THE ENVIRONMENTAL INFORMATION REGULATIONS 2004: RECENT DEVELOPMENTS

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1. This paper deals with a number of recent cases addressing the Environmental Information Regulations 2004.

1. *R (Evans) v Attorney General* [2015] UKSC 21

2. This case concerned the Claimant journalist's request for disclosure of communications passing between the Prince of Wales and certain government departments; the Information commission refused disclosure but the UT allowed C's appeal in respect of certain correspondence, including some environmental information. The departments did not seek permission to appeal against that decision. However, the A-G as the appropriate accountable person, issued a certificate under s. 53(2) of FOIA, effectively overriding the decision of the Upper Tribunal. C sought judicial review of the decision to issue the certificate on 2 principal bases – a) that the A-G was unable to override the decision of the UT; b) s. 53 of FOIA (which the EIR applied to access to environmental information was incompatible with the Aarhus Convention (art. 9) (amongst other provisions). The High Court dismissed the claim but the Court of Appeal allowed the appeal. The Supreme Court dismissed the A-G's appeal.

3. The rule of law was upheld. The use of the certificate procedure under s. 53 (as imported into EIR) was incompatible with the Aarhus legislation. There was some dispute between the Justices as to how far this went. Some, like Lord Neuberger, took the view that it was a basic principle that that Executive could not override the judgment of the Court. Others (like Baroness Hale) considered that a certificate could be issued where there

was disagreement but only where in each case there was the clearest possible justification to do so.

2. *R (oao Corbett) v Cornwall Council* [2013] EWHC 3958

4. This case concerned the interrelationship between decisions to grant permission and the duty to provide information under the EIR. The substantive challenge related to a decision of the Council to grant permission for wind turbines. It was alleged by the Claimant that there had been a failure to disclose certain specified documents and make them available to the public and/or there had failure to notify the public of the existence of the documents.

5. The Court rejected that claim. It noted that the Claimant had asked for information to be disclosed during the determination process. The request had been made and had been complied with within 20 working days (that required under the EIA Regs), albeit after the date of the decision. It was contended that the failure to provide the information prior to the decision constituted an error under the regulations. That submission was rejected: the legislation was based upon a request system and in this case the request had been made after the determination of the authority (albeit prior to them issuing the relevant notice).

3. *Dransfield v Information Commissioner* [2015] EWCA 454

6. This was a case relating to vexatious requests under FOIA and "manifestly unreasonable" requests under regulation 12(4)(b) of the Environmental Information Regulations 2004. The case involved 2 appeals one of which related to environmental information concerning high voltage cabling. The IC found that the department had been entitled to find that the request was manifestly unreasonable. The FTT and the UT found it to be manifestly unreasonable. The Court of appeal agreed. It found that the phrase "manifestly unreasonable" meant the same as "vexatious" under FOIA.

7. When deciding whether a request was vexatious, it was held that it would be if, objectively, there was no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of it.

8. It was also found that the decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request was vexatious.

9. Importantly, the test was objective but that did not mean that motive would always be irrelevant: the Court held that if a relevant motive could be discerned with a sufficient degree of assurance, it might be evidence from which vexatiousness could be inferred. But there were limits to that: a request pursued against an authority out of vengeance for some other decision made by it could not be said to be vexatious, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available.

10. The Court gave further guidance on how local authorities should deal with applications that seem vexatious: in responding to any request, the authority had to exercise its judgment in good faith in the light of all the information available to it.

4. *Innes v Information Commissioner* [2014] EWCA 1086

11. This case concerned the format by which information should be provided. The applicant had sought information from the local authority and requested that it be supplied in a specified software format. The information was provided but not in the software format requested so that while the applicant had the information, he could not process it in the way he wished. On a complaint to the IC on the basis that s. 11(1)(a) of FOIA

required the material to be provided in a useable format, the complaint was rejected. The FTT and the UT upheld the IC's decision. The Court of Appeal allowed the appeal. The authority was obliged to provide the information in the requested format: the authority was under a duty under reg. 11(1)(a) to give effect, so far as reasonably practicable to the applicant's preference for the provision of "a copy of the information in permanent form or in another form acceptable to the applicant" – this extended to a preference that the material should be in an electronic format and in a particular software format.

12. However, if the conversion to a different format cannot be readily undertaken, it is able to rely on the reasonable practicability qualification; the same would be the case if the provision of the information would be inconsistent with its licence governing the use of the software. The preference for particular software must be made at the time of the request for information.

5. *R (oao Thornton) v Secretary of State for Transport* [2014] EWHC 2700

13. This case arose during the *Evans* litigation in *R (oao Thornton) v Secretary of State for Transport* [2014] EWHC. Importantly, the case considered whether the Aarhus provisions conferred a right to expedition of decisions (in Court particularly but potentially administratively) if it was necessary to enable a party to be adequately involved in a decision-making process (the decision arose in the context of an application to stay the proceedings behind the Supreme Court decision in *Evans*). The Court rejected any such suggestion of a right to expedition. In that case (involving disclosure in relation to HS2), the Court concluded that article 6 of the Aarhus convention, while it referred to the need for expeditious resolution of proceedings, did not confer any such right; rather, the convention acknowledged that there was a tension between the need for early disclosure and the ned to obtain a correct answer which properly balances important public interests which may be in conflict.

6. *Department for Environment, Food and Rural Affairs v Badger Trust* [2014] UKUT 0526

14. This was a case in which the Badger Trust sought disclosure of certain risk analyses undertaken by a project board of DEFRA into the appropriateness of badger culling.

