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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

WEATHERUP J

[1] This is an application for judicial review of a decision of the Planning Appeals Commission of 10th July 2006, further to a report from Commissioner Allen, refusing the applicant's application for retention of an existing dwelling without compliance with a condition of planning permission that had been imposed on 8th March 2002. Mr Young, the applicant, appeared in person and Mr Larkin QC appeared for the respondent.

[2] On 2nd August 2000 outline planning permission was granted to the applicant for a dwelling house at 39A Carradore Road, Greyabbey. An application for full planning permission was made on 23rd December 2000 and after nine months had elapsed and no determination had been made the applicant appealed the deemed refusal to the Planning Appeals Commission in September 2001. Full planning permission was granted on 8th March 2002. The full planning permission was subject to a number of conditions that included the dwelling being sited as indicated on a site plan with a finished floor level not exceeding one metre above a specified level referred to in the application papers.

[3] The building work commenced on the site in May 2003. The Planning Service issued a letter on 22nd July 2003 outlining breaches of the planning conditions. The dwelling was occupied in November 2003. The Planning Service was of the opinion that the dwelling was not in accordance with the planning conditions. An Enforcement Notice was issued in January 2004. The applicant submitted a retrospective planning application for the retention of the building without complying with the conditions of the earlier planning permission and the retrospective application was accepted as valid in December 2004. In default of a decision by Planning Service the applicant appealed the deemed refusal to the

Planning Appeals Commission on 14th March 2005. The appeal proceeded by way of written submissions and a site visit on 2nd August 2005 undertaken by Commissioner Farrington and a Planning Service Officer and objectors and representatives. There was an issue about measurements and the applicant requested measurements to be taken in a particular manner but his request was not accepted. Following the site meeting the applicant invited the Commissioner to view other prominent properties in the area but Mr Farrington stated that those properties were not sufficiently well identified and he could not attach weight to them. The Commissioner's report was provided to the Commission in August 2003 with a recommendation that the appeal be dismissed. By letter of 9th September 2005 the Planning Appeals Commission wrote to the applicant dismissing his appeal.

[4] The applicant challenged the decision of the Planning Appeals Commission by way of judicial review. The applicant had written a letter of complaint to the Planning Appeals Commission on 11th September 2005 setting out eight points of complaint. The applicant received a reply dated 1st November 2005 from the Planning Appeals Commission setting out their position on each of the eight points. In discussing point 7 the letter identified a problem that had not previously been noted. It was stated that "…. in investigating your complaint we have identified that subsequent to the site visit Mr Farrington, through our administrative staff, sought further background information from the Department of the Environment …. which was received by the Commission on 22nd August 2005. Contrary to Commission procedures, Mr Farrington neither ensured that other parties were advised that he had requested this information nor advised our administrative staff that copies of the information should be sent to other parties for their comments before he finalised his report. Furthermore, although Mr Farrington states in paragraph 7.8 of his report that there was insufficient information to identify other developments to which you referred, he has confirmed in fact that, along with the parties, he visited some existing properties which may have included the property on Mount Stewart Road …. The report that Mr Farrington submitted to the Commission makes no specific reference to any of these existing properties. The Commission, therefore, made its decision without any knowledge of these factors."

The letter concluded by stating that the Chief Commissioner was satisfied that Mr Farrington's conduct of the site visit was competent, transparent and impartial and he did not find any of the matters raised in points 1 to 5 and 8 of the applicant's letter of complaint to be justified. He continued, "However, I must inform you that Mr Farrington's action subsequent to the hearing, as set out under point 7, is in clear breach of the Commission procedures and lacks the openness and fairness you are entitled to expect as an appellant. If Mr Farrington had included the various matters I have referred to under point 7 in his report, I cannot be certain whether or not the Commission would have reached the same decision on your appeal. Please accept my apology for the unacceptable breach of Commission procedures in handling your appeal. However as stated in earlier letters, there is no mechanism by which the Commission can review its decision."

[5] The letter led to the application for judicial review. The Court made an Order on 16th December 2005 quashing the earlier Planning Appeals Commission decision.

