Public Authorities and Environmental Information

Robert McCracken QC

1. Aarhus Convention 2 (2)

'"Public authority" means:
(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; This definition does not include bodies or institutions acting in a judicial or legislative capacity;'

2. Environmental Information Directive 2003/4/EC 2 (2)

'"Public authority" shall mean:
(a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
and (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)….[judicial& legislative exceptions permissible]'

Environmental Information Regulations 2004 2 (2)

'….. "public authority" means—

(a) government departments;

(b) any other public authority as defined in section 3(1) of the [Freedom of Information] Act…..[except]….

(c) any other body or other person, that carries out functions of public administration (RMcC NOTE absence of words 'including …[re] the environment) or

(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.'

3. Access to information about enterprises whose activities affect the environment is a fundamental tool which anyone who seeks to protect and enhance the environment needs. The then European Economic Community introduced powerful legislation 30 years ago in 90/313/EEC. The EC and the UK later acceded to the Aarhus Convention. The EC therefore promulgated a new Environmental Information Directive 2003/4/EC. The Preamble expressly stated that its intention was to enlarge the scope of its predecessor, and to ensure that the EC was in conformity with the Aarhus Convention so that it could be ratified. The UK Environmental Information Regulations 2004 ('EIR') transpose the EID. They must therefore, so far as possible, be interpreted in accordance with the canon of convergent construction; if they are incompatible with the D they must be disapplied. The D provides rights which can be directly enforced against emanations of the state in accordance with the principle of direct effect.

4. The UK's withdrawal from the EU at the end of 2019[1] makes little immediate change in theory to the substance of their rights. The terms of the withdrawal agreement and domestic legislation in theory leave people with the substance of rights which they had immediately before Brexit. The UK is, of course, able to change the substantive position in the future. Importantly, however, **the departure is also likely to facilitate the development of a different culture** on the part of UK courts, tribunals, public officials and privatized industries to the interpretation, application and enforcement of such rights —which will no longer be subject to the supervision of the European Commission and Court of Justice.

5. An area where this may manifest itself is in the interpretation of the scope of the D and R. It applies to information held by or for 'public authorities'. How have courts and tribunals interpreted the legislation?

6. *Smartsource* UT[2]: The development of the law is often influenced by the factual matrix of the cases which come before appellate bodies. This is well illustrated by the treatment of privatized water companies (and the Royal Household in *Cross*). Smartsource was a commercial entity which sold information about water. It sought some of that information from privatized water companies without paying for it, relying on the EIR. This was an unattractive claim. As so often hard cases makes bad law. The Upper Tribunal held that privatized water companies were not public authorities and therefore not subject to EIR. This presented problems for environmental groups such as Fish Legal and individual activists such as Emily Shirley. Happily for them Judge Jacobs of the UT thought that *Smartsource* had been wrongly decided so rather than following it, he later referred the issue to the CJ.

[1] See European Union (Withdrawal) Act 2018 as amended in 2019 and 2020

[2] Wikeley, Christopher Ryan, UTJJ and Fitzhugh UTM

7. C-279/12 *Fish Legal & Shirley* CJEU (re water and sewerage undertakers post privatization) The companies accepted that they were providing a public service under applicable national law [53]. The CJ ruled:

   (i) EID 2 2 (a) bodies: ones which only the state could create or destroy (and are organically part of the state) (**eg councils—classic, traditional public authorities)**

   (ii) EID 2 2 (b) (==EIR 2 2 (c)) bodies: ones which were **entrusted** with public services **under applicable national law** and had '**special powers'**. The CJ did not suggest that such powers had to relate to activities affecting the environment . An EID 2 2 (b) body had to make **all its environmental** information available even if that information did not relate to any environmental activity. (As to whether some of the public activities had to relate to the environment see below under XX of *Cross*)

   (iii) EID 2 2 (c) (=EIR 2 2 (d)) bodies: The requisite degree of control could be through regulation, ownership or any means so long as the effect was that such bodies did **not have autonomy**. But the **only information** which they had to make available under the D was that **relating to the environmental services** of activities which they provided. If there was any **doubt** as to whether information was so related the doubt was **to be resolved in favour of release**.

8 *Fish Legal & Shirley* [2015] UKUT 52 (AAC) [3]:

   (i) water and sewerage undertakers had special powers (**practical advantage**). So they were subject to EIR under EID 2 2 (b)/EIR 2 2 (c).

