel v Austria* (1993) 17 EHRR 116 Lord Hoffmann confidently asserted that article 6, in its application to an administrative or policy decision, did not require that it be reviewable on its merits by an independent and impartial tribunal. The availability of judicial review of such decisions was sufficient to satisfy the requirements of article 6. Having analysed the decisions of ECmHR and ECtHR in four cases where they have specifically considered the English planning system, (*ISKCON v UK* (1994) 76A DR 90; *Bryan v UK* (1995) 21 EHRR 342; *Varey v UK* App No 26662/95; and *Chapman v UK* (2001) 10 BHRC 48) Lord Hoffmann concluded that the principle established by *Zumtobel* of respect for the decision of an administrative authority on questions of expediency or planning policy remained intact. "It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal." (paragraph 117)

[41] The policy/factual dichotomy featured strongly in the judgment of the Court of Appeal in England in *Runa Begum v Tower Hamlets London BC* [2002] 1 WLR 2491. In that case the issue was whether the procedure for a local housing authority's internal review of its decisions on homelessness, such reviews being subject only to appeal in point of law to the County Court, complied with article 6. Laws LJ said: -

> "[40] As I have shown, the extent to which the first instance process may be relied on to produce fair and reasonable decisions is plainly an important element. But it is not to be viewed in isolation. The matter can only be judged by an examination of the statutory scheme as a whole; that is the necessary setting for any intelligent view as to what is fair and reasonable. Where the scheme's subject-matter generally or systematically involves the resolution of primary fact, the court will incline to look for procedures akin to our conventional mechanisms for finding fact; rights of cross-examination, access to documents, a strictly independent decision-maker. To the extent that procedures of that kind are not given by the first instance process, the court will look to see how far they are given by the appeal or review; and the judicial review jurisdiction (or its equivalent in the shape of a statutory appeal on law) may not suffice. Where however the subject-matter of the scheme generally or systematically requires the application of judgment or the exercise of discretion, especially if it involves weighing of policy issues and regard being had to the interests of others who are not before the decision-maker, then for the purposes of art 6 the court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expert than a judge (I use the term loosely), and the second instance appeal is in the nature of a judicial review. It is inevitable that across the legislative board there will lie instances between these paradigms, sharing in different degrees the characteristics of each. In judging a particular scheme the court, without compromise of its duty to vindicate the convention rights, will pay a degree of respect on democratic grounds to Parliament as the scheme's author.

…

> [43] I should indicate moreover that although there were sharp issues of primary fact falling for determination in the present case, that is not a necessary feature in a s.202 review, and certainly not a systematic one. As often as not there will be no real question of fact, and the decision will turn on the weight to be given to this or that factor against an undisputed background … Now, clearly the statutory scheme is either compliant with art 6 or it is not. Its compliance or otherwise cannot vary case by case, according to the degree of factual dispute arising. That would involve a wholly unsustainable departure from the principle of legal certainty. In my opinion, judged as a whole, this statutory scheme lies towards that end of the spectrum where judgment and discretion, rather than fact-finding play the predominant part.'

[42] This reasoning was adopted and applied in the planning context by the English Court of Appeal in *R* (*on the application of Adlard*) *v Secretary of State for the Environment Transport and the Regions* [2002] EWCA Civ 735, [2002] 1 WLR 2515. In that case the applicants claimed that they were entitled to have the Secretary of State call in the planning application for a new stadium for Fulham FC, which would have afforded them an oral hearing. He had left the decision to the local planning authority, which did not permit oral representations, although it carried out a very thorough investigation of the issues and the responses to consultation. The Court of Appeal held that the procedure, taken with the remedy of judicial review, satisfied the requirements of art 6(1). At paragraph 17 Simon Brown LJ, after quoting the passages from the judgment of Laws LJ in *Runa Begum* set out above, said: -

> "What, then, of the planning process? Where in the spectrum does this statutory scheme lie? To my mind there can only be one answer to that question and it is the same answer as *Runa Begum* gave with regard to the homelessness legislation, namely 'towards that end of the spectrum where judgment and discretion, rather than fact-finding, play the predominant part.' Accordingly (see para 40 of *Runa Begum*) 'the court will incline to be satisfied with a form of inquisition at first instance at which the decision-maker is more of an expert

than a judge … and the second instance appeal is in the nature of a judicial review.'"

