Neutral Citation No: [2023] NICA 22	*Ref:*	**KEE12122**
	ICOS No:	**21/78576/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**21/04/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Between:

GORDON DUFF

Appellant

and

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

Respondent

and

ALEX McDONALD

Notice Party

_____

The appellant appeared as a litigant in person
Mr Kevin Morgan (instructed by Causeway Coast & Glens Borough Council Legal Services) for the Respondent
Mr Richard Shields (instructed by Shean Dickson Merrick, Solicitors) for the Notice Party

_____

Before: Keegan LCJ, Treacy LJ and Sir Paul Maguire

_____

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an application by Mr Gordon Duff ("the appellant") to appeal an order made by Mr Justice Scoffield ("the judge") on 11 February 2022 dismissing his application for leave to apply for judicial review of a decision of Causeway Coast and Glens Borough Council ("the Council"). The decision was one granting planning permission in relation to a site between 51 and 53 East Road, Drumsurn made on 26 August 2021.

[2] The judge found the appellant did not have sufficient interest in the subject matter of the proceedings for leave to be granted.

[3] Where an application for leave is refused, the refusal may be appealed to the Court of Appeal pursuant to Order 53 rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules").

[4] The core issue is therefore whether the judge was correct to refuse leave to apply for judicial review on the basis that he found the appellant did not have standing to bring the judicial review.

Background

[5] The grant of planning permission was to Mr McDonald ("the notice party") for an 'infill' dwelling in a gap between numbers 51 and 53 East Road, Drumsurn, near Limavady. An infill dwelling is a dwelling which is considered permissible under Policy CTY8 of Planning Policy Statement 21 as filling a small gap in an otherwise substantial and continuously built-up frontage in the countryside.

[6] This planning application was the third in sequence by the notice party. None of the applications have had the support of the planning officer. None of the applications were objected to. The first application was refused in 2012. The second application was withdrawn by the notice party. The third application was brought 16 days after the withdrawal.

[7] The matter was considered by a planning committee of the Council. There was a site visit in advance of the decision that was made. Ultimately, in adjudicating on the application the planning committee voted by six votes to five with one abstention not to refuse the application. This meant that the planning approval was granted against the recommendation of the planning officer.

[8] We need say no more as to the factual background which is set out in the first instance judgment reported at [2022] NIQB 11. To our mind it is the litigation context which is of most relevance in this appeal. This context is highlighted by the pre-action correspondence which we discuss in a little detail as follows.

[9] First in time is the pre-action correspondence sent by the appellant following the planning decision. This is dated 2 September 2021. Of particular note is that the appellant specifically deals with the question of standing in some detail at section two of his letter as follows:

> "**Standing**
>
> The applicant has established in a number of judicial reviews that he is committed to protection of the

environment and in particularly the protection of the Northern Ireland countryside.

The applicant has brought 40 judicial reviews (most in the name of various Rural Integrity Companies) and has never been found to have been a mere busybody or vexatious in any case.

All cases were challenging environmental harm and were brought on merit.

The court is consistently accepting that cases which are brought for environmental protection of the countryside are Aarhus Convention cases.

I claim standing on the basis that the environment cannot protect itself and all people have a genuine interest in the environment and responsibility to protect the environment.

As Advocate General Sharpston said:

> 'the natural environment belongs to us all and its protection is our collective responsibility. The court has recognised that the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such. Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing.' Opinion of Advocate General Sharpston, delivered on 12 October 2017 in Case C-664/15, Protect Natur, ECLI:EU:C:2017:760, para 77.

In *Walton v The Scottish Ministers (Scotland)* [2012] UKSC 44 (par152) the principle that the environment is of legitimate concern to everyone is examined and this establishes that if an individual or an organisation has a genuine interest in and sufficient knowledge of an environmental issue to qualify them to raise issues in the public interest they should be regarded as a person aggrieved. A section of paragraph 152 states the following:

> 'Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not

> open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.'
>
> The applicant has standing to bring this application."