   (ii) (surprisingly) **the regulation to which they were subject under WIA and WRA did not amount to control**. They were not EID 2 2 (c)/EIR 2 2 (d) bodies. It is arguable that the UT effectively treated the wording of the CJ 'does not determine in a genuinely autonomous manner the *way* in which it performs…[68].' as if it meant that such bodies must have no freedom over day to day decision making cf CJEU [71].. As Fish Legal and Ms Shirley had won on the first point there was no appeal. This aspect of the decision is potentially **flawed** as it is hard to reconcile with a fair reading of the tone and wording of the relevant passages of the CJEU judgement at [64]—[71]. **The present culture of the upper judiciary is such, however, that the approach of the UT might well be upheld by the CA if the matter ever came before it.**

[3] When the case came back the UT panel was the former Family Division judge Charles HCJ, presiding, with Gray and Jacobs UTJJ. But sitting with them throughout and theoretically playing no part in their decision was one of the *Smartsource* judges!

9 *Cross* UT[4] [2016] UKUT 153 (AAC) : re Royal Household's Social Responsibility Committee (not p.a.)

Quadruple test for EID 2(b)/EIR 2(c):

(i) **Entrustment under national law** with services of public interest

(ii) **Some of those services must relate to the environment [86]** **(**as [86] of Cross re EID 2 2 (b) has been **(mis)interpreted** later eg by FTT in *Poplar* at [121] and ICO in *HAL* at [24] and *E.ON* at [30]*)* (XX—

(**1**) *Cross* accepts in [113] that its interpretation of EID 2 2 (b) may not apply to the EIR as the **EIR 2 2 (c) wording has no such requirement (**note what Wall LJ said **(**in *Jones* (see below App 2) about how easy it was for readers to miss the important part of over long judgements

(**2**) consider *expressio unius exclusio alterius:* contrast express requirement in EIR 2 2 (d)

(**3**) **(a)** Not part of Ruling One in *Fish Legal & Shirley* (**b**) Aarhus Convention Guide statement that there is no such requirement (**c)** probably endorsed by CJEU at [50] as last of 3 points made at [48]-[50] (see App 1 below)

(4) TEU 11 (ex TEC 6) (integration) & TFEU 193 (ex TEC 176) (no bar on higher domestic MS environmental protection)

(**5**) how decide what activities do *not* relate to the environment (see *HAL* below?

But contrariwise :

(6) note EID recital 11 not necessarily inconsistent with the supposed '*Cross'* approach as might the guardedly ambiguous wording of CJEU in C 279/12 even at [50]

(**7**) scheme of EU and AC legislation not necessarily consistent with either approach and

(**8**) order of words and position of comma before 'including' in EID probably not significant in EU context (though it might in a domestic context indicative that these were just examples ie contrary to the supposed '*Cross*' approach))

(iii) Special legal powers **which need not relate to the environmental services [88]**

(iv) Provisional view reached re (i) (ii) and (iii) **to be cross checked** with underlying objectives and purposes of EID/EIR [100]

(RMcC—sensible as approach at each stage but problematic as theoretically separate stage)

(diversion re criticism of overcomplications and poor judgement of Charles J by CA in *Jones v Jones* & metaphor of climbing Mount Everest to convey the exhaustion, effort and danger of reading the whole of any of his judgements—see Appendix 2)

[4] Charles HCJ presiding with Gray UTJ and Fitzhugh UTM

10 *Poplar* 2020 UKUT 182 (AAC) re*:* social housing provider inheritor of much council housing (not p.a.)

four points of note: for EID 2 (b)/EIR 2 (c)

(1) Entrustment under national law with services of public interest (regulation not enough)
(2) Relating to the environment
(3) **Special legal powers (which do not amount to entrustment**)
(4) **Cross check not separate requirement** (RMcC but quite useful as approach to all issues) Test may be too narrow for privatized utilities, but that is for legislature not UT.

