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Judgment: approved by the Court for handing down | *Delivered:* **1/10/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Central Craigavon's Application

AN APPLICATION FOR JUDICIAL REVIEW BY CENTRAL CRAIGAVON LIMITED

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TREACY J

Introduction

[1] The applicant, Central Craigavon Ltd ("CCL") challenges two statements of what is contended was new planning policy made in the Northern Ireland Assembly by the former Minister of the Environment, Sammy Wilson ("the respondent").

[2] Mr Larkin QC appeared with Mr Schofield on behalf of the applicant. Mr Maguire QC appeared with Mr McMillan on behalf of the respondent. Mr Orbinson QC appeared on behalf of the intervener, CALNI. Mr Beattie QC and Ms Comerton appeared on behalf of the intervener, Rose Energy.

Background

[3] The first impugned statement was made on 11 May 2009 in relation to the weight to be given to the economic benefits of development proposals ("the economic statement"). The second was made on 16 June 2009 in relation to major economic development proposals and the development plan scheme ("the prematurity statement").

[4] The present application arises in the context of the as yet undetermined application by Sprucefield Centre Limited ("SCL") for planning permission for a retail development at Sprucefield.

[5] The applicant is a limited liability company and the landlord of Rushmere Shopping Centre in Craigavon ("Rushmere"). The applicant is concerned that the statements made by the respondent will assist SCL in obtaining planning permission for the retail development at Sprucefield - a development which, the applicant submits, would have serious effects on Rushmere.

[6] The applicant is plainly suspicious about the timing of the two statements shortly before the (aborted) public inquiry into the Sprucefield application was due to be heard – statements which the applicant asserts appear designed to increase the weight to be given to economic benefits of proposals (one of the main factors said to be in favour of the Sprucefield development) and a further statement which appears designed to decrease the weight to be given to prematurity considerations (one of the main factors said to be against the Sprucefield Development).

[7] Leave to intervene was granted to CALNI, a local residents group objecting to what they characterised in their written submissions as a major and highly controversial planning application for a poultry waste incinerator at Glenavy Co Antrim submitted by Rose Energy Ltd (leave, which was effectively unopposed, was recently granted on the papers to CALNI in respect of that application). In setting out their reasons for intervention they claimed that it was evident from the submissions made by Rose Energy in respect of their application that economic justification for the development will be a significant consideration in the determination of the proposal and that Rose Energy considers the proposal to bring significant economic benefits. CALNI sought to support the applicant in respect of their grounds of challenge. Rose Energy sought to support the respondent.

[8] Whereas the respondent claims that the economic statement does not represent new planning policy and that the prematurity statement is merely offering "clarification" the applicant's primary case is that the respondent was making new policy, that he did so unlawfully and that these statements should be quashed.

The Grounds on which Relief is Sought

[9] The grounds set out in the Order 53 Statement on which relief is sought are:

(a) The applicant has a legitimate expectation that the economic statement will not be treated as a material consideration in the development control process since the Respondent expressly disavowed that he was making new planning policy.

(b) Insofar as the Respondent was making new planning policy, he did so unlawfully by virtue of:

(i) His failure to appreciate that he was making new policy in the economic statement (evidenced by his express disavowal that he was doing so), so that he misdirected himself and/or erred in law.

(ii) His failure to consult on each new policy, adequately or at all.

(iii) His adoption of each new policy in breach of directly effective provisions of Directive 2001/42/EC and/or the requirements of regulation 11 and/or regulation 12 of the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004.

(iv) His adoption of each new policy which was significant and/or controversial and/or cut across the responsibilities of two or more Ministers and/or required a common Executive position without Executive approval as required by virtue of sections 20(3) and/or (4), 29A(1) and (10) of the Northern Ireland Act (as amended)."