[43] The same approach was taken by the Court of Appeal in this jurisdiction in *Re Stewart's Application for Judicial Review* [2003] NI 149. In that case the court considered a challenge to the conduct of an appeal against the refusal of planning permission by what is known as the 'informal hearing procedure'. At an informal hearing the procedure is more inquisitorial than adversarial. Parties may participate in discussion and ask informal questions through the commissioner, but there is no formal questioning or cross-examination. The objector to the grant of planning permission complained that such a procedure did not allow him to make relevant comments; that there was a lack of structure to the proceedings; and a lack of opportunity to question the developer. He claimed that the informal hearing procedure was inherently unfair in the lack of opportunity given to present a case and question witnesses and that the particular hearing was on its facts unfairly conducted and in breach of the appellant's rights to a fair hearing under art 6(1) of the convention. The Court of Appeal rejected these claims. Applying the reasoning of Simon Brown LJ in *Adlard's* case, Carswell LCJ observed "the issues in planning decisions lie at the judgment and discretion end of the spectrum".

[44] After *Adlard* and *Stewart* had been decided, the House of Lords considered the fact-finding/discretion dichotomy in the appeal against the decision of the Court of Appeal in *Runa Begum*. In advancing the case for the appellant before the Judicial Committee, Mr Morgan QC relied on the dictum of Lord Hoffmann in *Alconbury* (quoted at paragraph 37 above) to the effect that where one was dealing with the evaluation of facts such as arise on the question whether there has been a breach of planning control, one needs the safeguard of a limited review of the facts by the appellate tribunal. Lord Hoffmann dealt forthrightly with Mr Morgan's argument based on this dictum, saying that he thought that it had been "an incautious remark" since the extent to which the appellate tribunal had to be able to review questions of fact did not arise in *Alconbury* (paragraph 40). After reviewing again the case of *Bryan* and a number of decisions of ECtHR (principally dealing with issues of social policy) he concluded that in cases involving administrative decisions, while judicial review was required for article 6 purposes, "limitations on practical grounds on the right to a review of the findings of fact will be acceptable (paragraph 57). He then addressed directly Laws LJ's thesis that where the subject-matter of a scheme systematically involved the resolution of primary fact, the court will incline to look for procedures akin to conventional mechanisms for finding fact. Of this Lord Hoffmann said, at paragraphs 58 & 59: -

> 58. … I agree with the Court of Appeal that the right of appeal to the court was sufficient to satisfy article 6. I should however say that I do not agree with the view of Laws LJ that the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain. I rather think that Laws LJ himself, nine months later, in *R (Beeson's Personal Representatives) v Secretary of State for Health* [2002] EWCA Civ 1812, (unreported) 18 December 2002, had come to the same conclusion. He said, at para 15:
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> > "There is some danger, we think, of undermining the imperative of legal certainty by excessive debates over how many angels can stand on the head of the article 6 pin."
>
> 59. Amen to that, I say. In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making."

[45] In deciding whether a particular species of decision-making requires an independent fact finder, the emphasis must, therefore, be on whether the decision making power is one to be exercised by administrators. This approach returns the principle firmly to the theme to be derived from ECtHR's judgments in the post *König* era, namely that administrative decisions do not attract the full judicial model type of review - see, for

instance, *Kaplan v United Kingdom* (1980) 4 EHRR 64; *Zumtobel v Austria*; *ISKCON v UK*; *Bryan v UK;* (op.cit.). *Stefan v United Kingdom* (1997) 25 EHRR CD 130; *X v United Kingdom* (1998) 25 EHRR CD 88; and *Kingsley v United Kingdom* (2000) 33 EHRR 288. Lord Hoffmann expressly included the grant of planning permission within the category of administrative decision making and the short answer to the applicant's claim that he is entitled to a PAC type appeal hearing might be supplied simply by referring to that statement. But a somewhat more elaborate consideration of the issue is appropriate.

[46] It should by now be clear that the 'fair and public hearing … by an impartial and independent tribunal' guaranteed by article 6 may comprise a number of separate stages or elements; it should also be clear that the type of hearing that will be required to meet the demands of article 6 will vary according to the nature of the decision or determination under challenge. In practical terms this means that the article 6 requirements for an administrative decision such as is under challenge here will be met be the availability of judicial review to test its validity.

[47] The efficacy of such a challenge should not be underestimated. The matters that the applicant claims he would wish to raise at a PAC type appeal exemplify the point. Claims such as the impact that the development would have on his privacy; whether the development was out of keeping with houses in the vicinity; whether the Department had departed from proposals in the Area Plan; whether the standards required by DCAN15 – Vehicular Access Standards could be achieved; and the differences between the 1995 permission and that granted in 1999 are all matters that can be raised in judicial review proceedings, albeit on the more restricted basis that the Department had failed to have regard to them rather than by way of challenge to the merits of the judgment made by the Department about them. Expressed more generally the spectrum of challenge by way of judicial review is not inconsiderable. It was summarised by Lord Bingham of Cornhill in *Runa Begum* in this way at paragraph 7: -

> "… the court may not only quash [a] decision … if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1030, per Scarman LJ) if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact."

