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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY WILLIAM YOUNG FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Weatherup J whereby he quashed a decision of the Planning Appeals Commission of 10 July 2006 refusing the respondent, William Young's application to retain an existing dwelling without complying with a condition of planning permission.

[2] The respondent had challenged the Commission's decision on various grounds. All of these were dismissed by the judge except that which related to apparent bias on the part of Commissioner Allen. The commissioner had heard the respondent's appeal and reported to the full Commission but it transpired that he had participated in an earlier appeal which had been dismissed by the Commission. The decision to dismiss the earlier appeal was subsequently quashed because of certain irregularities in the hearing. Weatherup J concluded that, because Commissioner Allen had voted to dismiss the earlier appeal, the appearance of bias was present and the decision of the Commission on the second appeal, based as it was on the recommendation and report of Commissioner Allen, could not be allowed to stand.

Relevant background

[3] The key events, taken principally from the judgment of Weatherup J, appear to be the following: -

- On 23 December 2000 an initial application for planning permission was made by the respondent;

- In September 2001, since the Planning Service had not determined the application, an appeal to the Planning Appeals Commission was launched;

- On 8 March 2002 full planning permission was granted subject to a number of conditions;

- In May 2003 building work commenced;

- On 22 July 2003 the Planning Service wrote to the respondent outlining a number of breaches of planning conditions;

- In January 2004 an enforcement notice was issued;

- In December 2004 a retrospective application for retention of the building without complying with conditions was accepted by the Planning Service;

- On 14 March 2005, the Planning Service again having failed to determine the application, an appeal was made to the Planning Appeals Commission on the retrospective application;

- On 22 August 2005, after the hearing of the appeal, Commissioner Farrington received additional information that he had sought from the Department of the Environment. He did not share this information with the other parties and did not ensure that they had an opportunity of dealing with it. He also failed to make reference to visiting other properties in his report. These irregularities were not disclosed to the full Commission;

- In August 2005 Commissioner Farrington supplied his report to the full Commission;

- On 5 September 2005 a PAC meeting (which included Commissioner Allen) considered Commissioner Farrington's report. Commissioner Allen and the other commissioners

present voted to accept Commissioner Farrington's report and to dismiss the respondent's appeal;

• On 9 September 2005 PAC wrote to the respondent informing him that his appeal had been dismissed;

• On 11 September 2005 the respondent wrote a letter of complaint to PAC outlining eight grounds of complaint;

• On 1 November 2005 the Chief Commissioner replied, rejecting seven of the eight grounds of complaint, but accepting that the use of the additional information was not shared with the parties and the fact that he had visited other properties was not referred to in the report. It was stated that the Commission had made its decision in ignorance of these facts; that the commissioner's action was a breach of procedure; and that it was not possible to be certain that the Commission would have reached the same decision if it had been aware of these matters.

• On 16 December 2005, with the consent of the PAC, the decision arrived at as a result of Mr Farrington's report was quashed by judicial review.

• On 14 March 2006 PAC wrote to the respondent indicating that his reconstituted appeal would proceed by informal hearing;

• On 18 June 2006 the respondent wrote to PAC, indicating his refusal to participate in the second appeal because of personal circumstances and because he had not been consulted about the procedure to be used;

• On 10 July 2006 following the second appeal, which was heard by Commissioner Allen, PAC adopted his recommendation and dismissed the appeal.

The judge's decision

[4] Having reviewed a number of domestic and Strasbourg authorities, Weatherup J expressed his conclusion on the issue of apparent bias in the following paragraph: -

> "[24] In the present case Commissioner Allen prepared the Report to be presented to the Planning Appeals Commission to make the decision on the appeal. Commissioner Allen had a

> previous involvement in the matter as a member of the panel of the Commission that determined the appeal on the basis of Commissioner Farrington's Report. The complaint does not relate to a common member of the panels of the Commission that determine the appeal. The dual role in issue in the present case concerns a member of the panel of the Commission that accepts the first Report then being the Commissioner who prepares the second Report for the panel of the Commission. The reporting Commissioner is not the decision maker but he or she plays a significant role in the appeal process by preparing the Report that is presented to the Commission for a decision on the appeal. The preparation of the Report is a cornerstone of the decision. The tension that arises concerns the preparation of the new Report after accepting the earlier Report that has been set aside. That seems to me to create an appearance of bias in the mind of the informed and objective observer because of the tension between his role as a member of the panel of the Commission adopting the first Report that is later set aside and then preparing the second Report in the same appeal for the second panel of the Commission. The Commissioner preparing the second Report may well be seen as being influenced in the preparation of that Report by his earlier acceptance of the first Report. For that reason I propose to quash the decision of the Planning Appeals Commission. The appeal of the applicant lodged on 14th March 2005 remains extant."

