Neutral Citation No. [2008] NIQB 47

Ref: **GIL7151**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **29/04/2008**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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RE CENTRAL CRAIGAVON LIMITED FOR JUDICIAL REVIEW

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GILLEN J

Application

[1] The proceedings in this matter commenced on foot of a challenge by Central Craigavon Limited ("the applicant") to quash a decision of the Department of the Environment (Planning Service) ("the Respondent") made on or about 23 August 2006. This decision determined that draft Planning Policy Statement 5("PPS5") was a material consideration which it was bound to take into account in the re-determination of an application by Sprucefield Centre Limited ("SCL") for planning permission for a retail development at Sprucefield regional shopping centre. The grounds upon which that relief was sought were that draft PPS5 was ultra vires the powers of the Department of Regional Development (DRD) by virtue of the Strategic Planning (Northern Ireland) Order 1999, the legislative basis invoked by the DRD. Consequently it was argued on behalf of the applicant that the respondent had erred in law in considering that it was a material consideration which it was bound to take into account in the re-determination of the SCL application .Leave was granted on 13th September 2006.

[2] The original statement filed pursuant to Order 53 Rule 3(2)(a) of the Rules of the Supreme Court (Northern Ireland) 1980 was subsequently amended to include an application to quash a decision of the Minister David Cairns made on or about 23 November 2007. The Minister had indicated his intention, on behalf of the Respondent, to grant planning permission for the retail development at Sprucefield regional shopping centre in the course of the re-determination of the SCL application. The applicant sought also to quash any notice of opinion to grant planning permission issued by the Department as a consequence of the Ministerial decision. The grounds upon

which the applicant relied for the amended statement included that the Minister had failed to discharge his duty of enquiry and/or had failed to take relevant considerations into account and had acted in a procedurally unfair manner. It was further contended that the Minister's decisions were Wednesbury irrational/unreasonable.

[3] It is common case that part of the proceedings at least have been rendered academic by virtue of the fact that the Sprucefield Centre Limited application has now been withdrawn since 24 July 2007.

[4] This judicial review application had been conjoined with three new judicial review applications by other parties , the common thread being the challenge to the Minister's Sprucefield re-determination decision. Following an oral inter-partes hearing before Girvan LJ certain of the proposed grounds of challenge were refused and a composite Order 53 statement on behalf of all applications was generated.

[5] In the wake of SCL withdrawing its planning application, on 7 September 2007 the court acceded to the application by the Respondent that the three new applications for judicial review should be dismissed.

[6] The outstanding issue is whether the current application should not also be dismissed in light of the withdrawal of the Sprucefield planning application, the dismissal on 7 September 2007 of the other three related applications for judicial review and the principles set out in R v Secretary of State for the Home Department, ex parte Salem (1999) 1 AC 450 ("the Salem case").

The applicant's case

[7] Mr Larkin QC, who appeared on behalf of the applicant with Mr Scoffield, in the course of a well marshalled skeleton argument augmented by oral submissions made the following points.

(i) First, that a key objective in the application had been to achieve a situation whereby indisputably draft PPS5 would not apply to any further planning applications for future development at Sprucefield. This had clearly not been achieved by virtue of the withdrawal of SCL's application.

(ii) This entire case had been seen through the prism of PPS5. Counsel invoked a letter of 7 August 2006 from the applicant's solicitor to the Planning Service which had outlined the applicant's clear contention that the Department for Regional Development was acting ultra vires in making draft PPS5 and that draft PPS5 had failed to comply with the provisions of the Strategic Environmental Assessment Regulations.

(iii) There did not need to be an extant planning application with reference to Sprucefield in order to give the applicant status. The applicant operates a shopping centre in Craigavon and any applicable planning policy is a matter of grave concern to it. Mr Larkin instanced R v Secretary of State for Foreign Affairs, ex parte World Development Movement Limited (1995) 1 AER 611 and Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety (2005) NI 188("the Family Planning case") to underline his proposition that the court ought not to decline jurisdiction to hear an application in this case where the applicant was a responsible and concerned body seeking to challenge the validity of Government action.

[8] Counsel reminded me of my decision in Re Omagh District Council for Judicial Review (unreported) GILC5915 delivered 25 October 2007("the Omagh DC decision ") where I had determined that PPS14 was ultra vires the powers of the DRD. Whilst the respondent had not appealed this decision(which could have a resonance for the validity of PPS5), nonetheless draft PPS5 had been neither quashed nor withdrawn and therefore remains in force. Accordingly Mr Larkin argued that these proceedings are not academic. He advanced the submission that there is good reason in the public interest for the case being determined to enable the court to guide the Respondent and persons such as the applicant as to the applicability and lawfulness of PPS5 in the wake of the Omagh DC decision and generally.