The breadth of the challenge available by way of judicial review taken together with the procedures that must be followed by the planning authority to consider and safeguard objectors' interests must go some considerable way to assuage concerns about the protection of such rights as may arise under article 6.

[48] The unsuitability of a full merits review of a planning decision is readily understandable given the nature of the determination involved. If such a review were available it would unquestionably lead to what Lord Bingham described in *Runa Begum* as the 'emasculation (by over-judicialisation)' of planning decisions, with the planners' judgment on every conceivable aspect of a decision open to question and challenge. The practical difficulties in providing a scheme whereby every aggrieved objector could insist on a full merits review of a planning decision can be easily envisaged. As Lord Bingham has pointed out, the Strasbourg jurisprudence has shown a degree of flexibility in its search for just and workmanlike solutions to the application of article 6 to administrative decisions. It would be difficult to argue that what the applicant proposes in the present case would attract the soubriquet 'workmanlike'.

[49] It is, of course, also relevant that decisions on planning applications are subject to a relatively elaborate system of checks, both internal and external. These have been described in paragraphs 22 to 25 above. The procedure therein outlined, if properly operated, should ensure the full investigation of an objector's opposition to the grant of planning permission. If the planning authority fails to apply its own procedure it will be amenable to judicial review. I am satisfied, therefore, that if the decision on the application for planning permission in this case does involves a determination of the applicant's civil rights, the availability of judicial review is sufficient to meet the requirements of article 6.

[50] As to whether article 6 is engaged, it is unnecessary for me to decide. It is now well recognised that the tem 'civil rights' in the article is an autonomous concept. In his examination of the historical development of the Strasbourg jurisprudence, Lord Hoffmann has demonstrated that significant inroads on the exclusion of administrative decisions from the ambit of article 6 have been made, but, as Lord Walker of Gestingthorpe pointed out in his speech in *Runa Begum* (at paragraph 109), these inroads have not been consistent. Lord Walker suggested that the line of cases starting with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and leading to *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122 indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion. In the present case while it may be said that the applicant enjoys personal rights some of which are of an economic nature, it is by no means clear that the decision whether to grant planning permission did not require

the exercise of a large measure of discretion. It is at least questionable, therefore, whether the grant of planning permission involved the determination of the applicant's civil rights for the purposes of article 6.

[51] It is unnecessary to address the interesting question raised by Mr Hutton as to whether article 32 of the 1991 Order could be construed in a way that would permit a third party appeal against the grant of planning permission. I am inclined to accept his submission that such an interpretation would place an unacceptable strain on the language of the provision. Since the question is, for the purposes of this judgment at least, academic, I will refrain from further comment on it.

Were the safeguards in place?

[52] The applicant claims that many of the safeguards that, according to the Planning Service, attached to the treatment of third party objections were not in fact present in his case. He also claims that the representations made by him and others were not referred to in the case officer's report and were not therefore sufficiently conveyed to the council.

[53] These claims are disputed by the respondent. It points to the extensive consideration of this matter by the council on many occasions and the fact that councillors had been enlisted by the objectors to promote their opposition to the planning development.

[54] I do not consider that it has been established that any aspect of the objectors' case has been neglected either in the planning authority's consideration of them or in their exposition to the council. Numerous and extensive meetings and exchanges between members of the Planning Service and the objectors took place. It is not possible to accept that the planning authority was unmindful of the nature of the objections to the grant of planning permission. Likewise, all the available evidence suggests that the council was fully apprised of the reasons that the applicant and other residents were against the planning application.

The meeting of 22 September 2000

[55] It is common case between the parties that a meeting took place on 22 September 2000. The applicant claims that the objectors were promised a further 'office' meeting at which he would be consulted further before the matter was referred to the council. Mr McBride for the respondent denies that this was the nature of the undertaking given. He says that what he agreed to at the meeting was to consider the issues raised through the councillors who had become involved in discussions about the planning application. He suggests that he fulfilled this undertaking.

[56] After the meeting of 22 September a detailed letter was sent from Mr McBride to Alderman Carrick on 28 November 2000. Mr Carrick asked for a further meeting and this took place on 20 December 2000. The applicant and other objectors attended the meeting.