Legislative Background

[10] Article 3(1) of the Planning (Northern Ireland) Order 1991 ("the 1991 Order") states:

> **"The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development".**

[11] Article 25(1) of the 1991 Order provides:

> **"Determination of planning applications**
> **25.—(1) Subject to this Part, where an application is made to the Department for planning permission, the Department, in dealing with the application, *shall have regard* to the development plan, so far as material to the application, and to *any other material considerations*, and—**
> **(a) subject to Articles 34 and 35, may grant planning permission, either unconditionally or subject to such conditions as it thinks fit; or**

(b) may refuse planning permission."
[Emphasis added]

Policy Background

[12] Planning policy is a material consideration in determining applications for planning permission thus, for example, para.33 of Planning Policy Statement 1: General Principles states:

> **"33. Planning Policy Statements set out the policies of the Department on particular aspects of land-use planning and apply to the whole of Northern Ireland. Their contents will be taken into account in preparing development plans and are also material to decisions on individual planning applications and appeals. ...".**

And para.50 of the same document provides:

> **"The Department's planning policy publications are material considerations and due regard will be had to them."**

[13] Furthermore, the planning services have publicly committed itself to consultation before introducing new planning policies thus para.9 of Planning Policy Statement 1 states:

> **"… The Planning Service will … consult widely before introducing new planning policies. …"**

[14] The Encyclopaedia of Planning Law and Practice (Sweet & Maxwell, Vol.2, Section P70.36 makes it clear that ministerial statements can amount to planning policy:

> **"... the policies promulgated by [the Minister] provide a framework for decision making by him, by his inspectors and by local planning authorities in accordance with the principles discussed above. His policies filter through to local planning authorities both through the forward planning system and through development control. Policy is communicated to local planning authorities principally by way of circulars [in Northern Ireland, Planning Policy Statements] but also by way of ministerial statements, White Papers, appeal decisions and other means ...**

> **A policy need not be promulgated in any particular fashion for it to be taken into account ...**
>
> > **... if the considerations comprised in the policy are material to the determination of the planning application, then they must, irrespective of whether they are set out in a form other than a statutory development plan, be taken into account."**

[15] The economic statement was made by the respondent on 11 May 2009 to the Assembly. The prematurity statement was made on 16 June 2009. These statements, so far as material, are set out below as well as some of the questions and answers which they provoked.

The Economic Statement - 11 May 2009

[16] The respondent was addressing the Assembly when he said:

> **"… I wish to make a statement to underline the importance that I attach to ensuring that the planning system contributes to the growth of our economy, especially at this difficult time.**
>
> **The Executive's Programme for Government makes economic growth and wealth creation our top priority, to be taken forward in a fair and sustainable manner. That strategic priority is echoed as a key theme that underlies our planning system, which seeks to deliver economic development while protecting and enhancing the environment. As members will know, over the last few years there has been widespread pressure for the planning system to be reformed. We all recognise that the system needs to adapt more flexibly and more quickly to the many challenges that we face, particularly in the current economic climate. …**

He continued:

> **That brings me to the main point of the statement. I want to give decision-makers the confidence and support to make judgments that will give *greater weight* to economic considerations where it is appropriate to do so. I want to give clarity and to leave no one in any doubt about how to deal with economic considerations. *That is not a change of***

> *policy.* **The purpose of this statement is to provide certainty and to give guidance so that the planning system can play a positive role in encouraging investment and kick-starting regeneration. To that end, the following paragraph clarifies the weight that should be accorded to economic aspects in the making of planning decisions.**
>
> **…In cases where the economic benefits of a proposal are significant, *substantial weight* *shall* be afforded to them in the determination of the planning application. …"**
> [Emphasis added]

[17] Having made his statement the Respondent then engaged in a process of questions and answers. In response to the first question from Mr McGlone, the Chairman of the Committee for the Environment, who asked:

> **"Will the Minister provide a bit of clarity on his Statement's anticipated impact on the interpretation of policy if, in fact, it is not a change of Policy?"**

The Respondent responded:

> **"…** ***This is not a change of policy. If it was a change of policy, it would have required widespread consultation*** **etc. This is simply an attempt by me, as Minister of the Environment, to translate a priority of the Executive that I want to see in the planning system down to those officers who have to take difficult decisions on the ground.**
>
> **It means that, if planning officers, in weighing up all of those considerations in the circumstances that I outlined, have to give greater weight to an economic consideration, they can be confident that they are reflecting the wishes of the democratically elected Assembly, the Executive and the Minister. …**
> [Emphasis added]

[18] In response to a question from Mr Weir who asked "Will he outline the practical economic benefits of the direction his Department has taken?" the respondent stated:

> **"… That will be particularly true of cases that are finely balance. In future, when planning officers**

> **are wondering how to balance the environmental, social and economic considerations, they will have the full weight of the Executive and ministerial priority behind them, which will be helpful. …"**

[19] Mr Ford asked:

> **"The Minister stated that he proposes to give greater weight to economic considerations, what does this mean? Does it mean that greater weight than previously will be given to economic considerations? Does it mean that greater weight will be given to economic considerations than to the social and environmental considerations that planners are also obliged to take into account?**

[20] The Respondent replied by stating:

> **"I said that *greater weight <u>will</u> be attached* to economic considerations. I believe that, in the past, I have made my view clear that when it comes to material considerations, sometimes economic considerations have not been given as much weight as I would have liked. ...**
>
> **Therefore, it is partly in response to my gut feeling, partly in response to representations that other Members have made on the issue, and partly in response to the people in the development industry that want to clarify the weight that must be given to economic considerations. *Greater weight means simply that: in circumstances where there is a balance of arguments and where it is appropriate, greater weight <u>must</u> be given to economic considerations."***
> [Emphasis added]

[21] In response to a question from Mr Kennedy the Respondent said:

> **"I will correct the Member, as I do not want it put on record that this is a new policy. It is not a new policy; it is guidance on, and clarification of, existing policy."**

The Prematurity Statement – 16 June 2009

[22] On the Planning Service website it states that this Statement instructs officials that prematurity should only be employed as a reason for refusal in cases where the Department can plainly demonstrate that an approval of planning permission would clearly prejudice or undermine the Development Plan process or key elements of the plan itself.

[23] In the Statement the respondent said:

> **"On 11 May 2009 I made a statement to the Assembly on the weight to be accorded to economic aspects of development proposals. …**
> **The primary purpose of my earlier statement was to instil confidence in decision-makers to make judgments that give greater weight to economic considerations where it is appropriate to do so while continuing to protect and enhance the environment. I wanted to ensure that the planning system would play a full and positive role in encouraging investment.**
> **…**
> **I also have concerns about prospective significant economic development proposals being frustrated through the inappropriate application of prematurity considerations in places where new draft plans have been issued but not yet adopted. I appreciate that prematurity is clearly an important consideration in areas in which considerable work has been undertaken to produce new draft plans. However, it is only one of a number of factors to be weighed by the Department in reaching its decision on individual proposals. Other matters include the planning history of a site, distinguishing factors and administrative fairness must also be considered.**
>
> **It is clear that, immediately following the publication of the joint ministerial statement in January 2005, officials made extensive use of prematurity considerations in determining proposals, which often resulted in a refusal of planning permission. Since that time, however, more thought has been given to the approach that is adopted. As a result, it has been considerably refined.**
>
> **To reinforce that position further, I am instructing officials today that prematurity should be**

> **employed as a reason of refusal *only* in cases in which the Department can *demonstrate clearly than an approval of planning permission would prejudice or undermine the development plan process or key elements of the plan itself.* I am also pleased to advise that such cases have diminished, as, thankfully, most draft area plans are now progressing well towards their ultimate adoption.**
>
> **I am confident that the *clarification* that I am providing today, *together with* my statement of 11 May, will ensure that there is sufficient flexibility in the planning system to deal effectively with significant economic development opportunities that may arise. Alongside the determination of the Planning Service to process all proposals in a speedy and efficient manner, that should ensure a positive contribution to our economic recovery."**
> [Emphasis added]