[10] The Council's reply to this correspondence takes no issue with the appellant's standing to bring judicial review. Rather, in unequivocal terms, the Council stated that it would concede the case and invited the appellant to bring a judicial review to quash the planning decision. Para [5] of the reply encapsulates the Council position as follows [with our emphasis]:

> "5. **Response to the Proposed Application**
>
> We have now had the opportunity to consider your letter, speak with the member of the Planning Committee and take legal advice in relation to the issue. <u>It has been decided that given the specific facts and circumstances of this particular planning permission application that your application will be conceded in full to avoid the incurring of costs. On that basis the proposed respondent accepts your proposal expressed at paragraph 6 of your letter and will consent to your application that the subject planning permission is quashed</u>.
>
> <u>To effect this, we would invite you to issue your stated judicial review application to the court inviting it to quash the decision of 25 August 2021 granting planning permission for the subject site</u>. The proposed respondent will consent to such application.
>
> Please provide your draft application on the proposed respondent prior to it being lodged with the court so that we may consider it in advance of provision of our written consent. We will consider same, and your application can then be progressed without further delay."

[11] Thereafter, the Council engaged in further correspondence which was largely in relation to costs. Ultimately, an agreement was reached with the appellant that he

would bring a judicial review to quash the planning approval on the basis that no order for costs would be made against the Council.

[12] Following from the consensual position which was plain the judge issued a case management order of 4 November 2021 as follows:

> "THE COURT NOTES that:
>
> a. This is an application in which the applicant challenges a decision of Causeway Coast and Glens Borough Council ('the Council') made on 26 August 2021 to grant planning permission (reference LA01/2020/1235/O) for a proposed infill site for a dwelling between 51 and 53 East Road, Drumsurn.
>
> b. The applicant relies on a variety of grounds of challenge, including breach of planning policy and a variety of species of irrationality. The central thrust of the proposed application is that there was no proper policy justification for permitting the relevant development in the countryside.
>
> c. The Council's professional planning officers had recommended refusal of the planning application on the ground that it breached Policies CTY1, CTY8, CTY13 and CTY14 of PPS21; but the Council's Planning Committee, by a majority, voted to approve the application.
>
> d. In the Council's response to pre-action correspondence, it has stated that:
>
> > 'It has been decided that given the specific facts and circumstances of this particular planning permission application that your application will be conceded in full to avoid the incurring of costs. On that basis the Proposed Respondent… will consent to your application that the subject planning permission is quashed.'"
>
> AND IT IS ORDERED as follows:
>
> **Case Management Direction Order No 1**

> 1. In light of the proposed respondent's stance, the Court is minded to quash the impugned decision and resulting planning permission at the leave stage pursuant to RCJ Order 53, rule 3(9). Before doing so, the proposed respondent should have an opportunity to finally confirm its position to the court; and the proposed notice party (the beneficiary of the permission, on whose agent the papers have been served) should also have an opportunity of making any representations. These are to be provided within seven days of the date of this Order."

[13] This proposed order would have been made without issue had the appellant not alerted the court that the notice party may not have been properly served. The appellant volunteered this information and thereafter the court paused its order.

[14] Thereafter, the notice party, who was the beneficiary of the impugned planning permission became involved. He was joined as a notice party and indicated his intention via his legal representatives to oppose the quashing of his planning permission and the grant of leave. Specifically, he disputed the appellant's standing to bring the judicial review.

[15] The matter was therefore listed for a full leave hearing before Scoffield J. At that hearing the question of standing was raised by the notice party in opposition to the grant of leave. At that hearing the Council adopted a neutral position on the question of standing. The appellant maintained his case that the planning approval should be quashed and that he had standing to bring the case with the support of the Council.