The authorities

[5] As Weatherup J pointed out, the leading authority on the issue of apparent bias is *Porter v Magill* [2002] 2 AC 357, The essential principle is perhaps best expressed by Lord Hope of Craighead in paragraph 103 of his opinion where he said: -

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

[6] The notional observer must therefore be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker was biased. In this context, it is pertinent to recall Lord Steyn's observation in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, quoting with approval Kirby J's comment in *Johnson v Johnson* (2000) 201CLR 488 at 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

[7] Subsequent decisions have followed the general approach outlined in *Porter v Magill* and have examined various types of situation that might give rise to the conclusion that there was a real possibility of bias on the part of the tribunal whose decision is challenged. Thus, for instance, in *Feld v The London Borough of Barnett* [2004] EWCA Civ 1307 the Court of Appeal in England rejected the suggestion that a review officer who conducts successive reviews of a decision concerning homeless persons has the appearance of bias. Ward LJ described (at paragraph 44) how the informed observer of this situation should be considered to have approached his task: -

> "In judging whether that is a real as opposed to a fanciful risk the informed observer will bear in mind that this is an administrative decision which by the will of Parliament is placed in the hands of a senior officer of the local housing authority who has been trained to the task and brings expert knowledge and experience of the local housing authority's work to bear on the decision making process."

[8] It is relevant for the informed observer, therefore, to take into account the administrative arrangements that underlie the decision and the statutory requirements, if any, as to how it should be reached. In the case of PAC, it is noteworthy that there is a limited number of commissioners and that, on occasions, all of them may participate in a decision on a report by the appointed member. To require that a renewed appeal be conducted by a commissioner who has had no prior involvement with the matter may present considerable logistical difficulties, therefore. It is also of some limited significance that there is no statutory obligation to do so.

[9] In *R (Al-Hasan) v Home Secretary* [2005] 1 WLR 688 the House of Lords considered the issue of apparent bias on the part of a deputy governor who conducted the adjudication of a disciplinary offence alleged against two prisoners who refused to squat while being searched for the presence of items of a kind that could threaten the security of the prison. The deputy governor, a Mr Copple, had been present when the governor approved the decision to require prisoners to squat as part of the search. One prisoner had refused to

obey the order to squat on the ground that a reasonable suspicion was required for such an order and there was none in his case. The other refused on the ground that he had not been given proper reasons for the order. It was held that since Mr Copple had been present when the squat search order was approved, and had not dissented from that approval, the fair-minded observer might infer that he had tacitly accepted that the order was lawful, so that, when it was disobeyed and the deputy governor subsequently came to rule upon its lawfulness, there was a real possibility that he might be predisposed to find it lawful.

[10] Lord Brown of Eaton-under-Heywood described the approach to be taken to the issue in paragraph 37 of his opinion as follows: -

> "Would [the informed observer] think it a real possibility that Mr Copple, having been present when the squat search order was confirmed by the governor, would be predisposed thereafter to find it lawful? Would he, in the language of the Strasbourg court in *Procola v Luxembourg* (1995) 22 EHRR 193, feel 'doubt, however slight its justification', about Mr Copple's impartiality, 'legitimate grounds for fearing' that Mr Copple may have been influenced by his prior participation in the decision-making process?"

[11] Having confessed that he did not find it easy to decide the case, Lord Brown ultimately concluded that the case of apparent bias had been made out. At paragraph 39 he said: -

> "… it seems to me that by the very fact of his presence when the search order was confirmed, Mr Copple gave it his tacit assent and endorsement. When thereafter the order was disobeyed and he had to rule upon its lawfulness, a fair-minded observer could all too easily think him predisposed to find it lawful. After all, for him to have decided otherwise would have been to acknowledge that the governor ought not to have confirmed the order and that he himself had been wrong to acquiesce in it.

