Neutral Citation No: [2023] NICA 56 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McB12253** *ICOS No:* **21/32114/01/A01** *Delivered:* **20/09/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE KING'S BENCH DIVISION (JUDICIAL REVIEW)

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Between:

GORDON DUFF

Applicant/Appellant

and

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

Respondent

and

F P McCANN LTD

Notice Party

AND IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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The applicant appeared as a Litigant in Person
Mr Vanderman (instructed Causeway Coast & Glens Borough Council) for the Respondent
Mr Orbinson KC with Mr McAteer (instructed by Carson McDowell LLP) for the Notice Party

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Before: Treacy LJ, Colton J and McBride J

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McBRIDE J (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from the decision of Humphreys J dated 30 September 2022 when he dismissed the applicant's application for leave to apply for judicial review of the respondent's, Causeway Coast and Glens Borough Council ("the council"),

refusal to take enforcement action in relation to quarrying activities undertaken by FP McCann Ltd, the notice party, at Craigall Quarry in Kilrea ("the quarry").

[2] Leave was refused on the basis that the claim was out of time and was unarguable.

[3] The appellant seeks to appeal this decision on several grounds, albeit there is considerable overlap between them. In essence he submits that:

(i) The hearing before the lower court was infected with procedural unfairness.

(ii) The trial judge erred in finding that the claim was out of time.

(iii) The trial judge erred in finding that the claim was unarguable.

The appellant seeks an order compelling the council to serve an enforcement notice and asks the court for a declaration that the planning permission granted in respect of the quarry in 1964 was extinguished due to the operation of the Planning (General Developments) Order (Northern Ireland) 1973.

Pre-Hearing Applications

[4] The appellant also filed three interlocutory applications to this court. By notice of motion dated 6 February 2023 he applies to submit fresh evidence. By further notice of motion dated 7 March 2023 he seeks an order that the notice party and respondent file affidavit evidence regarding the authenticity of the site map provided to the Department of the Environment ("the DOE") and by notice of motion dated 17 May 2023 he seeks to introduce forensic reports recently prepared by Mr Craythorne regarding the authenticity of the site map provided to the DoE.

[5] At the hearing the appellant indicated to the court that he was no longer requiring the court to re-run the merits argument based on evidence which was not available at the lower court. Accordingly, it is not necessary to rule on his application to submit fresh evidence. Similarly, as the application dated 17 May 2023 related to the admission of fresh evidence, namely reports from Mr Craythorne, we do not need to rule on this application.

[6] Prior to the appeal hearing, the appellant, without order, served interrogatories on the respondent and notice party relating to the provenance of the site map which was provided to the DoE. As a gesture of goodwill, the notice party provided responses to the interrogatories which related to the site map. The respondent also confirmed in affidavit that it was not in possession of the original 1964 site map. Considering the responses provided by the notice party and the respondent we consider that it is unnecessary to require the notice party and respondent to file affidavit evidence regarding the authenticity of the site map. Accordingly, the court dismisses this application.

The parties

[7] The appellant acted as a litigant in person. He describes himself as being "passionate about the countryside" and is part of "a large environmental activist network." Over recent years he has become a prolific litigant launching numerous applications for leave to apply for judicial review both in his own name and by using a variety of corporate vehicles.

[8] The respondent is Causeway Coast and Glens Borough Council. The council was represented by Mr Vanderman of counsel. The notice party is FP McCann Ltd, the beneficiary of the impugned planning permission and the owners of the quarry operating at Craigall, Kilrea. The notice party was represented by Mr Orbinson KC with Mr Philip McAteer of counsel. The court is grateful to all parties for their well-researched and concisely drafted skeleton arguments.

Background and chronology

[9] Before turning to the issues in dispute it is instructive to set out the chronology of events leading to the impugned decision.