The relevant law

[16] First, we refer to the statutory framework. Order 53 rule 3(5) of the Rules of provides as follows:

> "The court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[17] Section 18(4) of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") provides:

> "The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[18] The applicable principles in respect of standing were considered at length by the judge between paras [27] and [40] of the court's judgment. The judge also considered the effect of the Aarhus Convention on the principles to be applied between paras [41] and [46]. There is no dispute about the relevant law, rather this case concerns application of the relevant law to the particular facts.

[19] In this appeal the core legal authority relied on by all parties is *Walton v Scottish Ministers* [2012] UKSC 44. This case involved an application by an individual protestor challenging the validity of schemes and orders made by the Scottish Ministers permitting the construction of a new road network around Aberdeen. The issue of standing is addressed at paras [83] to [96] by Lord Reed and paras [151] to [156] by Lord Hope.

[20] The test applicable to standing in Scotland is that of a person aggrieved. This is in different terms from the Northern Ireland legislative provision. However, in agreement with the judge, we think that the principles found in *Walton* are of more general application and assist in our determination of whether the appellant has sufficient interest within the Rules.

[21] We distil the following principles from *Walton*:

(i) A wide interpretation of whether an applicant is a "person aggrieved" for the purpose of a challenge under the relevant Scottish statutory provision is appropriate, particularly in the context of statutory planning appeals (para [85]).

(ii) The meaning to be attributed to the phrase will vary according to the context in which it is found, and it is necessary to have regard to the particular legislation involved, and the nature of the grounds on which the applicant claims to be aggrieved (para [84]).

(iii) A review of the relevant authorities found that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made (para [86]).

(iv) The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be "aggrieved": where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry (para [87]).

(v) Whilst an interest in the matter for the purpose of standing in a common law challenge may be shown either by a personal interest or a legitimate or reasonable concern in the matter to which the application relates, what constitutes sufficient interest is also context specific, differing from case to case,

depending upon the particular context, the grounds raised and consideration of, "what will best serve the purposes of judicial review in that context." (Paras [92] and [93]).

(vi) Para [94] also refers to the need for persons to demonstrate some particular interest to demonstrate that he is not a mere busybody. The court was clear that "not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."

(vii) The interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded (para [95] and [103]).

(viii) Lord Hope added at paragraph [52] that there are environmental issues that can properly be raised by an individual which do not personally affect an applicant's private interests as the environment is of legitimate concern to everyone and someone must speak up on behalf of the animals that may be affected.

(ix) Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (para [53]). It will be for the court to judge in each case whether these requirements are satisfied.

[22] In *Walton* the appellant was found to be a person aggrieved as he had made representations to the Ministers in accordance with the procedures laid down in the relevant Act, he had taken part in the local inquiry, lived in the vicinity of the road scheme (although his home would not be affected) and was an active member of local organisations concerned with the environment.

[23] In this jurisdiction Treacy J in *Re Doyle's Application* [2014] NIQB 82 found at para [11] that where, "members of the public are provided with a reasonable opportunity to participate in a quasi-judicial process, a person who does not so participate cannot ordinarily be said to have a sufficient interest in the outcome of that process."

[24] In addition to the above we note commentary as follows from *Valentine, All Law of NI, Public and Constitutional Law,* page 70 on the question of standing as follows:

> "The *locus standi* issue should normally be decided at the leave stage: *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270 (SC). The test of sufficient interest is decided in the context of the whole case and the merits are relevant: *Re McBride* [1999] NI 299, at 311; and may be less stringent where there is an important illegal act or abuse of power which might otherwise go unchallenged: *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270."

[25] Mr Gordon Anthony in the text *Judicial Review in Northern Ireland* (2nd ed, 2014) at paras 3.66–3.68 also refers to the development of a liberal approach to the sufficient interest requirement citing the judgment in *Re D's Application* [2003] NICA 14 of Carswell LCJ at para [15] in which the court tentatively suggested four "generally valid" propositions in respect to the judicial approach to standing:

(i) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.

(ii) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.

(iii) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(iv) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined.