[6] The Planning Appeals Commission wrote to the applicant on 14th March 2006 indicating that the appeal would proceed by way of informal hearing. There was correspondence exchanged between the parties and on 21st March 2006 and 18th June 2006 the applicant confirmed that he would not be participating in the appeal process. The explanation for this approach is stated in the Order 53 statement to be that the applicant did not participate because he was under severe financial and emotional strain at the time and was dealing with various financial, family and personal problems and accordingly he was not in a position to apply himself to the matter as he normally would have done. A second reason was advanced at the hearing of the judicial review to be that the applicant believed that he should have been consulted by the Planning Appeals Commission about the conduct of the further appeal and had been awaiting contact from the Planning Appeals Commission, which he had not received. The applicant was therefore aggrieved that the Planning Appeals Commission had settled the procedure without reference to the applicant and he was not satisfied that he could expect a proper hearing if he participated without having been consulted.

[7] The Planning Appeals Commission appointed Commissioner Allen to prepare a report for the Planning Appeals Commission. Mr Allen concluded that the applicant's appeal should fail and his recommendation was adopted by the Planning Appeals Commission in their decision of 10th July 2006. This is the decision that is the subject of the present application for judicial review.

[8] Commissioner Farrington's report had been considered by the Planning Appeals Commission at a meeting held on 5th September 2005. Those present at the meeting who voted to accept Commissioner Farrington's recommendation and reject the applicant's appeal included Mr Allen.

[9] The applicant sets out four grounds of challenge to the latest decision of the Planning Appeals Commission based on procedural unfairness. First, that the Planning Appeals Commission appointed Commissioner Allen to prepare a report when he had already voted to reject the applicant's appeal based on access to the Farrington report which the Planning Appeals Commission had acknowledged was procedurally unfair and incorrect. Secondly, that Commissioner Allen failed to attach any weight to other developments in the vicinity. Thirdly, that Commissioner Allen's prior involvement was unfair and contrary to the right under Article 6 of the European Convention to a fair hearing by an independent and impartial tribunal. Fourthly, that the decision had taken into account objections which were made in relation to the previous appeal despite the objectors having been written to and invited to comment in relation to this appeal and not having replied.

[10] In addition there are a number of factual disputes. In general judicial review is not concerned to resolve factual disputes. Judicial review deals with policy and

procedure. On occasions factual disputes emerge in determining the necessary background to the policies and procedures in question and a resolution of the factual disputes may be required. If they cannot be resolved on paper then it is often the outcome that the applicant will be found not to have satisfied the burden of establishing the facts for which he contends.

[11] The present Chief Commissioner Ms Campbell filed two affidavits, in the first of which she states at paragraph 5 that during the previous judicial review proceedings the Commission indicated, through its solicitor, that Mr Young's appeal would be reconsidered with a different appointed member and that the Commission would welcome Mr Young's views on the procedure to be adopted. Ms Campbell also states that all parties to the appeal were informed of the position by letter dated 15th February 2006. However that assertion was a mistake. In her second affidavit, Ms Campbell, at paragraph 2, refers to all other parties to the appeal being informed of the position by letter dated 15th February 2006 and states that as the Commission was awaiting Mr Young's views on the procedure to be adopted for the reconsideration of the quashed decision the Commission judged it unnecessary to include him in its correspondence.

[12] According to the respondent, when the agreement was reached between the parties in relation to the quashing of the first decision, in respect of which the Court Order was made on 16th December 2005, the parties also agreed that the Commission would welcome the applicant's views and the Commission had therefore awaited his views. When it came to writing to the other parties in February of 2006 to notify them as to the appeal procedures the Commission decided it was not necessary to contact the applicant as they were still awaiting his response. The applicant disputes this because he says that it was not part of the agreement at the first hearing that he was to correspond with them about the procedures and he had no contact with them until a later date. It is now common case that the applicant did not receive the letter of 15th February 2006 which went to the other parties. There was handed into Court, as an additional item which was not originally exhibited, a memo from the Planning Service file by which Ms Campbell on 7th February 2006 sent a note to her staff that the letter of 15th February 2006 was to be sent to all the parties except the applicant. However the instruction was to send a copy of the letter to the applicant with a note explaining that it had been issued to all other parties and the memo states that the Commission was waiting to hear from the applicant on how he wished to proceed with the re-hearing of the appeal. It appears that the staff did not send a copy of the letter or an explanatory note to the applicant.