(a) On 5 Sept 1964 County Londonderry County Council granted permission to P Bradley to re-open the quarry at Craigall, Kilrea, under the Planning Acts (Northern Ireland) 1931 and 1944 ("in accordance with the submitted details"). The submitted details consisted of a site map which showed the extent of the land benefitting from the permission. The site map was signed by the County Planning Officer and was date stamped 21 August 1964. The council no longer holds the original permission decision nor the accompanying site map.

(b) Since 1981 various approvals for extensions and alteration to the quarry have been granted including the erection of additional plant and facilities ancillary to quarrying operations.

(c) In 2012 Mr and Mrs Dempsey made a complaint to the DoE alleging that the development rights in respect of quarrying had expired.

(d) Between 2012-2014 the DoE conducted an investigation. As it did not hold the original permission or accompanying site map it requested and obtained copies of the original permission decision and accompanying site map from the previous owner of the quarry, P Bradley. The site map he provided was entitled "Proposed reopening at Kilrea for Messrs P Bradley Ltd." The map is date stamped 21 August 1964 by Londonderry County Council and was signed by the County Planning Officer. This map had a red line endorsed on it delineating the boundary of Craigall Quarry.

(e) The DoE report at para 6.1.3 stated:

> "The status of the permission has been confirmed and it is considered that it is valid. As such, the operations may continue subject to the extent of the permission issued as shown on the map accompanying the permission. Accordingly, there would be no breach of planning control in respect of the unauthorised winning and working of materials."

(f) On 16 July 2014 the DoE wrote to the Dempseys stating:

> "An enforcement case C/2012/009/CA was opened to investigate the alleged unauthorised extraction of minerals at Craigall Quarry and the operation of the asphalt plan. Investigation into the alleged unauthorised activities have concluded that both the quarry and asphalt plant benefit from the requisite planning permissions and, accordingly, the case was recommended for closure.
>
> A number of quarries applied for planning permission from the local council within which they were situated. Craigall Quarry was one of these sites where express permission was obtained.
>
> … Craigall Quarry did not require planning permission as this already existed under the permission granted in 1964."

(g) On 6 January 2016 the Department for Infrastructure closed an enforcement investigation regarding the quarry on the basis that there was no breach as the site had the benefit of planning permission granted on 5 September 1964.

(h) In 2018 the Dempseys made further complaints regarding the site which were rejected by the council.

(i) On 27 Feb 2021 the appellant corresponded with the council complaining that the quarry did not have the benefit of planning permission.

(j) On 1 March 2021 the appellant received a copy of the planning permission as requested together with a copy site map. The site map was endorsed with a pink line delineating the boundary of the quarry. This site map bore the same date stamp and other annotations as appeared on the original source site map.

(k) On 16 March 2021 in reply to correspondence from the appellant the respondent confirmed it did not hold a copy of the original site map.

(l) On 29 March 2021 the council wrote to the appellant and confirmed its view that the quarry benefitted from planning permission granted on 5 September 1964 and, accordingly, further planning permission with an environmental statement was not required for quarry operations within the area of the approved site. The council confirmed it had served an enforcement notice on 18 March 2021 in respect of development which had taken place outside the area for which planning permission had been granted in 1964 on the basis of destruction of priority habitat. This decision has now been appealed by the notice party to the PAC.

(m) On 23 March 2021 the pre-action protocol letter was sent.

(n) On 13 April 2021 the respondent replied to the pre-action protocol letter.

(o) On 1 June 2022 the Order 53 Statement was served in which the appellant sought an order compelling the council to serve an enforcement notice pursuant to section 138 of the Planning Act (Northern Ireland) 2011 and a declaration that the 1964 Craigall Quarry permission was not a planning permission and was effectively extinguished by the operation of the Planning (General Development) Order (Northern Ireland) 1973.

Grounds of appeal

[10] In the notice of appeal the appellant submits that the lower court:

(a) Acted in a procedurally unfair manner and in breach of court rules, by *inter alia*:

(i) Failing to require the notice party and respondent to disclose original or verifiable copy of the 1964 site plan attached to the decision dated 5th September 1964;

(ii) Requiring the appellant to file a skeleton argument first in time; and

(iii) Holding a contested leave hearing.

