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Judgment: approved by the Court for handing down | *Delivered:* **26/03/07**

*(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 FRANCIS McHENRY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION DATED 22 NOVEMBER 2006

GILLEN J

[1] This is an application for leave to apply for judicial review of a decision of the Planning Appeals Commission ("the PAC") dated 22 November 2006 ("the impugned decision") whereby it refused the applicant's appeal from a decision of the Department of Environment Planning Service. The applicant seeks leave for:

(a) A declaration that the impugned decision was unlawful, ultra vires, in breach of the applicant's right to a fair hearing and contrary to natural justice/procedural fairness.

(b) An Order of Certiorari quashing the impugned decision.

(c) An Order pursuant to s.21 Judicature (Northern Ireland) Act 1978 remitting the matter to the PAC for further consideration and determination in accordance with such directions and guidance as may appear appropriate to the court.

(d) It is well settled law that in order to be permitted to present a judicial review application, the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision. (See R v SOS for the Home Department ex parte Cheblank [1991] 1 WLR 890.

[2] The applicant makes the following points:

(a) On 9 May 2005 he submitted an application to the Department of Environment Planning Service for permission to construct a single dwelling

house and garage. The site of the proposed development was described as "345 N East of 34 Knockmore Road, Mosside". He submitted a map depicting the precise location of the proposed development site. This showed the site bounded with a red line and also highlighted the proposed access route to the Knockmore Road.

(b) By notice dated 1 November 2005 the Planning Service refused planning permission for the proposed development.

(c) The applicant lodged an appeal and the appeal hearing proceeded on 2 November 2006. The applicant was present at the hearing together with his solicitor and architect.

(d) The Planning Commissioner ("the Commissioner") hearing the appeal allegedly indicated that she had two maps before her, the first being the map attached to the original planning application and the second being the map depicting planning history in the locality. She identified the two reasons for refusal of planning permission, namely, lack of integration and detrimental change to the rural character of the area. At the hearing there were a series of submissions by both parties. The applicant alleges that at no point during the hearing did the Commissioner raise with either party the issue of the adequacy of the advertisement placed by the Department in a local newspaper during its initial consideration of the application. Neither party was invited to make submissions on this point, no information was sought by her from either party regarding the advertisement and no invitation was extended to adduce any relevant evidence on the issue surrounding the adequacy of the advertisement.

(e) By letter dated 22 November 2006, the PAC informed the applicant that the Commissioner had rejected his appeal. The sole ground of refusal was that the application had been incorrectly advertised by the Department. It was stated that the site was described in the original planning application as located at "345 N East of 34 Knockmore Road, Mosside" whereas the site actually lay in the south east of No 34 Knockmore Road. Accordingly, it was held that the advertisement was in breach of the requirement contained in Article 21 Planning (NI) Order 1991, the Planning Service's decision was invalid and no valid appeal existed.

(f) I pause to observe that the Planning (Northern Ireland) Order 1991 ("the 1991 Order") states as follows:

> "Publication of Notices of Applications
>
> 21.-(1) Subject to paragraph (2), where an application for planning permission is made to the Department it –

> (a) shall publish notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated; and
>
> (b) shall not determine the application before the expiration of 14 days from the date on which notice of the application is first published in a newspaper in pursuance of sub-paragraph (a)."

(g) It is the applicant's case that the exact location of the proposed development site is contained in the map which accompanied the original planning application. He believes that this application and the map available for public inspection throughout the period it was being considered by the Department was such that any interested member of the public would have been able to identify the precise location of the proposed development site. Whilst he accepts that the proposed site may not lie precisely to the east of No 34 that had been his understanding whilst he lived very close to the proposed development site. It was his case that he did not believe that the description on his planning application could be regarded as a misdescription or an omission and he did not believe that any member of the public would have been misled in any material way who wished to inquire into the application further. He asserts that there is no distinction between the alleged competing descriptions of the development site since both are in the open countryside and the entire area of land is governed by precisely the same planning policies namely those contained in "A Planning Strategy for Rural Northern Ireland".

(h) The applicant asserts that the procedure followed by the Commissioner was unfair and contrary to natural justice. It is his belief that if he had been able to adduce evidence of the similarity between the land which lies to the east of No 34 Knockmore Road and the proposed development site he could have demonstrated to the commissioner that there was no prejudice to any local or adjoining owner and that the land in the area was extremely uniform.

(i) Mr Larkin QC, who appeared on behalf of the proposed respondent, argued that this was purely a matter of jurisdiction. The error on the map was perfectly clear and placed a site which was manifestly in the south east of the area in the east of the area. He argued that it did not comply with the requirement under Article 21 of the 1991 Order and that the error was unquestionably seriously misleading.

(j) He drew my attention, as did Mr McLaughlin on behalf of the applicant, to a number of authorities namely:

(i) Morelli v DOE (NI) [1976] NI 159;

(ii) Thallon v DOE (NI) [1982] NI 26("Thallon's case");

(iii) Re Foster's Application for Judicial Review [2004] NI 248.

In essence Mr Larkin submitted that irrespective of any procedural point raised by Mr McLaughlin, the fact of the matter was that the Planning Appeals Commission was plainly right in her conclusion and that her decision was unanswerable.

