The public/private divide in the Environmental Information Regulations 2004

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"*The laws are no longer fit for purpose*", reported the Information Commissioner to Parliament last year – "*In the modern age, public services are delivered in many ways by many organisations. Yet not all of these organisations are subject to access to information laws.*"[1]

In a judgment that will be of interest to a number of entities, particularly in the transport and utilities sectors, the Upper Tribunal in *IC v Poplar Housing Association* [2020] UKUT 182 (AAC) has provided a boost to this analysis, upholding a narrow definition of "public authority" under Regulation 2(2)(c) of the Environmental Information Regulations ("EIR") that will exclude many organisations from the scope of the regime.

Background

The case concerned whether a housing association, Poplar, was a "public authority" within the meaning of Article 2(2)(c) of the EIR. Poplar was a community benefit society set up with the transfer of some of the London Borough of Tower Hamlet's housing stock. Poplar was registered with the Regulator of Social Housing as a private registered provider of social housing, and owned approximately 13% of the social housing in Tower Hamlets. As a private registered provider, Poplar had certain statutory powers not available to non-registered landlords, designed to allow it to manage tenants without the need to resort to evictions, for example through seeking injunctions against anti-social behaviour or seeking parenting orders or the grant of a family intervention tenancy.

Poplar had received an information request seeking a list of addresses of its empty properties and plots of land earmarked for redevelopment or disposal, as well in relation to two particular sites as a detailed breakdown of redevelopment costs and copies of any major contracts relating to development. The Information Commissioner concluded that Poplar was a public authority under the EIR;

[1] 'Outsourcing oversight?': Report of the Information Commissioner to Parliament 2019, under s. 139(3) of the Data Protection Act 2018. Available at: https://ico.org.uk/media/about-the-ico/documents/2614204/outsourcing-oversight-ico-report-to-parliament.pdf

the request was for "environmental information"; and Poplar had accordingly breached the EIR by failing to respond to the request. Poplar appealed to the FTT, which allowed the appeal, holding that Polar was not a public authority for EIR purposes.

The grounds of appeal

The Commissioner appealed to the UT on three grounds. The first – with which the majority of the UT judgment is concerned – was that the FTT had been wrong in law to conclude that in order for an entity to be a public authority, there must be a legislative entrustment of public interest services in addition to a legislative vesting of special powers. The FTT had held that Poplar did not meet the criteria of being "entrusted" with public interest services as defined in the CJEU's caselaw, as it had not been empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation. The FTT commented, however, that it considered this requirement to be an artificially narrow interpretation of Directive 2003/4/EC ("the Directive"), and a serious limitation on the scope of the right of access to environmental information, that bodies carrying out services of public interest on behalf of the state, but in circumstances where there was no "express delegation of statutory functions", did not fall within the scope of the EIR. The FTT stated therefore that it would have taken a broader approach, accepting that Poplar had been entrusted with the provision of social housing, had it not considered itself constrained by authority to conclude otherwise.

The second ground was that the FTT had made an error of law in concluding that the requirement for public interest services to have a legal basis specifically defined in national legislation must be equated with an express delegation of statutory functions, and could not also be met by a body falling within a particular regulatory framework.

The third ground was that the FTT misdirected itself in relation to the "cross check" required by *Cross v IC* [2016] AACR 39.

Poplar cross-appealed a number of points where the FTT had found against it, arguing that the provision of housing was not a service of public interest; the FTT was wrong to conclude that Poplar performed specific duties, activities or services in relation to the environment within the meaning of Article 2(2)(b) of the Directive; and that the FTT had made an error of law by concluding that Poplar had special powers and in concluding that if it did, they were not required to "environmental".

The Upper Tribunal's judment

The UT considered the CJEU's judgment in CJ-279/12 *Fish Legal v IC* [2014]

QB 521 ("*Fish Legal EU*"), as interpreted on its return to the UT in *Fish Legal v IC* [2015] AACR 33 ("*Fish Legal UT*") and in *Cross*.

As a preliminary matter, counsel for Poplar argued that since *Cross* had been decided by a three judge panel, its decision on legal principle was binding on the single judge hearing this case. The judge rejected this argument, noting that while three judge panels should, per *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC), be followed by a single judge unless there are compelling reasons not to do so, in Cross the panel was comprised of two judges and a non-legal member. In this case Mrs Justice Farbey, the Chamber President, refused to extend the principle in *Dorset Healthcare* from three judge panels to judgments given by three member panels.