[13] The result is that the applicant did not receive the letter of 15th February 2006. That leads to a second factual dispute that concerns the circumstances in which the parties reached agreement on 16th December 2005. There was certainly a misunderstanding at that point because the Planning Appeals Commission thought that the applicant was going to come back to them in relation to the form of appeal that should be processed whereas the applicant was waiting for the Planning Appeals Commission to consult him about the matter. The result was that neither

party was in contact with the other. Ultimately the applicant did receive notification as to the manner in which the Planning Appeals Commission had decided that it would proceed. This aggrieved the applicant because he had not been consulted for the reasons that I have indicated and in part that led to him not participating in the appeal. This non participation was a voluntary action by the applicant who was aggrieved by the manner in which he had been treated. There were other ways in which he might have responded, but in the event he chose not to participate in the appeal and that voluntary non involvement will be taken into account in assessing the applicant's grounds.

[14] The third factual matter in dispute concerns the contents of Commissioner Allen's Report. The parties are in dispute concerning measurements, where measurements ought to have been taken, the size of the maps, what part of the map was excluded and whether the building may be sited in the correct position if measurements are taken in a certain way. All of these are matters for the Planning Appeals Commission to resolve and not for a judicial review Court. Further, there is an issue of a similar character concerning comparable buildings in the vicinity and whether the comparables were viewed, why some were not viewed, what weight was attributed to them and whether sufficient particulars were available. Again these are matters of planning detail and not a matter for the judicial review Court.

[15] I turn to the four grounds on which reliance has been placed by the applicant. First of all ground (d) concerns the taking into account, during the preparation of Commissioner Allen's Report, of the objections lodged during the preparation of Commissioner Farrington's Report. The appeal was that of the applicant of 14th March 2005. There was a processing of the appeal and a decision on 9th September 2005 and ultimately a quashing of that decision on 16th December 2006. While the decision was quashed, the appeal of 14th March 2005 remained extant. In addition the appeal papers remained extant and that included the objectors' papers, although that would have been subject to such alterations as the objectors might have wished to introduce for the purposes of the preparation of Commissioner Allen's Report. There were invitations to respond to the new process involving the preparation of Commissioner Allen's Report and there was no alteration of the original objections. The Planning Appeals Commission was entitled to proceed on the basis of the objections that had been made during the appeal, although the Report was prepared by a different Commissioner. I do not accept ground (d).

[16] I turn to ground (b), namely that the Commissioner failed to attach any weight to other developments in the vicinity. This is the point concerning the comparables that I have already touched on and there is a dispute about the manner in which the Commissioners handled the issue of comparables. The Planning Appeals Commission was entitled to take the view that they did on the comparables and I do not propose to interfere. I do not accept ground (b).

[17] Next, ground (a) concerns the fact that Commissioner Allen had access to the Report of Commissioner Farrington before he produced his own Report. It is

common case that Commissioner Allen had considered the Farrington Report as a member of the Planning Appeals Commission that had considered and adopted Commissioner Farrington's Report. He thus had the information that Commissioner Farrington had obtained. I leave aside for the moment the issue of apparent bias which I will treat as a separate ground under ground (c). The point here is concerned with the reporting Commissioner having been involved in the earlier processing of the appeal and having had access to the information available at that earlier time.

[18] I do not accept in principle the objection to a new Commissioner being engaged who has considered an earlier Report. There may however be circumstances where knowledge of an earlier Report would pollute a later Report because of the considerations that might arise in a particular case. But is this such a case? The recommendation in the earlier Report was adopted by the Commission and that decision was quashed. However the decision was quashed, not on its contents, but on the lack of notice to the parties of information obtained by Commissioner Farrington. Thereafter the undisclosed information was on the file for the appeal process. The contents were not notified to the parties, nor circulated to the applicant or the parties, but all the information was available nonetheless to those who exercised the right of access to the file. The applicant could have looked at the information on the file and contributed to the process but he chose not to do so. I do not accept ground (a).

[19] That leaves grounds (c) which is the issue of apparent bias. Commissioner Allen, who produced the Report which was the basis of the decision in question, was a member of the panel who accepted the earlier Farrington Report and reached the decision to reject the applicant's appeal. The applicant does not allege actual bias but rather the appearance of bias. The domestic approach to apparent bias is based on the decision of the House of Lords in Porter v Magill [2002] 1 All ER 465. The Court revised the previous test in the light of authorities in Scotland, the Commonwealth and Strasbourg. The present approach is that the Court must ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased and must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. This was stated by Lord Hope in Porter v Magill at paragraph 13 as follows:

> "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."