15. Interestingly the Court considered that there was a lack of clarity in the authorities as to when the public interest balancing exercise should be assessed; early cases looked at the date of the information request; many now look at the date of the public authority's final decision but this approach was doubted in the High Court (in *Office of Government Commerce v IC* [2010] QB 98). The UT noted that the approach of considering the position at the date of the authority's decision is not consistent with the development of the FTT's role of receiving new evidence. The Tribunal decided, however, not to rule on this issue (because of the cost of further submissions being made on this point) and resolved to take the date as the date of the authority's consideration. The Tribunal stated, however, that they regarded this issue as an open one.

16. The Tribunal also set out the principle behind the public interest test of the principle of having "space to think in private"; the Tribunal noted the following:

(a) commonly while many policies are being worked out there is a public interest in government having "a space to think in private",

(b) the disclosure of the robust or other discussions and of the risk assessments during that process may cause harm to efficient decision making and thus be against the public interest,

17. The Tribunal also rejected the suggestion (decided by a number of FTTs) that once a policy has been formulated and announced, there could be no further public interest in withholding information from publication. However, the Tribunal did not accept that there is always a general public interest in protecting confidential information and preserving the relationship between confider and confidant – those who disclose must be aware of the potential for confidential information to be disclosed; the legislation provides specifically for such disclosure. The Tribunal decided ultimately that the information should be disclosed.

7. *McInerney v DfE* [2015] UKUT 0047

18. This was a case in which a student had sought information from the Department for Education relating to applications for Free Schools. The DfE refused the applications; the Commissioner upheld M's complaint and ordered disclosure; the DfE appealed.

19. One issue which arose was whether the DfE was able to rely upon exclusions/exemptions not raised at the time of its refusal. The UT in *Birkett and Information Commissioner v Home Office* [2011] UKUT 17 (AAC) (upheld in the CA) decided the public authority could, subject to the FTT's case management powers. The Tribunal reached the conclusion that in respect of the exemption being relied upon in that case (s. 12, the cost exemption) there was a right to rely upon this subsequently. The reasoning indicated that the decision in *Birkett* applied over all exemptions. There is a good reason for that: practically, as in this case, the cost exemption only became apparent when the other substantive ground relied upon (confidentiality) was rejected by the IC.

8. *East Sussex County Council v Information Commissioner* [2016] Env LR 12

20. This case involved a reference to the ECJ over the interpretation of

European (and so the EIR) on charges for the supply of information under regulation 8 of the EIR and article 6 of the Directive 2003/4. The case involved a property search company's requests for information of the local authority. The authority's costs involved a scale of charges which were standardised. They involved an hourly rate which took into account the time spent by the whole of the information team on maintaining the database and replying to individual requests for information.

21. The Court found that public authorities' charges could not exceed a reasonable amount. However, two factors had to be taken into account when fixing the charge. First, they had to be relate to 'supplying' the environmental information requested; second, and in any event, the total amount of the charge could not exceed a 'reasonable amount'. It followed that the costs of maintaining the database used by the authority for answering requests for environmental information may not be taken into account when calculating a charge for 'supplying' environmental information. The effect of such a charge would stand contrary to the provision in article 5(1) that investigation personally of the information at the authority's premises would be free of charge. But, since the costs which could be subject to a charge related to those incurred in providing the information, staff costs incurred in answering the individual request for information was chargeable. While overheads could in principle be included, that had to be a cost factor falling within the "supplying" of environmental information.

22. With regard to identifying what amounted to a "reasonable amount", it could not have a deterrent effect on the individual seeking the information. The Court held that it was important to assess the person's economic situation and the public interest in protection of the environment. There was therefore a need to individually assess the particular applicant's requirements and also a need to objectively assess

whether any charge would be contrary to that public interest. – the charge must not appear objectively unreasonable. It followed that while the claimant in that case might be able to afford the charges, this did not mean that the charge was reasonable. The specific case had to be considered on the merits.

9. GW v Information Commissioner and Local Government Ombudsman [2014] UKUT 0130

23. This was a decision addressing the limits of reliance on legal professional privilege. Advice had been given by Counsel to the local authority in connection with an allegation that there had been a breach of the clean air legislation in effect in the authority's area. A complaint had been made to the LGO who refused to disclose the Advice to GW when he requested it. The UT had to be consider whether the exceptions in regs 12(5)(b) or 12(5)(d) of the EIR would be engaged to prevent disclosure. The UT considered specifically the question whether LPP was capable of amounting to an absolute exception; it noted the comments of the 3 panel UT decision in *DCLG v IC and Robinson* [2012] UKUT 103 that reg. 12(5)(b) would always be capable of being relied upon except in particular circumstances (for example, when the legal advice is very stale) although ultimately the issue was left open.

24. The UT considered, however, that reg. 12(5)(b) did not automatically apply in circumstances where LPP was relied upon. Regulation 12(5)(b) applied "to the extent that [the information's] disclosure would adversely affect … the course of justice". The Court stated (see para. 43): "In my judgment that requires attention to be focused on all the circumstances of the particular case, and there is no room for an absolute rule that disclosure of legally privileged information will necessarily adversely affect the course of justice". The Court considered in that case that it had

not been established that the disclosure would adversely affect the course of justice and rejected the argument that there would be general "chilling" effect in future cases if LPP was overridden in this particular case; it was important, the UT to focus on the specifics of each case when deciding whether the public interest balance lay in favour of disclosure.

25. Ultimately, the UT found that disclosure was properly prevented under regulation 12(2)(d) given that the LGO had received the information on a confidential advice and that disclosure by the LGO could affect its future handling of cases.

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