11 *E.ON* ICO 2020 re Rampion Off shore Wind Generator: electricity generator and supplier p.a.
Five points of note:

(1) A service relates to the environment **if it has an impact on the environment** [31]
(2) Special powers do not need to relate to the activity which has an impact on the environment [36]
(3) Need for confirmation of CPO does not prevent it from being a special power [38]
(4) No need for 'net advantage' when special power balanced against service obligations—q is 'is it a power not available under private law' [43]
(5) Service **of public interest** –if state would be compelled to step in if not provided [47] (?? cf food/child care) (much of [47] effectively overruled by later UT decision of *Poplar UT*)

12 *HAL (Heathrow)* ICO 2020 re London airport p.a
Two points to note:

(1) Confirms E.ON

(2) Holds that (a) climate change emissions from aircraft (b) noise emissions from aircraft and (c) congestion environmental effects make the airport's activities ones which relate to the environment

(but how decide at what point emissions do *not* count? Eg car park operation?)

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See over

Note: this paper and all oral statements made at the FTB seminar are for the purposes of a general introduction. They are not professional advice. Decisions should not be based on them . Professional advice for the purposes of making decisions is available in the usual way by contacting the clerks at FTB.

Appendix 1

C279/12 Fish Legal & Shirley Grand Chamber re EID 2 (b) (=EIR 2(c))

48 It follows that only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in Article 2(2)(b) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute 'public administrative functions' within the meaning of that provision must be examined in the light of European Union law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept.

49 Secondly, as regards the criteria that must be taken into account in order to determine whether functions performed under national law by the entity concerned are 'public administrative functions' within the meaning of Article 2(2)(b) of Directive 2003/4, the Court has already stated that it is apparent from both the Aarhus Convention itself and Directive 2003/4 that in referring to 'public authorities' the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the performance of their functions (*Flachglas Torgau*, paragraph 40).

50 In addition, the Aarhus Convention Implementation Guide explains that 'a function normally performed by governmental authorities as determined according to national law' is involved but it does not necessarily have to relate to the environmental field as that field was mentioned only by way of an example of a public administrative function.

Appendix 2

Jones v Jones [2011] EWCA Civ 41

Wilson LJ (then about to be promoted to the Supreme Court as Lord Wilson of Culworth)

"3. The judge released his judgment for publication but on an anonymised basis, i.e. as *J v. J*. Its citation number is **[2010] EWHC 2654**. It has 484 paragraphs. An article on the judgment, by Mr Ashley Murray of counsel, has recently been published in [2010] Family Law, Vol 40, at 1111. Mr Murray introduced his article as follows:

> "There are certain challenges each of us should attempt in our lifetime and for most these involve a particular jump, a mountain climb, etc. Akin to these in the legal world would be reading from first to last a judgment of Charles J. One of his most recent is J v. J …"

Mr Murray's introductory sentences were witty and brave. In respect at any rate of the judgment in the present case, they were also, I am sorry to say, apposite. The judgment is a monument to the intellectual energy of the judge. Nevertheless, notwithstanding my extreme personal discomfort in saying so, I feel driven to describe it as far too long, too discursive and too unwieldy. I have devoted days to trying to understand it. So have the parties' advisers, at substantial further cost to the parties themselves. With respect to a colleague whom I greatly admire, I refuse to accept that our modern principles of ancillary relief are as complex as the content of the judgment of Charles J implies."

Sir Nicholas Wall P:

"73 When I was a puisne judge at first instance, I sat in this court as the third member of the constitution hearing the case of *HM Customs and Excise and another v A and another* [2002] EWCA Civ 1039, [2003] 2 All ER 736. Schiemann LJ, who gave the leading judgment in the case said:

> 81. The judgment under appeal runs to some 223 paragraphs [I interpolate that this was less than half of the length of the judgment in the instant case] ……
>
> 82. A judge's task is not easy……. One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision-making process. Moreover the experienced judge commonly has thoughts about avenues which it might be crucial to explore but which the parties have not themselves examined. It may be his duty to explore these privately in order to satisfy himself whether they are relevant. Having done the intellectual work there is an understandable temptation to which many of us occasionally succumb to record our thoughts for posterity in the judgment or to refrain from shortening a long first draft.
>
> 83. However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that

i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge;
ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal;
iii) …….
iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice.

84. Our system of full judgments has many advantages but one must also be conscious of the disadvantages.

74. I echo all the sentiments eloquently expressed by Wilson LJ in paragraphs 3 and 54 of his judgment. Speaking for myself, however, I do not think that the length of the judgment was justified by the judge's laudable aim of ensuring that such cases are properly presented. I thus feel obliged to remind all judges who sit at first instance (as I regularly now do myself) of what I have extracted from what Schiemann LJ said in *HM Customs and Excise and another v A* and another, which, in my judgment applies directly to the judgment under appeal in the instant case."

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