[57] I am not satisfied that the applicant's version of what took place at the meeting on 22 September is correct. The onus of establishing its correctness rests with him – see *R v Reigate Justices ex parte Curl* [1991] COD 66 and *Supperstone & Goudie* Judicial Review 2nd Edition, paragraphs 17.8 – 17.9.

[58] In any event, I am entirely satisfied that all matters that concerned the applicant and his fellow objectors had been fully canvassed with the Planning Service and that these had been adequately ventilated before the council at their various meetings. No disadvantage has accrued to the applicant by the failure to hold a further meeting. Even if I had been persuaded that a further meeting had been promised but not held, I would have exercised my discretion to deny the applicant relief on this ground because I am satisfied that if such a meeting had taken place it would have made no difference either to the outcome of the planning application or to the presentation of the case to the council.

The 1996 planning permission

[59] The applicant's complaint about the permission granted in April 1996 is twofold. Firstly he complains that this permission should not have been taken into account at all by the Planning Service in deciding whether to grant the application made in September 1999. Secondly he suggests that the Planning Service ought not to have referred to this item of the planning history when making their presentation to the council.

[60] The respondent argues that the 1996 permission was a material consideration to which the Department was obliged to give consideration. That obligation arose even if the permission could be described as a nullity since it further established the principle of a housing use on the site. The weight to be attached to the fact that planning permission had been granted was a matter that lay uniquely within the competence of the Planning Service.

[61] The respondent further argues that in any event the planning permission was capable of implementation; and that even if it could not be implemented it should be regarded as presumptively lawful.

[62] I do not find it necessary to embark on an examination of whether the development permitted in 1996 could, with adjustment, be accommodated on the site or whether, if it could not, that was capable of rendering the permission invalid because I have concluded that the significance of the grant of planning permission was in showing that the site had previously been considered suitable for housing. Indeed, that it was suitable was plain even

before the 1996 permission was granted but the extent of the importance of the grant then was to further confirm its suitability. That consideration would have been relevant even if a successful challenge to the validity of the grant had been made on the basis that the development permitted could not be physically accommodated in the space available. In my judgment, the Planning Service was bound to take into account the conclusion of the planning authority in 1995/6 that a housing development should be permitted.

[63] In any event, of course, no challenge to the validity of the grant was made and I accept the argument of the respondent that it must be treated as valid in the absence of such a challenge. The presumption of legal certainty requires that if the validity of a planning permission is not challenged timeously it must be deemed to be valid. In [1983] 2 AC 337 at 280H, Lord Diplock said: -

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

[64] If a challenge to an apparently validly taken decision is not made promptly that will have the effect of immunising it from subsequent attack. Lord Diplock in *O'Reilly v Mackman* again at page 283F: -

> "Failing such challenge within the applicable time limit, public policy, expressed in the maxim *omnia praesumuntur rite esse acta*, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision."

[65] I am satisfied, therefore, that the Planning Service was entitled to treat the 1996 planning permission as valid and that they were equally entitled to represent it thus to the council.

Bias

[66] The charge made by the applicant, although not articulated as such, appears to be one of actual bias. This is an extremely serious allegation and one that should be made only when supported by the clearest evidence. When analysed, however, the applicant's allegation of bias can be seen to be based solely on the fact that decisions were made by the Department that were adverse to the objectors on various issues. This is plainly insufficient to sustain the very serious charge of bias. In any event, I do not accept that it

has been shown that the 1996 permission was granted, "without properly considering the objections of the residents". Nor do I accept that the Department felt obliged to grant permission in 2001 because of the "erroneous granting of the 1995 application". On the contrary, for the reasons that I have given, I consider that the Department was bound to take into account the grant of planning permission in 1996. The fact, if indeed it be the fact, that the planning application received a "less than favourable response from the local council" is patently inadequate as a foundation for an allegation of bias; and I have found that it has not been established that there was any breach of undertaking given at the meeting of 22 September 2000. I do not consider that it has been shown that there was a failure to give reasons for the decision.

[67] I am afraid that I must conclude that the charge of bias should never have been raised in this case. The material referred to was not remotely sufficient to sustain such a serious allegation.

[68] Even if one treats the case as one of apparent bias, it is immediately clear that there is a complete dearth of evidence to advance, much less make good, that allegation. In *Magill v Porter* [2002] 2 AC 357, Lord Hope of Craighead referred to the "reasonable likelihood" and "real danger" tests discussed by Lord Goff of Chieveley in *R v Gough* [1993] AC 646 and examined some of the criticisms made of that decision in some Australian cases. He then referred to the decision of the Court of Appeal in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and in particular the passage in which Lord Phillips of Worth Matravers MR suggested that there be a modest adjustment to the test propounded in *R v Gough* and commended that to the House of Lords. The passage of Lord Phillips judgment is found at paragraph 85 as follows: -

> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge 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, or a real danger, the two being the same, that the tribunal was biased."

