Landmark CHAMBERS

THE ENVIRONMENTAL INFORMATION REGULATIONS 2004: RECENT DEVELOPMENTS

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Landmark Chambers

Overview

- Top 9 cases (aside from those already discussed) on EIR.
- Themes:
  - Rule of law;
  - Relationship to substantive challenges
  - Manifestly unreasonable requests.
  - The format of production.
  - The requirement for expedition
  - Space to think in private.
  - The reasonableness of charges.

1. Rule of law

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

- **Journalist's request for disclosure of communications passing between the Prince of Wales and certain government departments.**
- **A-G – issued a certificate under s. 53(2) of FOIA (applied to EIR).**
- **Arguments: 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).**

Evans (Cont)

Supreme Court:

- **The use of the certificate procedure under s. 53 (as imported into EIR) was incompatible with the Aarhus legislation**
- **Basic principle that that Executive could not override the judgment of the Court.**
- **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. Relationship with Substantive Challenges

- ***R (oao Corbett) v Cornwall Council*** **[2013] EWHC 3958**
- **substantive challenge related to a decision of the Council to grant permission for wind turbines**
- **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.**

Corbett (cont)

- Court rejected: the EIR subject to its own disclosure regime.
- The request had been complied with in 20 working days albeit that this fell after the decision.
- It was contended that the failure to provide the information prior to the decision constituted an error under the regulations. This was rejected.
- The legislation is based upon a request system and in this case the request had been made after the determination of the authority (albeit prior to it issuing the relevant notice).

3. Manifestly unreasonable requests

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

- 2 appeals, one of which related to environmental information under the EIR.
- Court of Appeal guidance:
- “Manifestly unreasonable” same as “vexatious”.
- Test.: 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.
- This required consideration of all factors.

Dransfield (cont)

- The test was objective but did not mean that motive would always be irrelevant.
- If a motive could be discerned, it might be evidence from which vexatiousness could be discerned.
- But: a request made out of vengeance for some other decision could not be vexatious, however vengeful, if the request was aimed at the disclosure of important information which ought to be made publicly available.

4. Format of Information

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

- **Applicant had sought information from the local authority and requested it to be supplied in a specified software format.**
- **It was provided but not in the format requested and alleged breach of reg. 11(1)(a).**
- **Court of Appeal agreed.**
- **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.**

Innes (cont)

- But – if conversion to a different format cannot be readily undertaken, authority 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 applicant's preference must be made at time of request.

5. Expedition

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

- **Case considered whether, in Court proceedings, there was a right to expedition (potentially of wider application given derived from art 6 of Aarhus).**
- **The Court rejected argument: while it referred to the expeditious resolution of proceedings, it did not confer any such right.**
- **The convention acknowledged that there was a tension between the need for early disclosure and the need to obtain a correct answer which properly balances important public interests which may be in conflict.**

6. Space to think in private

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

- **Request for disclosure of risk analyses a project board of DEFRA into the appropriateness of badger culling.**
- **Principal issue – application of public interest question of right to think in private.**
- **Two particular points:**
  - **First, commonly while many policies are being worked out there is a public interest in government having "a space to think in private".**

Badger Trust (cont).

- **Second, 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.**
- **The UT 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.**
- **But, it was reiterated that confidential information would not necessarily stay confidential.**

Badger Trust (cont)

- **Side point: 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.**
- **Issue not ruled on; open question.**

7. Later reliance on exemptions

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

- **student had sought information from the Department for Education relating to applications for Free Schools.**
- **The UT considered *Birkett* [2011] UKUT 17 in which it was indicated there was a right to rely upon an exemption after the date of the decision to refuse release in respect of the specific exemption under question.**
- **The UT agreed and widened the conclusion to cover all exemptions.**

McInerney (cont)

- This makes sense: e.g. where the exemption only became apparent when the other substantive ground is rejected – e.g. costs.

8. The calculation of production charges

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

- **A reference to the ECJ on scale of charges.**
- **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.**
- **The costs were required to be reasonable.**
- **To be reasonable:**

East Sussex (cont).

- First, they had to relate to ‘supplying’ the environmental information requested;
- Second, and in any event, the total amount of the charge could not exceed a ‘reasonable amount’.

- So, costs of maintaining the database used by the authority for answering requests not to be taken into account.
- But staff costs incurred in answering the individual request for information was chargeable.
- Overheads were chargeable only if they were related to supplying the information.

East Sussex (Cont)

- Regarding what is reasonable, the charge could not have a deterrent effect.
- Important to assess the person's economic situation and the public interest in protection of the environment.
- So - 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 - while C. might be able to afford the charges, this did not mean that the charge was reasonable.

9. Legal Professional Privilege

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

- **Legal advice given 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.**
- **UT considered whether regs 12(5)(b) (exemption - adversely affecting course of justice) and 12(5)(d) (confidentiality exemption).**

GW (cont)

- **UT considered UT's observations in *DCLG v* IC that LPP might always prevent disclosure except in particular circumstances when the legal advice is very stale.**
- **UT considered that reg. 12(5)(b) did not automatically apply where LPP relied upon.**
- **"In my judgment [reg. 12(5)(b)] 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".**

GW (cont).

- There is no basis for automatic exemption on ground of “chilling effect”. Had to be established that disclosure would adversely affect the course of justice.
- 12(2)(d) was satisfied because LGO disclosure prejudice its future conduct.