(k) As a further argument, Mr Larkin submitted that the applicant had failed to bring proceedings promptly and that no attempt had been made to satisfy the court that there was a good reason for so doing. The impugned decision had been made on 22 November 2006 and the application had not been brought before the court until 19 February 2007.

(l) In response to the delay argument, Mr McLaughlin submitted the applicant that any delay in the matter had been occasioned by the applicant properly seeking legal advice in what was a complex area of planning law. He denied that anyone had been occasioned prejudice as a result.

[3] **CONCLUSIONS**

(1) Delay

Mr Larkin was in my view correct to urge me to deal with the question of delay at the leave stage. It is at this stage that the court may refuse leave on the ground of delay unless it considers there is good reason for extending the period. Indeed at this stage even if there is such good reason, the court may still refuse leave if in its opinion the granting of the remedy sought would be likely to cause hardship or prejudice. I respectfully adopt what Lord Diplock said in R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Limited [1982] AC 617 at 643 a-b:

> "The need for leave to start proceedings for remedies in public law is not new. … Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived".

Hence I consider it is appropriate to give a full hearing to issues of delay even at the leave stage.

(2) An application for permission to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made pursuant to Order 53 rule 4. It is for the applicant to establish that there is good reason to extend time (see R v Warwickshire County Council ex parte Collymore [1995] ELR 217 at 228 f-g).

(3) For the removal of doubt, I make it clear that an application for permission to apply for judicial review must not only be made promptly, but even where an application is made within three months it may still be rejected where, for example, finality is important (see R v Bath Council ex parte Crombie [1995] COD 283). In particular I respectfully adopt the comments by Simon Brown LJ in R v N West Leicestershire District Council ex parte Moses [2000] Env LR that:

> "The rule that any application for judicial review must be made promptly applies with particular force when seeking to challenge the grant of planning permission by a party".

(4) In approaching this matter I regard a good overview of the principles to be applied in delay applications is found in R v Secretary of State for Trade and Industry ex parte Greenpeace Limited [2000] Enb LR 221 where Kay J posed three criteria:

> "(1) Is there reasonable objective excuse for applying late?
>
> (2) What, if any, is the damage in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?
>
> (3) In any event, does the public interest require that the application should be permitted to proceed?"

(5) I have concluded that this application was not promptly brought notwithstanding that three months have not yet expired but that there was good reason for time being extended in the following circumstances:

(a) The search for legal advice in difficult and complicated areas of planning can often generate delay. Whilst more expedition might well have been engendered in this instance, nonetheless the acquisition of legal advice before proceeding further was a prudent decision and one that in my view justified some measure of delay.

(b) I see no prejudice to third parties or good administration in this instance. No one has acted on the refusal and the appeal has not been upheld.

(c) The issue of a decision being taken in the absence of the parties and without the parties having been afforded an opportunity to address the decision maker on the point that determined the outcome is a matter of public interest.

(6) Even if an applicant can make out a good reason for obtaining permission to extend time, the court retains an overriding or residual discretion and may still refuse permission for example where the public interest does not require the application to proceed. Moreover if the substantive merits are poor the applicant may be refused at the initial stage or later. For reasons which I will shortly set out, I do not consider that the substantive merits are poor or that the public interest does not require the application to proceed. I therefore extend the time for this application to be made.

(7) On the substantive issue as to whether or not the applicant has an arguable case , I consider that the gravamen of the legal issue in this case is captured by Hutton J (as he then was) in Thallon's case where, in the context of the similarly worded Planning (NI) Order 1972, and dealing with the misleading advertisement the Judge said at page 26:

> "The purpose of a notice published pursuant to Article 15(a) (*of the 1972 Order*) is to give interested members of the public proper notice of the planning application, and this purpose is not carried out if the notice is seriously misleading as to the nature of the development proposed, whether or not the planning application itself contains the inaccuracy which is published in the notes. I therefore hold that because the notice which the Department purported to publish pursuant to Article 15(a) was seriously misleading, the planning permission of 1977 was invalid. I have held the notice in this case to be seriously misleading; I consider that some minor inaccuracy in a notice which does not mislead the public

> would not render the notice a nullity and the subsequent permission invalid …".

(8) The issue in this case therefore to be argued is whether the error in the map was seriously misleading and would frustrate the purpose of the contents of Article 21 or whether it could be characterised as a minor inaccuracy which did not mislead the public. Should the applicant have been permitted the raise the arguments before the Commissioner which have been raised before me? In this context I am mindful of the views set out by Bingham LJ (as he then was) in an article "Should Public Law Remedies Be Discretionary" [1991] PL 64 at 72 where he said:

> "(1) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could or would have put if he had had the chance.
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> (2) As memorably pointed out by Megarry J in John v Ross [1970] Ch 345, 402, experience shows that that which is confidently expected is by no means always that which happens.
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> (3) It is generally desirable that the decision-maker should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
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> (4) In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.
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> (5) This is a field in which appearances are generally thought to matter.
>
> (6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."

(9) In all the circumstances I have come to the conclusion that whatever the strength or weaknesses of the matters that have been raised above, the

applicant has made out an arguable case that he was not afforded a fair hearing on this occasion and I therefore grant leave in this case. It is superfluous to add that this is no indication of how strong this argument will be at the full hearing and the grant of leave is no indication of the eventual outcome.