(b) Erred in determining the challenge was out of time, as time did not run from the historical decisions made in 1964 or 2014 but rather from the date of each act of unlawful quarrying and as quarrying operations were ongoing the challenge was not out of time and no application to extend time was required.

(c) Erred in finding the challenge lacked merit. The appellant submitted the respondent wrongly accepted a site map with red/pink lines endorsed on it to delineate the boundary of the quarry site as authentic when in fact these lines represented fraudulent alterations to the original site map which only granted

permission for the reopening of the original quarry at Craigall which occupied a much smaller site.

Consideration

Has the appellant standing?

[11] The respondent and notice party both submitted that the appellant lacked standing.

[12] The relevant legislation related to standing is set out in section 18(4) of the Judicature (Northern Ireland) Act 1978 which provides:

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

[13] Before relief can be considered, however, the applicant must be granted leave and Order 53 rule 3(5) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides as follows:

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

[14] The trial judge held that if he had been satisfied there was an arguable case, he would not have refused leave to apply for judicial review on the basis of a lack of standing. He referenced the fact the subject matter was of national importance; no local challenger had come forward and very significant environmental harm had occurred; the appellant had a very strong interest in environmental protection and the legality of the operations at the quarry would impact on other challenges in which he was involved; the fact that he was a very young child when the 1964 permission was granted and therefore, could not have been involved in that process; and the fact that when a challenge is to an alleged failure to take enforcement action it falls into a different category than one to grant planning permission. As enforcement of planning control is a responsibility imposed upon public bodies and if they behave unlawfully in failing to take the necessary steps to enforce Humphreys J felt it could be argued that any citizen should have the right to bring this to the attention of the court.

[15] No cross appeal was lodged in respect of Humphreys J's decision regarding standing. Nonetheless, as the issue of standing goes to jurisdiction it is one which we consider falls to the court to determine and accordingly, even in the absence of a

cross appeal, we now turn to consider at the outset the question whether the appellant has standing.

[16] The principles governing standing have been the subject of much jurisprudence. The leading authority is now the Supreme Court ruling in *Walton v The Scottish Ministers* [2012] UKSC 44 which was recently considered in this jurisdiction in *Duff v Causeway Coast and Glens Borough Council and McDonald* [2023] NICA 22.

[17] We consider that the following principles can be distilled from the jurisprudence and legislative framework:

(i) The test to be applied is whether the applicant has "sufficient interest" in the matter to which the application relates.

(ii) What constitutes sufficient interest is context specific, differing from case to case and requiring consideration of the issues raised including merits and of what will best serve the purposes of judicial review in that context.

(iii) 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.

(iv) There may be situations in which failure to participate is not a bar where, for example, an inadequate description of the development in the application and advertisement could have misled the applicant so that he did not object or take part in the process.

(v) An interest in the matter for the purpose of standing in a common law challenge may be shown either by:

    (a) A personal interest – eg noise, disturbance to the visual amenity of the property or some other private law right interference; or

    (b) A legitimate or reasonable concern in the matter to which the application relates.

(vi) The nature and weight of the person's substantive interests and the extent to which they are prejudiced are factors which will be assessed objectively. The sufficiency of the interest must also be considered.

(vii) What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a standing.

(viii) There are environmental issues which can be raised by an individual which do not personally affect his private interests as "the quality of the natural environment is of legitimate concern to everyone."

(ix) The courts must be careful not to encourage the proliferation of litigation by the busy body to avoid unnecessary cost and administration. Accordingly, individuals who wish to do this on environmental grounds will have to demonstrate that:

(a) They have a genuine interest in the aspects of the environment that they seek to protect; and

(b) They have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity.

It is for the court to judge in each case whether these requirements are satisfied.