Lord Hope suggested (in paragraph 103 of his opinion) that the Appellate Committee should accept this modification of the *Gough* test and the other members of the Committee agreed.

[69] Applying the modified test to the present case it is abundantly clear that a suggestion of apparent bias simply cannot be maintained. Bias in this context means, "motivated by a desire unfairly to favour one side or to disfavour the other" – per Lord Goff in *Gough* at page 659. There is nothing in the material placed before the court that suggests that the planning officials acted in this way beyond their having taken decisions adverse to the applicant.

Wednesbury unreasonableness

[70] The suggestion that the decision was irrational was, unsurprisingly, not developed to any significant extent. While one may acknowledge that the decision to grant planning permission was controversial, it could not be described as irrational.

[71] No evidence was produced to support the claim that the Department had failed to take account of the various matters that the applicant suggested it had ignored. The respondent asserts that regard was had to all of these factors. In *SOS (NI) Ltd's application* [2003] NICA 15, the Court of Appeal, although there dealing with an application for leave to apply for judicial review, gave a timely reminder that it is for the applicant who avers that a decision maker has not taken into account a relevant consideration to adduce evidence to support that claim. At paragraph 19, Carswell LCJ said: -

> "… It is for an applicant for leave to show in some fashion that the deciding body did not have regard to … material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did do so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review."

[72] The need to support a claim that the decision maker has failed to have regard to a relevant factor is all the more acute on a substantive judicial review hearing. In the absence of any such evidence the applicant's argument on this aspect of the case must also fail.

Article 8

[73] 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 preservation of disorder or crime, for the protection of health or morals or for the protection of other rights and freedoms of others.'

[74] In *Stewart* the Court of Appeal accepted that article 8 might be engaged if "a person is particularly badly affected by development carried out in consequence of a planning decision made by the state" (paragraph 26). It is to be remembered, however, that the essential object of article 8 is "to protect the individual against arbitrary interference by public authorities" – *Botta v Italy* (1998) 26 EHRR 241, paragraph 33. Moreover, the duty cast on the state is to have *respect* for an individual's private and family life.

[75] It is at least questionable whether the applicant has shown that he is so affected by this development that article 8 is engaged but I need not decide that issue because I am satisfied that, even if it is engaged, there has been no violation of article 8 in this case. In the first instance I do not consider that any lack of respect for the applicant's private life has been demonstrated. The planners have met the applicant and other objectors frequently; they have received and, I am satisfied, considered their complaints. The decision not to act on those complaints does not alone constitute a failure to have respect for the applicant's article 8 rights. Moreover, I consider that even if there had been an interference with those rights, that this was justified in order to permit this necessary development to proceed and that the decision taken was proportionate to that aim.

[76] The discrete complaint made by the applicant, *viz* that the refusal as a matter of policy to take into account disputes about boundaries or access constitutes a breach of article 8, is without substance, in my view. Such a policy is soundly based in practicality; if a planning authority was bound to make a judgment on the merits of a boundary dispute on every occasion that a planning application revealed one, it would be faced with a task for which it is neither equipped nor competent. The decision not to take such disputes into account does not connote a failure to respect the article 8 rights of those involved in disputes; it merely reflects the impossibility of the planning authority acting as a surrogate arbiter of such disputes.

The occupation of the houses

[77] The applicant complains that the Department did not reveal that persons with disabilities would occupy some of the houses on the development. The Department had obtained information about this, partly as a result of the meeting of 20 September and, it is claimed, failed to relay it to the applicant and other objectors.

[78] I do not consider that the Department was under a legal obligation to disclose this information. The applicant has been unable to point to any statutory provision or legal principle (other than the duty to act fairly) that would support the claim that it was legally obliged to inform the objectors about this matter.

[79] Moreover, as Mr Elvin QC for the respondent pointed out, the identities and personal characteristics of the proposed applicants of the houses did not constitute a land use consideration and there were therefore no relevant representations that the applicant could have made on the matter. Put slightly differently, the Department could not have refused planning permission *solely because* the proposed applicants were persons with disabilities. Any objection to the planning application based solely on that consideration would have had to be disregarded by the Planning Service. The applicant's argument on this ground must also be rejected.

Conclusions

[80] None of the grounds advanced by the applicant by way of challenge to the grant of planning permission has been made out. The application for judicial review must be dismissed.