[26] Whilst *Re D* offers some common-sense guidance more recent cases have tightened the previous liberal stance and placed some parameters upon environmental judicial reviews. In this regard we have also been referred to the decision of *Ashton v Secretary of State for Communities and Local Government* [2010] EWCA Civ 600. This case predated *Walton* but contains some common threads. At para [53] of *Ashton* the following principles were extracted from a review of the authorities on standing and held to apply when considering whether a person is "aggrieved":

> "1. Wide access to the courts is required under section 288 (*article 10a, N'Jie*).
>
> 2. Normally, participation in the planning process which led to the decision sought to be challenged is

required. What is sufficient participation will depend on the opportunities available and the steps taken (*Eco-Energy*, *Lardner)*.

3. There may be situations in which failure to participate is not a bar (*Cumming*, cited in *Lardner*).

4. A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced (*N' Jie* and *Lardner*). The sufficiency of the interest must be considered (*article 10a*).

5. This factor is to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved (*Lardner*).

6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under section 288 (*Morbaine*).

7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures (*Lardner*).

8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings (Advocate General Kokott in *Ireland*)."

[27] The applicant in *Ashton* was refused standing due to insufficient participation in the planning process. He was not an objector to the proposal in any formal sense and did not make representations, either oral or written, at the properly constituted public inquiry. Mere attendance at parts of the hearing and membership of the development group which did make representations, who did not bring court proceedings, were insufficient.

[28] The more restrictive approach on standing is clearly expressed in the most recent decision brought to our attention of *The Queen (on the application of Good Law Project Limited Runnymede Trust) v The Prime Minister, Secretary of State for Health & Social Care* [2022] EWHC 298 (Admin). In that case the Divisional Court, applied *Walton* and a previous decision of the Supreme Court in *AXA General Insurance Ltd v HM Advocates* [2011] UKSC 46. At paras [28] and [29] the court stated as follows:

> "28. We also note that not everyone who has a strong and sincere interest in an issue will necessarily have standing, not even a public official such as the Mayor of London, who had an obvious interest in tackling crime and in the operation of the criminal justice system as it applies to London, including in relation to support provided for victims of crime: see *R (D) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285, at paragraphs 105-111. As the Divisional Court (Sir Brian Leveson P, Jay and Garnham JJ) noted in that case, at paragraph 111:
>
> > "The test for standing is discretionary and not hard-edged."
>
> One consideration which the Court took account of when reaching that conclusion was that there are, or would be, "obviously better-placed challengers": see paragraph 110.
>
> 29. Furthermore, it is important to recall that the issue of standing is one which goes to the court's jurisdiction and therefore the parties are not entitled to confer jurisdiction on the court by consent where it does not have such jurisdiction: see *R v Secretary of State for Social Services, ex p. Child Poverty Action Group* [1990] 2 QB 540, at 556 (per Woolf LJ, giving the judgment of the Court of Appeal)."

[29] From the above discussion we distil the following principles to be applied in this jurisdiction:

(i) The test is whether a litigant has sufficient interest.

(ii) This should usually be determined at the leave stage but may also arise if a court is considering relief in any given case.

(iii) The question of standing is a matter of jurisdiction which must be determined by the court.

(iv) Standing must be considered carefully and in context.

(v) The courts must be careful not to encourage the proliferation of litigation by the busybody to avoid unnecessary cost and administration.

(vi) In the planning sphere, a litigant will ordinarily have had to participate in the planning process to have sufficient standing.

(vii) There are exceptions to this rule, for instance where the litigant was misinformed or misled about the planning process.

(viii) Ultimately, each case must be adjudged on its own facts considering the context, the interests in play, and the purpose of judicial review to correct public law wrongs.