(x) In making this assessment the court can take into account whether there are or would be better placed challengers such as environmental organisations and NGOs. It is recognised that these bodies act both as a filter and contribute specialised knowledge thereby putting the courts in a better position to decide the case. Notwithstanding this there is still some room for individuals to carry out this role, but the court will determine in each case whether that individual meets the requirements necessary for him to act in a representative capacity and, in particular, will take into account the applicant's knowledge, ability and the resources open to him.

(xi) The absence of another responsible challenger can be a significant factor especially where a matter of public interest or concern might otherwise be left unexamined.

(xii) Whilst recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required and the interest relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings.

(xiii) 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.

(xiv) The issue of standing is not merely a threshold issue but 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.

[18] The appellant submits that he has standing based on:

(a) His genuine interest in and concern for the environment.

(b) The lack of any other challenger.

(c) The destruction of large areas of priority habitat which is a matter of national importance.

(d) The need to examine the alteration of the planning permission documentation and to ensure that there has been no fraudulent conduct or that the rule of law has not been breached.

[19] We accept that the appellant has a genuine concern for the environment but, nonetheless, we do not consider he has standing to bring this application for a number of reasons.

[20] None of the appellant's private law rights are affected as he does not live nearby and has no property in the vicinity. He did not participate in the planning process which led to the decision he now seeks to challenge. In particular, he did not participate in the process which led to the grant of permission in 1964 and whilst we accept it would have been unrealistic to expect that he would do so as he was probably very young when this decision was made, importantly, he did not participate in the investigation which led to the decision by the DoE in 2014 that the quarry had the benefit of planning permission to the extent of the red/pink lines shown on the site map. An important consequence of his failure to participate in the investigation process during 2012-2014 is that the notice party has in good faith relied on the existence of planning permission and the fact that this was accepted by the DoE in 2014. The quarry owners have also obtained, over the years, 10 planning approvals for operations which are all ancillary to the quarrying operations. In all these applications the principle of an established lawful quarry has always been accepted. In these circumstances there was no reason for the notice party to fear its permission would later be under attack by the appellant. Further, the notice party was deprived of grappling with the appellant's concerns during the DoE's investigation. This application not only causes them distress and inconvenience but also considerable expenditure as normally a notice party participates on a costs neutral basis, and therefore it will have to bear its own costs with no prospect of receiving these costs from the appellant regardless of the ultimate outcome.

[21] Although the appellant has engaged in correspondence with the council since 2021, complaining about the quarrying activities, we consider that he cannot acquire standing by simply writing letters which merely repeated complaints that had already been the subject of investigation and a decision in 2014.

[22] We also consider that there are more suitable challengers. Mr and Mrs Dempsey are local residents who instigated the DoE investigation in 2012. They could have brought proceedings at the appropriate time and would have had the

necessary standing on the basis of personal interest and participation, but they did not do so. Further, Mr Rainey could have brought proceedings. As appears from his affidavit evidence he is a senior ecologist; has local connections as he grew up in the vicinity; has been monitoring the site for a number of years; has in-depth knowledge of the site; has presented his finding to the council and has also been in touch with NIEA; and was aware of the concerns about the authenticity of the map as the appellant had advised Mr Rainey regarding this. Mr Rainey, therefore, is someone with expertise and someone who has participated and engaged with the council and was alive to all the issues that the appellant is now raising. Mr Rainey has not brought a challenge to the DoE's decision that the quarrying activities were covered by planning permission even though he would have had standing to do so.

[23] When an individual like the appellant seeks in effect to act in a representative capacity on behalf of the public, the court must consider his suitability having regard to his knowledge, ability and resources. For a number of reasons we do not consider that the appellant is a suitable representative of the public interest in this case. First, he is a litigant in person and although he is part of a loose environmental activist network, he is not an incorporated action group or an NGO. We agree with the observations made by Scoffield J in *Re Duff's Application* [2022] NIQB 11 at para [55]:

> "I must take into account that he is not an environmental representative in the sense that a specialist NGO would be; and that he acts as a litigant in person who therefore, notwithstanding his diligence and enthusiasm, is less likely to assist the court than a well-resourced organisation with access to environmental and legal expertise."

