

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 38663/08
William YOUNG
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 15 January 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Vincent A. De Gaetano,
Paul Mahoney,
Faris Vehabović, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 21 June 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr William Young, is a British national, who was born in 1961 and lives in Greyabbey. His application was lodged on 21 June 2008. He was represented before the Court by Mr Jack Quigley of Madden & Finucane, a solicitor practising in Belfast.

The United Kingdom Government ("the Government") were represented by their Agent, Mr Derek Walton, Foreign and Commonwealth Office.

A. The circumstances of the case

1. The facts of the case, as submitted by the parties, may be summarised as follows.

2. On 2 August 2000 outline planning permission was granted for the applicant to construct a house. On 23 December 2000 the applicant applied for full planning permission. When no decision was issued within nine months the application was deemed to have been refused. The applicant lodged an appeal to the Planning Appeals Commission which granted full planning permission, subject to a number of conditions, on 4 March 2002. Commissioner A was one of the Commissioners who voted in favour of allowing the appeal.

3. The applicant began construction in May 2003. On 22 July 2003 the Planning Service for Northern Ireland issued a letter alleging that the applicant had failed to comply with the conditions of the planning permission, in particular he had built the house in a different, more elevated, position. An enforcement notice was issued on 9 January 2004, requiring the removal of the house. The applicant did not seek to appeal against the enforcement notice but instead sought retrospective planning permission for the house as constructed. The Planning Service again failed to determine his application within the statutory time-limit. On 14 March 2005 the applicant brought a "non-determination appeal" to the Planning Appeals Commission.

4. At the time in question, there were 17 full-time Commissioners and a quorum of not less than four was needed to decide an appeal. Decisions were made by a majority vote of the Commissioners present, after they had considered a report prepared by the reporting Commissioner. In the applicant's case, the six Commissioners present at the meeting on 5 September 2005 voted to accept the recommendation in reporting Commissioner F's report, that the appeal be dismissed ("the first decision"). Commissioner A was one of the Commissioners recorded as having been present at this meeting. The decision was communicated to the applicant on 6 September 2005.

5. The applicant wrote to the Planning Appeals Commission on 11 September 2005, raising a number of complaints about the decision. In its reply, dated 1 November 2005, the Commission accepted that there had been certain irregularities in the way Commissioner F had established his report; for example, he had sought further background information from the Department of the Environment and visited other, comparable, properties in the area, without informing the other Commissioners or the parties to the appeal (namely, the applicant and the Planning Service) or disclosing the information to the parties. Although the Commission acknowledged that a breach of its procedures had occurred, there was no mechanism for it to quash or review its decision. It therefore advised the applicant that he should apply for judicial review. The applicant made the application, which

the Commission did not contest, leading to the making of a court order on 16 December 2005, quashing the Commission's first decision, with the Commission's consent.

6. On 14 March 2006 the Commission informed the applicant that the rehearing of the appeal would proceed under the informal hearing procedure. On 21 March 2006 the applicant informed the Commission that he did not intend to participate in the appeal due to various financial and personal problems. On 31 March 2006 the Commission wrote to the applicant outlining the procedures and timescales for submitting representations in relation to the appeal. The "written representation procedure without accompanied site visit" procedure was adopted in view of the applicant's intention not to participate in the proceedings. On 13 June 2006 the Commission wrote to the applicant advising him that it intended to rely on his original statement of case and submissions. On 18 June 2006 the applicant again informed the Commission that he did not intend to participate in the appeal.

7. For the purposes of this second appeal process, Commissioner A acted as reporting Commissioner. He had access to Commissioner F's earlier report, together with the file including the background information from the Department of the Environment which had not been disclosed to the parties during the first appeal process, leading to the quashing of the first decision. The case file was also accessible to the applicant, had he chosen to participate in the second appeal process and consult the file. On 10 July 2006 the applicant's appeal was refused by four Commissioners ("the second decision").

8. The applicant sought judicial review of the second decision, on the grounds *inter alia* that Commissioner A's involvement in both the first and second appeal processes was unfair and contrary to Article 6 of the Convention, because of his access to the case file including the previously undisclosed material and because of the appearance of bias, since he had voted in the first decision to dismiss the appeal. The applicant was initially supported by solicitors in his application for judicial review. The legal team was discharged before the hearing of the application as the applicant "no longer wished [the solicitors' firm] to act and preferred to deal with the matter on his own behalf". The judge held *inter alia* that, since the applicant also had a right of access to the case file, Commissioner's A's knowledge of the undisclosed material did not give rise to unfairness. However Commissioner A's involvement as a member of the Commission in the first decision and as the reporting Commissioner in the second procedure could create an appearance of bias in the mind of an informed and objective observer. The second decision was accordingly quashed on 30 March 2007.