Conclusion

[30] Scoffield J has characteristically provided a very thorough and comprehensive judgment in this case, considering the various arguments and submissions made on behalf of all parties. The judge accepted the genuineness of the appellant's environmental concerns in particular his passion for the countryside and his frustration at the lack of other challengers taking on what he perceives to be an unduly relaxed and harmful approach to piecemeal development in the countryside. However, the judge also observed that the appellant does not have any personal substantive interest in the grant of the planning permission involved. He does not live nearby. His amenity will not be affected. No property interest of his will be affected nor are any of his private law rights engaged.

[31] The judge also correctly commented at para [49] that the absence of a direct personal interest is not a determinative factor on its own, particularly given the wide access to the courts which is generally required in the field of environmental law.

[32] Then the judge referred at paras [50]-[51] to three factors which led him to refuse leave. First, he found that there has been a complete failure on the part of the appellant to participate in the planning process which led to the decision which he now seeks to challenge. Second, he found in favour of the notice party's submission that the environmental harm at stake in this case was modest, given the limited nature of the development proposal and in addition that Mr Duff had a lead case challenging policy which militated against bringing myriad applications on the same point. The third point which was of importance to the judge focussed on the public interest and the rights of the planning applicant who had the benefit of planning permission.

[33] We agree with much of what the judge said in his judgment about the need for good administration in judicial review courts. In addition, we understand that the appellant did not participate in the planning process. This is ordinarily a bar to judicial review in planning cases.

[34] We acknowledge that the development in question is a small rural site. However, as the judge accepted, the appellant is a person properly engaged with rural planning policy. Further, and of critical importance is the fact that he was invited to apply to quash the decision at issue once he raised a challenge.

[35] We make it clear that this court is reluctant to interfere with a decision made on standing. However, in this instance, we find that the judge did not strike the correct

balance between the competing interests. We reach this conclusion for the following specific reasons:

(i) The appellant raised the lawfulness of the grant of the impugned planning permission in pre-action protocol correspondence with the Council. The response of the Council, following discussion with the planning committee and having taken legal advice on the issue, was that the application "will be conceded in full." It further *invited* him to issue the judicial review proceedings to quash the planning permission and that the Council would consent to the quashing order.

(ii) If the appellant was refused standing there was no, and would be no challenger, to the decision of the Council, which they have conceded was unlawful in public law terms. As to the importance of this consideration see para [25](iii) and para [28] above.

(iii) Standing was never raised until the notice party became involved.

(iv) Whilst the notice party has an obvious private interest there is an overarching public interest in ensuring good administration and in correcting admitted public law wrongs.

[36] After careful consideration we conclude that the judge did not pay sufficient regard to the aspects of this case summarised at [35] above. We wish to make it clear that this is a rare case and does not provide a far-reaching precedent for litigants bringing judicial review challenges in the planning sphere. In this case the challenge was conceded by the Council. Thus, very different circumstances pertain from those described in *Good Law Project*. As such we do not think that certainty is undermined as Mr Shields and Mr Morgan suggested.

[37] Summarising, we consider that the balance comes down in favour of allowing judicial review to proceed by virtue of the specific circumstances of this case where the appellant was expressly invited by the decision maker to correct a public law wrong. To our mind it would be inimical to dismiss the judicial review at the leave stage based on standing in these circumstances where there is no other challenger, and where the Council conceded or was neutral as to standing until the appeal. We did not receive a satisfactory response from Mr Morgan as to why the Council had changed stance throughout this litigation. To invite a litigant to take a judicial review, not to oppose his standing and then to object at the appeal stage is a poor way of proceeding.

[38] By all accounts this is an exceptional case. We find that the appellant has standing to proceed with a judicial review in the specific circumstances of this case. Our conclusion is based primarily on account of the Council's actions in supporting the appellant to apply for judicial review. This decision is therefore highly fact specific

and should not be taken as a charter for the appellant or others to bring myriad judicial reviews in this area.

[39] We allow the appeal and grant leave to apply for judicial review. All parties interested in this case can now decide how the case proceeds before the judicial review court. We will also hear from the parties as to costs.