[24] In response to a question from Mr McGlone the Respondent said:

> **"… The Member asked about major proposals that have been turned down already. If a decision has not been made on a proposal or has been deferred or if a decision is in the pipeline and it has been indicated that the decision would be against it on the grounds of prematurity, *then, of course, my statement will be used by those who make planning decisions as a material consideration in dealing with those applications.***
>
> **… The Committee Chairperson will know that decisions to refuse that have been issued cannot be looked at, but individuals may see my statement as a *signal* to review their proposals and make new applications."**
> [Emphasis added]

[25] In response to a question from Mr Weir the respondent said:

> **"My statement is not designed to speed up the process; it is designed to allow applications that are being refused or are going to be refused by the planning system to be reconsidered, with *less weight* being given to prematurity. …"**
> [Emphasis added]

[26] The respondent went on to say in his statement:

> **"… As I said in my statement, one way in which we might free up some decisions is by giving *less weight* to prematurity considerations where land designations have been made; where there, perhaps, has been some challenge; and where we would have awaited the outcome of the development plan process. Planners can now make a decision and will be able to give greater weight to economic considerations, except in the situations that I described. If such decisions would undermine the area plan totally, obviously the weight will lie in not progressing with the planning application. However, where planners deem that a decision will not undermine or have a significant impact on the plan, *less weight can be given to prematurity than has been the case since the joint ministerial statement of 2005.*"**
> [Emphasis added]

The Parties Submissions

[27] The **applicant** contends, in summary, that:

(a) As the respondent says the statements are not planning policy they should not be taken into account in the planning process;

(b) If the respondent was incorrect in his assertion that the statements are not planning policy, or not new planning policy, and they are properly to be viewed as such, they fall to be quashed because of that error of law;

(c) If the Statements were in fact new planning policy, they also fall to be quashed by virtue of the respondent's failure to consult in relation to them or to subject them to necessary environmental assessment;

(d) Whatever the legal status of the statements, if they were to have any practical effect (as the respondent plainly intended), they were significant, controversial and/or cross-cutting matters which required Executive approval, which was not obtained.

[28] The **respondent** submitted that the statements did not constitute the formulation of new policy but rather constituted the provision of guidance within an existing and well established policy framework. In the case of the

economic statement this was, they said, at most a "refinement" of weight but that how it should be balanced with other material factors remained a matter for individual decision makers and that different decision makers may legitimately differ as to the weight to be attached to a relevant matter. Indeed, the same decision maker may differ in his approach to the question of weight as circumstances change without this amounting to a change in policy. Accordingly, without the matter being characterised as a change of policy the respondent was entitled to make his view known to the Assembly while at the same time informing those who need to know of it. It was additionally contended that the prematurity statement merely reflected consolidation of existing practice and betokened no change of policy. The effect of the prematurity statement was simply to alert the Assembly and the public to this fact and to put on record what was already the established approach. The clear intention of the respondent was to ensure that Prematurity was being applied appropriately and given appropriate weight but his Statement to this effect was not establishing new ground and certainly was not establishing new policy.

[29] The respondent acknowledged that consultation is a requirement of fairness in the context of establishing the policy framework. Its purpose is to provide those affected by the policy framework with an opportunity to make representations and to contribute to policy development. However, such consultation was not required in respect of guidance to decision makers on matters which are, in accordance with policy, properly within their domain. Consequently there is a line to be drawn between when consultation is required and when it is not. It cannot be the case, he submitted, that in an efficient system of government every adjustment within a policy framework, every consolidation of existing practice within that framework or every attempt to guide discretion likewise must be consulted upon. On a proper analysis the making of these Ministerial Statements, it was submitted, fell on the non consultation side of the line.