9. The Commission lodged an appeal with the Court of Appeal of Northern Ireland. During this period the applicant received legal advice and retained counsel until four days before the hearing of the appeal. On

6 September 2007, in a judgment delivered by the Lord Chief Justice, Lord Kerr, the Court of Appeal found that the case for apparent bias had not been made. The court had to decide whether an informed and fair-minded observer would consider that Commissioner A had a motive or incentive to decide the appeal in a particular way because of his earlier involvement. During the first proceedings, he had contributed to a decision based on Commissioner F's report without knowing that properties had been visited and material obtained that had not been disclosed to the applicant. It was because of these irregularities, for which Commissioner A bore no responsibility, that the earlier decision was quashed. Commissioner A had not committed himself to the approach adopted by Commissioner F; 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 second appeal procedure; rather, he was responsible for preparing a report that would be subject to the scrutiny and, ultimately, the endorsement or rejection of the panel of Commissioners. Furthermore, it was relevant that there were only a limited number of Commissioners, all of whom could participate in a decision on a report by a reporting Commissioner. To require that a renewed appeal be conducted by a Commissioner who had no prior involvement with the matter would therefore present considerable logistical difficulties.

10. On 9 November 2007 the Court of Appeal refused leave to appeal to the House of Lords and on 19 May 2008 the House of Lords refused permission to appeal on the basis that the petition did not raise an arguable point of law of general public importance.

B. Relevant domestic law and practice

11. Development control in Northern Ireland is governed principally by the Planning (Northern Ireland) Order 1991 ("the 1991 Order"), which provides that, *inter alia*, "building operations ... on, in, over or under land" require planning permission from the Planning Service for Northern Ireland. In the event that an application for planning permission is refused, or conditions are imposed on any grant, an appeal lies to the Planning Appeals Commission. Article 110 of the 1991 Order governs the composition of the Planning Appeals Commission, including that its members shall be appointed by the First Minister and Deputy First Minister acting jointly. The Planning Appeals Commission's "written representation procedure without accompanied site visit" consists of the following stages:

> "**Stage 1 -** Submission of Statements of Case by all parties within four weeks of the request by the [Planning Appeals Commission].

> **Stage 2** - All submitted documents are exchanged as appropriate through the [Planning Appeals Commission] and two weeks allowed for the submission of any comments. These are copied to participating parties for information only.
>
> **Stage 3** - The case is considered by the Commissioner, who carries out a site visit and issues a decision on the appeal or reports to the [Planning Appeals Commission], normally within two weeks.
>
> **Stage 4** - If applicable, the [Planning Appeals Commission] considers the case and normally issues its decision no later than two weeks from the presentation of the report to the [Planning Appeals Commission] meeting."

12. The domestic law test with regard to apparent bias was set out by Lord Bingham in *R. v. Abdroikov* [2007] UKHL 37, as "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". He continued:

> "The analysis of the European Court in Strasbourg has been to distinguish between a subjective test, directed to identification of actual bias, and what it calls an objective test, directed to what in this country would be called apparent bias: see, for instance, *Hauschildt v. Denmark* (1989) 12 EHRR 266, 279, paras 46-49. The court has not regarded a Defendant's perceptions as decisive, but has required that his suspicions of bias be objectively justified. By this is meant that there must be some demonstrable and rational basis for what he suspects. The court has accepted that appearances are not without importance (see, for instance, *Hauschildt*, above, para 48).
>
> ... the Convention test of apparent bias is understood to be the same as the domestic test (see para 14 above), and certainly to impose no more rigorous a test ..."

COMPLAINTS

13. The applicant complained that the appeals procedure as a whole violated his rights under Articles 6 and 8 of the Convention. He submitted that the defects in the first procedure were not remedied during the second procedure and that Commissioner A's involvement in both gave rise to an appearance of bias. Moreover, the proceedings were unfair because he was denied legal aid and because he was refused permission to cross-appeal by the Court of Appeal.

THE LAW

14. The applicant complained that the appeals procedure breached his right to a fair trial by an impartial tribunal, as guaranteed by Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

He also complained that, as a result of the flawed appeals procedure, he was denied his right to respect for his home, in breach of Article 8, which states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. The applicant submitted that the issues under consideration in the first and second decisions were identical and that the mere fact of Commissioner A's involvement in both procedures was sufficient to cast doubt on his impartiality. Further evidence of bias could be derived from the personal comments made by Commissioner F in his report, to the effect that the applicant must have known he was building the house in breach of the planning conditions, which were subsequently repeated in Commissioner A's report. The applicant relied on the conclusions of the High Court that "[t]he 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." In addition, he complained that for large portions of the proceedings he was unrepresented and, in particular for the hearings of the second judicial review and the hearing in the Court of Appeal he was forced to act as a litigant-in-person, while the Planning Appeals Commission was routinely represented by counsel in court. He alleged that he was unable to obtain legal aid and complains that his applications for funding were not determined according to the set procedures of the Legal Services Commission. He complained that the lack of legal assistance contributed to his error in failing to apply to cross-appeal in time.