The respondent's case

[9] Mr McCloskey QC, who appeared on behalf of the respondent with Mr McMillen, in an equally incisive and skilfully presented skeleton argument augmented by oral submissions, made the following points:

[10] The relief sought in this case was clearly related to the application by SCL at Sprucefield. It was a commercially motivated application which, far from being mounted to deal with matters of general application, was focused entirely on the application at Sprucefield. Since this specific application is now extinguished since July 2007 the relief sought under Order 53 is now moot and the Salem principles should apply.

[11] Mr McCloskey asserted that there was no public interest in continuing this application in the absence of a specific planning application to attach to it.

[12] The applicant had no status to bring a freestanding challenge to PPS5 unconnected to any specific application. No positive attempt has been made to draft or articulate an amendment to the current proceedings to meet the thrust of case now being made.

Conclusions

[13] I commence by outlining the well known principles set out in Salem. In that case Lord Slyn said

> "… I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. … The discretion to hear disputes, even in the area of public law must however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interests for so doing, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[14] I am also conscious of the views expressed by Munby J in R (Smeaton) v Secretary of State for Health (2002) 2 FLR 146 at paragraph 22 where he said that the constitutional function of courts is to:

> "Resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important to the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires."

[15] I am satisfied in this case that the thrust of the Order 53 statement has always been to deal with a specific application made by SCL for the John Lewis scheme at Sprucefield. The relief sought refers specifically to this scheme. Even the correspondence relied on by Mr Larkin of August 2006 has always been headed "Planning Application at Sprucefield by Sprucefield Centre Limited". This application has clearly not been instituted as a freestanding assault on PPS5 but rather as a closely argued enquiry into the application by SCL. That the grounds for mounting that attack on the SCL application were the alleged ultra vires aspects of PPS5 does not in my view detract from the essential specific nature of this application. Without the

specific application by SCL this judicial review would never have been mounted. That in itself is sufficient reason for me to decline to hear this case on the basis that the purpose of the proceedings has now been rendered academic and the present argument is a belated attempt to widen the ambit of an already spent application .

[16] The application by SCL was withdrawn in July 2007. That was four months before this application came before me . No attempt was made to apply to amend the proceedings in a manner that would have properly brought before this court the issue now being raised. I am not prepared to accede to the invocation of this broader aspect of the case in the absence of the pleadings being appropriately amended through the proper legal process and channels .

[17] Thirdly I am not satisfied that there is good reason in the public interest for debating the legality of PPS5 in this case. I do not know if a further planning application is to be made for this site which will invoke the use of PPS5 by the respondent. Should such an eventuality arise, then that will be the appropriate stage at which the lawfulness of PPS5 can be considered. To consider that topic in the absence of a specific instance would in my view be wasteful of the time and resources of a busy court and wasteful of the costs which would accrue. As was indicated by the Northern Ireland Court of Appeal in Re McConnell's Application (2000) NIJB 116, per Carswell LCJ at p. 120D-F, it is not the function of the courts to give advisory opinions to public bodies absent the appearance that the same situation was likely to occur frequently or that the body concerned, in this instance the Department, would act in a similar fashion.

[18] Finally, in any event I remain unconvinced that the applicant has the appropriate status to bring a freestanding application to attack PPS5 absent a specific planning application which it wishes to challenge. The question of standing has been described as being a mixed question of fact and law, to be decided on legal principles and as being a question of fact and degree. (See IRC v National Federation of Self-Employed and Small Business (1982) AC 617 at 631C per Lord Wilberforce). There are a wide range of factors to be taken into account in deciding whether there is a sufficient interest. What will always be of importance however is to pay close attention to the factual context and to the precise content of the remedy sought. (See *Supperstone on Judicial Review* 3rd Edition at paragraph 17.6.4). The court must focus on the specific circumstances of the individual case. I am not satisfied that because this applicant owns shopping interests in Craigavon, it therefore has a general interest in PPS5 in vacuuo without a specific case to attract its attention. There is a clear distinction between this case and for example the applicant in the Family Planning Association case. That was an Association which provided a service for woman faced with unwanted pregnancies The Health and Personal Social Services (Northern Ireland) Order 1972 which was the

subject of the proceedings potentially affected the services they provided each and every day. There is no such close connection between this applicant and PPS5 as existed in the Family Planning Association case. I do not believe that the applicant is so directly affected by PPS5, absent an extant planning application where PPS5 has been invoked, that it has the status to bring proceedings of a freestanding nature to attack it.

[19] In all the circumstances therefore I have come to the conclusion that I must refuse the application in this case.