Discussion

[30] The substantive content of planning policy, provided it is lawful, is a matter for the appropriate authorities and not the Court. So that there is no inadvertent misunderstanding as to the Court's role I emphasise that the Court is not concerned with the *merits* of this or that planning policy. The respondent was entitled in principle to introduce policy requiring particular weight to be given, for example, to economic considerations in the determination of planning applications – provided it was done lawfully.

[31] If, in this case, the statements represented a substantive change in planning policy the respondent misdirected himself and, in consequence, unlawfully failed to consult. The requirement to consult is explicitly recognised in para.9 of PPS1 set out above and the respondent did not

challenge the requirement for consultation if the statements represented the formulation of planning policy.

[32] But the respondent maintained that he was not changing policy. Of course, whether the impugned statements did effect or represent a change of policy must be assessed on the substance of the statements themselves and not on how they are described by the respondent.

[33] I do not accept that the statements were mere guidance. It went beyond mere advice or information aimed at resolving a difficulty. They were plainly intended, particularly in the case of the economic statement, to bring about a material change in the way planning applications were determined and to influence the outcome. Otherwise there would have been no point in making the statements. It was plainly envisaged that applications that would have been determined one way before the statements were made would (or might), on the same facts, now be determined differently in light of the new policy introduced by the statements. This is an inescapable inference when one considers, in the case of the economic statement, that it required decision makers to give **"greater"** or **"substantial weight"** to economic considerations than was previously the case under existing policy.

[34] Some Assembly members appear to have considered the economic statement to be new policy (see for example para.17 above). The Planning Service, contrary to the respondents case (in relation to the economic statement), also seems to accept that they are policy since it has published them in the policy and plans section of its website under the heading of "other *policy* publications" along with other ministerial statements, with the commentary "Ministerial Statements are an expression of Government *policy*".

[35] Notwithstanding the respondent's express assertion that the economic statement was not a change in policy and that the prematurity statement was "clarification" it is manifest that the statements bring about and are designed to bring about a substantive change in the manner in which planning control decisions are taken. As the applicant put it they each usher in a new policy direction.

[36] The respondent recognised in relation to the economic statement that "*if* it was a change of policy, it would have *required* widespread consultation etc". The matters addressed in the statements are plainly controversial as is evidenced perhaps not only by this judicial review but also by the intervention of CALNI and Rose Energy. Together the statements have the potential to and may be intended to exercise a significant effect on the planning system and the determination of major planning applications. Provided this objective is lawfully achieved the courts have no role. Had the respondent consulted in respect of these statements it is reasonable to infer that there would have been a variety of views expressed. In accordance with

his public law obligations of adequate consultation he would have had to have taken into account these views in formulating planning policy.

[37] The applicant had (in common with others) a legitimate expectation of consultation on policy of this nature arising, inter alia, from the clear and unambiguous representation by the respondent's department to the Northern Ireland public at large that it would consult on new planning policy as per para.9 of PPS1. No such consultation took place and the statements must therefore be quashed.

Conclusion

[38] In the Court's judgment the respondent misdirected himself in concluding that the statements did not represent a change in planning policy. He also, in consequence, of that misdirection, failed to consult which is accepted would have been required if, as I have held to be the case, these statements amounted to a change of policy.

[39] In the light of the above conclusions I do not consider it necessary to deal with the applicant's further submissions that the respondent's statements fall to be quashed by virtue of the alleged failure to obtain the necessary environmental assessment contrary to the relevant EC Directive 2001/42 EC and/or the requirements of Reg11 and/or Reg12 of the Environmental Assessment of Plans and Programmes Regulations (NI) 2004. Nor do I propose to deal with the applicant's interesting further submission that the legal status of the statements required executive approval which was not obtained. I note that at para.9 of Ms Smith's memo of 5 May 2009 to the respondent that it is asserted that "as this statement does not change policy it does not need Executive agreement". It may perhaps be inferred therefore that if the true nature of the statements as altering planning policy had been recognised that such agreement would have in fact been sought.