16. The Government submitted that the Court of Appeal in Northern Ireland examined the applicant's claim of apparent bias, applying a legal test materially similar to that applied by the Court. Its conclusion that there was no bias was unimpeachable. The applicant's complaint that Commissioner A's report was flawed because Commissioner A had had access to the file of documents relied on by Commissioner F had been rejected by the High Court, which found that the applicant had had every opportunity to participate in the process leading to the second decision, including inspecting and commenting on all the documents on the appeal file, but chose instead not to take part. The applicant failed properly to cross appeal against this decision, so that this part of the application was inadmissible for non-exhaustion. Finally, the Government pointed out that

legal aid was available for judicial review proceedings and the applicant had not explained whether he applied for legal aid or, if he was refused, on what grounds. In any event, he was represented and received legal assistance at various stages of the litigation and the lack of additional legal representation did not make the proceedings unfair, given the relative straightforwardness of the issues under consideration and the applicant's ability to represent himself. For these reasons, the Government requested that the Court declare inadmissible the applicant's complaints under Article 6 of the Convention or, alternatively, find no violation on the merits of the case.

17. The Court notes that the applicant's central complaint is that his appeal against the refusal of retrospective planning permission was not determined by an impartial tribunal. As is well established in the Court's case-law, there are two aspects to the test of impartiality under Article 6 § 1. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, §§ 90-91, ECHR 2003-VI).

18. It is not alleged in the present case that Commissioner A or any of the Commissioners who took the second decision to reject the appeal were subjectively biased. The only issue was whether there were legitimate doubts as to the impartiality of the Planning Appeals Commission, as a result of Commissioner A's involvement in the procedures which led to both the first and the second decisions. In this respect, the Court notes that Commissioner A was involved in all three of the applicant's planning appeals. He was part of the panel of Commissioners who, on 4 March 2004, allowed the appeal against the deemed refusal of planning permission. Subsequently, on 5 September 2005, he was one of the Commissioners who voted to reject the applicant's appeal against the refusal of retrospective planning permission. Commissioner A and the other Commissioners considered that appeal on the basis of a report prepared by Commissioner F. Unknown to them, the report was flawed because Commissioner F had sought information which he had not disclosed to the parties. That decision was therefore quashed with the consent of the Commission and the appeal was reconsidered by another Panel of Commissioners. The applicant was given the opportunity to participate fully in this process, including examining the case file and submitting written representations, but he chose not to for personal reasons. On this occasion, Commissioner A prepared the

report, in which he carefully considered the merits of the applicant's planning appeal and recommended that it should be refused. His report was subject to the scrutiny of other Commissioners, who had had no involvement in the first decision, and who had the power either to agree or disagree with the conclusion reached by Commissioner A. The applicant was then able to bring judicial review proceedings, which were successful at first instance but rejected on appeal. The Court of Appeal examined the applicant's complaint that the above chronology created the appearance of bias, with reference to the domestic law test for apparent bias and the Court's case-law under Article 6 § 1. It found that neither Commissioner A nor the Planning Appeals Commission had any interest in upholding the first decision, which had been quashed by consent. Had the Court of Appeal found that the Planning Appeal Commission's second decision was tainted by bias, it would have had the jurisdiction to quash the decision and remit the case for a fresh decision, as occurred following the first judicial review application brought by the applicant in November/December 2005.

19. It is not clear from the facts submitted by the parties whether Commissioner A voted in the second decision in addition to preparing the report. In any event, it is accepted that his role as reporting Commissioner was central to the decision-making process. However, the Court has held where an inferior administrative or judicial body undertakes a fresh consideration of the whole case, following the quashing of its earlier decision by a superior court, the fact that certain judges were involved in both sets of proceedings will not be sufficient in itself to cast doubt on the impartiality of the judges in question (*Thomann v. Switzerland*, 10 June 1996, § 35, *Reports of Judgments and Decisions* 1996-III; see also *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13).

20. In the present case, as the Court of Appeal found, there was nothing to suggest to an objective observer that either Commissioner A or any of the other Commissioners who took the second decision rejecting the applicant's appeal had any interest in upholding the first decision. The Commission had accepted that the procedure followed by Reporting Commissioner F had been defective, since he had visited other comparable properties in the area and obtained background information from the Department of the Environment, without disclosing this information to the parties and thereby allowing them to comment on it, and without informing his fellow Commissioners. The procedural error was clearly attributable exclusively to Commissioner F. Had the Commission had the power to quash its earlier decision and send the case back for a new appeal procedure, it would have done this. Since no such power existed, it consented to the first decision being quashed in judicial review proceedings (see paragraph 5 above). The Commission then embarked on a thorough *de novo* consideration of the issues, with the possibility for the applicant to participate, examine the evidence on the file and submit written observations. There is nothing in the

material before this Court which could lead it to interfere with the conclusions of the Court of Appeal, which examined the issues applying the same legal test of objective impartiality as this Court under Article 6 § 1. Moreover, the scrutiny of the High Court and Court of Appeal following the applicant's request for judicial review provided a further guarantee that the proceedings as a whole were fair and impartial.

21. The Court therefore concludes that in the particular circumstances of this case, including the composition and functioning of the Planning Appeals Commission, the applicant's complaint about lack of impartiality is manifestly ill-founded. As for his other complaints under Articles 6 § 1 and 8, in the light of all the material in its possession, and in so far as they fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Ineta Ziemele
President