On the first ground, the UT held that the test set out in *Fish Legal EU* was clear. The entrustment of public functions and the vesting of special powers were separate elements of the test articulated by the CJEU. The UT noted the CJEU's comments on the difference between the English and French language versions of the Directive, the latter making clear that "public administrative functions" had to be performed "under national law".

The UT rejected the Commissioner's submission that the purposes of the Aarhus Convention and the Directive included the widest possible access to environmental information, and that if the definition of "public authority" did not encompass the state's use of privatisation and outsourcing, the availability of environmental information would be unduly constrained contrary to those objectives. The judge considered this submission too broad, and inconsistent with *Fish Legal EU* – the Directive and the EIR were intended to have a wide reach, but not to give a general right to request environmental information from any entity. The UT's task was to interpret the legal instruments before it, not to question the policy underlying outsourcing.

Accordingly, the judge held that Cross correctly applied *Fish Legal EU* insofar as it laid down a dual test of entrustment and vesting of special powers, and she dismissed the first ground of appeal.

On the second ground, the judge held that while the FTT's reference to an "express delegation of statutory functions" did not precisely reflect the *Fish Legal EU* test and could theoretically be regarded as an unduly narrow gloss, in reality the choice of words did not imply or demonstrate that the FTT misdirected itself. The Commissioner made a wider submission that "national law" could include not only express legislative powers but also regulatory schemes. The judge rejected this: no authority had been cited for the proposition; neither the CJEU nor the UT had considered the role of regulation in the context of Article 2(2)(b) of the Directive; and this would be a surprising lacuna if a regulatory scheme could be regarded a decisive factor in the definition of a public authority.

The judge concluded on this ground that she did not see how the mere existence of a statutory regulation could convert a service provider into a public authority: this is a matter of context and the effect of the regulatory scheme in question. In the present case, the information before the FTT and UT on the scheme was limited, and it was not on the basis of this evidence clear how the regulation of social housing would cause Poplar to be regarded as an administrative authority.

The UT, on the third ground, questioned the utility of the cross-check as set out by *Cross*. The judge considered that a cross check is less appropriate for reaching conclusions of law compared to decisions resting on the exercise of judgment or discretion. She questioned whether the test added anything to existing principles of law, if all it did was advocate a flexible rather than rigid approach, and as a freestanding exercise it added a layer of complexity that risked distracting from the words of the legal instruments.

However, since the judge agreed with the FTT that the cross-check could make no difference to the analysis in this case, it was unnecessary to decide whether it formed a distinct and freestanding element of any legal test. Had she been called upon to do so, however, she would have departed from *Cross* on this point.

Concerning the points raised by Poplar, the judge noted that she did not have to decide these questions and they should therefore await resolution in a case where they were live issues. She stated, however, that she would have disagreed with the FTT about whether Poplar was vested with special powers – she considered that Poplar's powers did not give it a practical advantage compared with non-registered landlords, but rather mitigated a disadvantage that it was under as compared with those landlords. On the other issues, she said that she would have been reluctant to depart from the FTT's conclusions.

Finally, the UT declined to make a reference to the CJEU for a preliminary ruling: *Fish Legal EU* had provided a detailed analysis of the definition of a "public authority". The Judge considered that a reference would serve no purpose as, in her view, the CJEU has already addressed the point of law in question.

Conclusion

The UT's conclusions confirm a very limited definition of "public authority" for the purposes of the EIR – one which the FTT was notably unhappy with. It is likely to exclude from the scope of the EIR a number of cases where public functions are outsourced without being subject to an "express entrustment" by statute, and as the Commissioner has noted elsewhere, will considerably restrict the ready availability of environmental information to the public.

It is notable too that the UT was unwilling to find that Poplar satisfied this element of the definition of a "public authority" on the basis of its regulated status. The Commissioner's submission that the remaining parts of the test - namely, the requirement for specific duties, activities or services relating to the environment and for a vesting of special powers - would exclude from the scope of the EIR those regulated bodies and individuals (such as indeed barristers) who should not properly be subject to these obligations appears on its face a sensible compromise. That the Tribunal did not agree with this again considerably restricts the scope of the EIR, and will mean that a number of bodies carrying out traditionally public functions are likely now to escape public scrutiny under the EIRs.

From a legal point of view, there are two further points of particular interest.

a. The first is that the cross-check set out in *Cross* appears to be redundant – while its continuing validity awaits a case where it is a live issue, it is clear from the judgment here that the UT was sceptical of its value.

b. Secondly, the binding nature of a judgment of a three person panel applies only where all three of the panel members are judges – three Judge panel judgments will bind a single judge, but three member panel judgments will not. This is relevant beyond the information sphere, and will apply equally to judgments of the Upper Tribunal in other areas.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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