[24] Although we accept the appellant is well meaning and enthusiastic, he lacks specialist knowledge of the environmental matters in play and has few resources available to him to source environmental and legal expertise.

[25] It is also worthy of note that no responsible environmental group has sought to bring a challenge in this case.

Should standing be granted on the basis that he has a meritorious case of fraudulent conduct?

[26] The central plank of the appellant's case is that the site map attached to the original permission granted in 1964 has subsequently been fraudulently altered by the addition of red/pink lines which effectively extend the boundary of the quarry covered by the 1964 permission. He submits that the DoE during its investigation in 2012-2014 accepted this fraudulently altered site map as a genuine copy of the original site map attached to the original permission and, therefore, wrongly concluded that the quarrying operations could take place within the area delineated by the pink/red line when in fact the original site map only permitted quarrying

activities in a much smaller area namely the area of the original Craigall quarry. As a result, he submits all quarrying outside this original area is unlawful and the respondent ought now to issue enforcement proceedings due to the destruction of priority habitat. Accordingly, he submitted he had a meritorious case and failure to give him standing would mean that this important matter of public importance relating to a breach of the rule of law would be left unexamined.

[27] In his various affidavits and submissions the appellant set out the reasons why he considered the site map has been fraudulently altered and is not a true copy of the original site map. When pressed by the court, however, he accepted that he had only a "suspicion" about the veracity of the site map. He also accepted that the site map endorsed with red/pink lines bore a date stamp, headings and signature in common with the original source site map and he accepted the source site plan was genuine and original.

[28] The appellant has to persuade the court that he enjoys an arguable case with realistic prospects of success in order to secure a grant of leave. When alleging fraudulent behaviour the burden of proof is upon him to produce evidence in support. Mere suspicion of some fraudulent modification of documentation does not meet the well-established principle that fraud must be pleaded with full particulars and based on credible evidence. On the basis of the evidence available to the court (the appellant accepting that he is not relying on any new evidence which was not before the lower court) we are satisfied that the appellant does not satisfy the burden of proof as mere speculation on his part that the red and pink lines have been fraudulently endorsed on the site map is not sufficient to discharge the burden of proof placed upon him.

[29] As the allegation about the authenticity of the site map is the central plank of his application, like the trial judge, we consider that this claim is without merit. Accordingly, having regard to the merits we consider there is no basis in this case to give standing to the appellant to protect the rule of law.

[30] We are further satisfied that there is no other matter of concern left unexamined by refusing standing to the appellant. The existence of planning permission for quarries without the usual environmental conditions is obviously a matter of concern for the appellant and the wider public. However, legislation is due to be implemented, namely Review of Mineral Planning Permissions (ROMPS) – section 129 and schedules 2 and 3 to the 2011 Act which will put in place provision for a system of review of these permissions. Accordingly, there is no imperative to give standing to the appellant on this issue.

[31] Accordingly, we are satisfied for all these reasons that the appellant does not have standing to bring this challenge.

Did the trial judge err in finding the claim was out of time?

[32] Order 53 rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 provide:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the court considers there is good reason for extending the period within which the application shall be made."

[33] The appellant's primary case is that the operation of the quarry became unlawful on 1 October 1974 as a consequence of the provisions of the Planning (General Development) Order (Northern Ireland) 1973 and as there was no planning permission from that date, he submits that there has been a breach of planning control every day quarrying operations are carried out. Therefore, he submits he had not delayed in bringing the application and has no need to make an application to extend time.