[20] Two cases that have been referred to by the respondent as illustrative of the kinds of issues that might arise. The first was Feld v The London Borough of Barnett [2004] EWCA Civ 1307 concerning homeless persons who may apply for accommodation under the Housing Act to a local authority. An applicant has a right to request a review of various decisions that might be made in relation to his entitlement under the legislation. Regulations prescribe a procedure to be followed

and in particular require the review decision must be made by a person of appropriate seniority who was not involved in the original decision. The case proceeded on the basis that not infrequently after review there is a fresh decision which is made the subject of a second review and not infrequently the same officer will conduct that re-review. Ward LJ applied the test in Porter v Magill and concluded that there was no apparent bias. He stated that in judging whether there was a real as opposed to a fanciful risk the informed observer would bear in mind that this was an administrative decision which by the will of Parliament had been placed in the hands of a senior officer of the local housing authority, being an officer who had been trained to the task and brought expert knowledge and experience of the housing authorities work to bear on the decision making process. The fair-minded observer in that case would bear two particular matters in mind. First of all Judges do sit on matters that they have dealt with on previous occasions and he referred to an application for permission to appeal where the Judge might then sit on the substantive appeal. The second matter was the deference that must be shown to the will of Parliament in devising the scheme. The fair minded and informed observer would bear in mind the practical realities of decision making in the local authority housing department and considerations such as how many people can be employed and the practicalities of having many different officers. Indeed in that Borough only one reviewing officer was employed. Finally, reference was made to the need for confidence which must be inspired by the Courts and administrative officers in a democratic society. Having weighed up all the considerations Ward LJ decided that there was no apparent bias.

[21] The other case to which reference was made was R (Al Hasan v The Secretary of State for the Home Department [2005] 1 All ER 927. This was a decision in relation to prison discipline. The Governor of the prison had approved a decision to require prisoners to squat as part of a search and the deputy Governor was present when the Governor made the decision. The prisoners resisted the search and adjudications were conducted by the deputy Governor. The issue that arose was whether the roles of the deputy Governor gave rise to apparent bias. The House of Lords held that the deputy Governor should not have participated in the adjudications. To avoid the appearance of bias a governor would either have had to made it plain at adjudications that he himself had actually been present when the order had been confirmed and not given the impression that he had nothing to do with it and should have sought the prisoners consent to his nevertheless hearing the charges, or alternatively to have stood down and enabled the adjudications to be heard by a different governor, if necessary from another prison, without any such previous involvement in the case. By the very fact of his presence when the search order was confirmed the deputy Governor had given 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 have thought him predisposed to find it lawful, as 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.

[22] Lord Brown recites a number of examples from paragraph 32 which have some bearing on the circumstances of the present case, being cases where a decision maker has had previous involvement, in a different capacity, in the issue that is before the Court. First, in Davidson v The Scottish Ministers [2004] SLR 895 Lord Hardy was a member of the Court determining a question of law as to whether section 21 of the Crown Proceedings Act prevented the Scottish courts from ordering specific performance against the Scottish Ministers. Some few years earlier Lord Hardy, as Lord Advocate, had assured the House of Lords in its legislative capacity that such was indeed the position. The early role before the legislative body on the particular issue was followed by a later judicial role on the same issue. The decision was set aside. The second example is Procola v Luxembourg [1996] 22 EHRR 193. Four of the five members of the Court had previously contributed to an advisory opinion on the lawfulness of proposed new legislation and they subsequently ruled to confirm that lawfulness. This would found to be a breach of Article 6(1) of the Convention. In McGonnell v UK [2000] 8 BHRC 56 the Bailiff of Guernsey determined an appeal which turned upon the application of a development plan in which he had personally been involved whilst in Government. As Deputy bailiff he presided over the States of Deliberations when the policy was adopted at an earlier stage. The final example is Pabla KY v Finland [2004] ECHR 47221/99 which is on the other side of the line. A member of the Finish Parliament sat as an expert member of the Court of Appeal. However as a member of Parliament he had not exercised any prior legislative, executive or advisory function in relation to the subject matter of the legal issue before the Court of Appeal for decision. The judicial proceedings therefore could not be regarded as involving the same case or the same decision in the sense which has been found to infringe Article 6(1).

[23] The ECtHR in Procola expressed its approach at paragraph 45 –"The Court notes that four members of the Conseil d'Etat carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's Conseil d'Etat the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question …."

[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.