[12] What emerges clearly from this passage is that the critical factor was that the deputy governor had – at least in the perception of the informed observer – a stake in upholding the lawfulness of the order. This feature is present in the other cases considered by Lord Brown where apparent bias was held to be present. Thus in the *Procola* case the fact that four of the five members of the

Conseil d' Etat had previously contributed to an advisory opinion on the lawfulness of a proposed new regulation, their subsequent ruling confirming its lawfulness was held, unsurprisingly, to have breached article 6(1) of the European Convention on Human Rights. So also in *McGonnell v United Kingdom* (2000) 30 EHRR 289, where the Bailiff of Guernsey's determination of an appeal which turned upon the application of a development plan in which he had personally been involved whilst in government constituted a breach of article 6.

[13] In *Davidson v Scottish Ministers* 2004 SLT 895 the House of Lords affirmed the decision of the Second Division of the Court of Session to set aside decisions made by an Extra Division of that court on the ground that they were vitiated by apparent bias and want of objective impartiality on the part of one member of the court, Lord Hardie. The Extra Division had been decided as a matter of law that section 21 of the Crown Proceedings Act 1947 prevented the Scottish courts from ordering specific performance against the Scottish Ministers as part of the Crown. Three years earlier Lord Hardie in his capacity as Lord Advocate had informed the House of Lords when the Scotland Act 1998 was passing through the House that this was the position. Again, the finding of apparent bias is explicable on the basis that Lord Hardie would be perceived as having an interest in the vindication of his earlier opinion. Significantly, however, Lord Bingham stressed that earlier judicial pronouncements would not normally give rise to an appearance of bias where a judge was called upon to consider the same legal issue. At paragraph 10 of his opinion he said: -

> "Rarely, if ever, in the absence of injudicious or intemperate behaviour, can a judge's previous activity as such give rise to an appearance of bias. Over time, of course, judges acquire a track record, and experienced advocates may be able to predict with more or less accuracy how a particular judge is likely to react to a given problem. Since judges are not automata this is inevitable, and presenting a case in the way most likely to appeal to a particular tribunal is a skill of the accomplished advocate. But adherence to an opinion expressed judicially in an earlier case does not of itself denote a lack of open-mindedness; and there are few experienced judges who have not, on fresh argument applied to new facts in a later case, revised an opinion expressed in an earlier. In practice, as the cases show, problems of apparent bias do not arise where a judge is invited to revisit a question on which he or she has expressed a previous judicial opinion, which must happen in

> any developed system, but problems are liable to arise where the exercise of judicial functions is preceded by the exercise of legislative functions."

[14] What might be described as the presumption of open-mindedness is not confined solely to judges. As Lord Rodger of Earlsferry pointed out in the *Al-Hasan* case, persons who are required to apply rules on a day-to-day basis, having previously been involved in devising those rules, are not to be considered, on that account alone, of lacking the independence of approach necessary to apply the rules impartially.

Conclusions

[15] The discussion whether there was an appearance of bias must begin with a clear recognition of the material facts. In this case Commissioner Allen contributed to a decision based on Mr Farrington's report without knowing that material had been obtained from the Planning Service that had not been made available to Mr Young. Nor did he know that Mr Farrington had visited other properties. It was because of these irregularities (for which Commissioner Allen had no responsibility whatever) that the earlier decision was quashed. The question then arises whether an informed and fair-minded observer would consider that Mr Allen had a motive or incentive to decide the appeal in a particular way because of this history.

[16] In my judgment it would not be reasonable so to conclude. Commissioner Allen had not committed himself to the approach adopted by Mr Farrington. If anything, he could be forgiven for being concerned that he had been misled into believing that the proper procedures had been followed. He had not adopted a position that required to be vindicated by the subsequent decision on the second appeal.

[17] This is not an instance of a decision-maker having expressed an opinion on the law such as in *Davidson* and *Procola* or having acquiesced in the making of an order on whose lawfulness he was subsequently called on to pronounce as in *al-Hasan*. In my view, there would be no warrant for a suspicion as to the impartiality of Mr Allen. He was required to conduct a thorough examination of the planning issues and report comprehensively on them in the knowledge that his report would be subject to the scrutiny – and ultimately the endorsement or rejection – of a panel of commissioners. There is no obvious reason that he would reach a different judgment on the planning arguments in the appeal from that which was impelled by their intrinsic merit.

[18] I have therefore concluded that the case for apparent bias has not been made out. I would allow the appeal and dismiss the application for judicial review.