[34] The appellant submits the original permission granted in 1964 was granted by the local council under the Planning Acts (NI) 1931 and 1944. The Planning (Northern Ireland) Order 1972 then centralised all planning decisions in Northern Ireland within the then Ministry of Development. Subsequently Article 3 of the Planning (General Development) Order (Northern Ireland) 1973 provided that certain classes of development, set out in Schedule 1 to the Order, may be undertaken without the permission of the Ministry. One of the classes set out in Schedule 1 was Class 13 which related to the working of minerals by surface working during a period of one year from 1 October 1973 on land in respect of which such development was permitted immediately prior to that date under the Planning (General interim Development) Order (Northern Ireland) 1944 ("the 1944 Order"). The appellant therefore submits that the permission for quarrying granted under the 1944 Order only continued for one year from 1 October 1973 and accordingly expired on 1 October 1974. Accordingly, the quarry no longer enjoys the benefit of planning permission, and it is now incumbent on the council to take enforcement action.

[35] Article 4 of the 1944 Order allowed development of certain classes of development, including mining operations, without the permission of the "interim development authority." These classes of development were referred to in the legislation as "permitted developments." After the implementation of the 1973 Order quarries operating under permitted development rights granted under the 1944 Order had one year to apply for planning permission before their permission expired. The 1944 Order also provided, under section 3, that Londonderry County Council, as an interim development authority, had power to grant permission for development.

[36] After investigation between 2012 -2014 the DoE was satisfied the quarry did not operate under "permitted development" but rather had the benefit of planning permission granted in 1964 by Londonderry County Council and accordingly it decided no enforcement action was required as there was no breach of planning control. The position of the council is that the 1964 permission remains extant, and the notice party is therefore entitled to conduct quarrying operations within the area delineated by the pink/red line on the site map and accordingly no enforcement proceedings are required as there is no breach of planning control.

[37] We consider that the actual decision under challenge by the appellant is whether planning permission exists for the quarry and, in particular, whether the planning permission extends to the area delineated by the red/pink lines on the site map.

[38] In 2014 the Department made a decision after investigation that the quarry had the benefit of planning permission for the entire area delineated by the red/pink line on the site map. Accordingly, we consider time runs from the date of that decision. The application is therefore years out of date, and we consider the trial judge did not err in dismissing the challenge on the ground it was out of time.

[39] The appellant did not apply to extend time but even if such an application had been sought, we would not have granted it for the reasons set out by the trial judge at para [28] of his judgment.

[40] Accordingly, we are satisfied that the learned trial judge did not err in determining that the application for leave to apply for judicial review was out of time and that there was no basis to grant an extension of time.

Was the hearing at the lower court infected with procedural unfairness?

[41] The appellant complains that the hearing was infected with procedural unfairness as the court failed to follow Order 53; deviated from Judicial Review Practice Directions; breached the Aarhus Convention; ordered a contested leave hearing; acted unfairly in requiring him to file a skeleton argument before the others; did not require the notice party and respondent to submit affidavit evidence; dismissed the evidence of the appellant regarding fraud and did not allow the appellant to be heard on the merits issue.

[42] Having determined that the appellant does not have standing and is out of time it is strictly speaking unnecessary to deal with the issue of procedural unfairness. Nonetheless, the court is satisfied that there was no procedural unfairness in the lower court. The appellant has not provided any evidence of how the trial judge failed to abide by Order 53; the Judicial Review Practice Direction or the Aarhus Convention. The learned trial judge was entitled to order a contested leave hearing and although he directed the appellant to file a skeleton argument the appellant failed to do so and in the event the notice party filed a skeleton argument

first in time and, accordingly, there was no prejudice to the appellant. During the hearing the appellant was allowed time to make his case and to reply to the case made against him and although he had prepared a speaking note it was the appellant who decided not to distribute it.

[43] Although the appellant complains that he felt rushed and was ill-prepared for the hearing, he did not ask for an adjournment and accepts that he considered that he had submitted enough evidence to the court. It is further evident from the judgment of the trial judge that he did consider all the evidence that was before him and was entitled to conclude that there was no sufficient evidence demonstrating fraudulent conduct.

[44] Accordingly, we are satisfied that the decision of the lower court was not infected by any procedural unfairness.

Conclusion

[45] Accordingly, we dismiss the appeal.