IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2010/0069, 0076, 0079

BETWEEN:-

FISH LEGAL, EMILY SHIRLEY & STEPHEN REEVE

Appellants

and

THE INFORMATION COMMISSIONER

Respondent

FISH LEGAL's WRITTEN SUBMISSIONS
For directions hearing on 7 February 2011

Introduction

1. Fish Legal makes these submissions in advance of the scheduled directions hearing on 7 February 2011 including in response to the Information Commissioner's (ICO) written submissions dated 18 January 2011, which include an application to strike out Fish Legal's appeal under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Rules) on the basis that the appeal has no reasonable prospects of success following determination of the lead appeal by the Upper Tribunal (the UT) in ***Smartsource Drainage and Water Reports Limited v ICO*** on 23 November 2010 (GI/2458/2010) (***Smartsource***).

2. By the submissions set out below, Fish Legal:

   a) requests a direction that its appeal be transferred to the UT pursuant to rule 19(2) of the Rules in order for the UT to consider making a reference to the Court of Justice of the European Union (CJEU) as to the meaning of public authority under the EU Directive on public access to environmental information (2003/4/EC) (which the Environmental Information Regulations (EIR) 2004 (SI 2004/3391) give effect to); and thus

   b) resists the ICO's application to strike out the appeal.

3. The need for a reference to the CJEU arises because, as below:

a) The UT failed to adopt the required approach when considering the meaning and application of key points of EU law;

b) The points of EU law raised are of wide general importance since they concern the scope of application of the entire Directive and its equal application across the EU; and

c) A reference to the CJEU by the UT for a preliminary ruling is the most cost-effective way to resolve the question of the correctness of the UT's decision in ***Smartsource***. Indeed, the requirements of Article 6(1) of the Directive make that imperative:

> "Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive." [Underlining added]

4. Attached to these submissions is a letter from the European Commission's Directorate-General Environment regarding the ***Smartsource*** decision. It strongly supports Fish Legal's concerns about the correctness of the decision and the need for a reference.

The UT's decision in *Smartsource* is wrong

5. The decision in ***Smartsource*** concerned the question of principle as to the correct approach to determining which bodies fall within the definition of public authorities under Regulation 2(2) of the EIA Regulations, and, in particular in this case, whether water companies in England and Wales "carr[y] out functions of public administration" (under Reg 2(2)(c)) or are "under the control of" a public authority (and have (i) 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) (under Reg 2(2)(d)).

6. The wording of Regulation 2(2) gives effect to the definition of public authority in the Directive, which in turn gives effect to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (which has been ratified by the European Community (Council Decision of 17 February 2005, 2005/370/EC, (OJ L124/1).

7. As the ECJ (as then was) said in ***Marks & Spencer –v- Customs & Excise Case*** C-62/00 [2002] ECR I-06325:

> "[24] ...it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, inter alia, Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 41). <u>It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive</u>, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20)." [underlining added]

8. It follows that (as considered further below) domestic law must be construed to give effect to EU law, not the other way round (i.e. with EU law being read and understood to give effect to domestic law).

9. The question addressed by the UT is thus self-evidently of considerable importance since it determines the scope of application of the Regulations/Directive/Convention.

10. The UT correctly recognised that it was faced with a novel question on which it did not have the assistance of any binding case law ([22]).

11. And it is evident from the detailed submissions of the parties to the appeal and the reasoning of the UT in its judgment that, on any view, the question was of considerable difficulty.

12. However, in Fish Legal's submission, the UT's answer that water companies in England and Wales would never fall within the scope of Regulation 2(2) was wrong as below.

<u>(i) The UT's adopted the wrong approach overall</u>

13. In ***CILFIT Sr CILFIT (Srl) v Ministry of Health*** (Case C-283/81) [1983] 1 CMLR 472, what was then the Court of Justice of the European Communities, gave authoritative guidance regarding the correct approach to questions of European law by domestic courts and tribunals, saying:

> "[16] ... the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised

is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the court of justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it .

[17] However, the existence of such a possibility must be assessed on the basis of the characteristic features of community law and the particular difficulties to which its interpretation gives rise.

[18] To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

[19] It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member-States.

[20] Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

14. A number of important points are apparent from this passage:

a) A comparison of different language versions of the provision in question is required;

b) even if consideration of different language versions reveals no textual difference, it must not be assumed that the passage bears the meaning it would in the domestic law of the court in question since the provision may not mean the same in another member states or it may bear a distinctive meaning in EU law;

c) a contextual interpretation in light of the objectives of the EU law in question is required; and

d) the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the court of justice if a reference is to be avoided.

15. The UT's decision in ***Smartsource*** entirely failed to follow this approach, maybe because (so it seems) the parties before it failed to raise the points which thus needed to be considered.

16. In particular, it did not consider other language versions of the Directive (or Convention); it answered the questions of interpretation predominantly by reference to domestic sources (which could have no bearing on the key question on the meaning and application of the Directive (etc) across the EU; and it failed to focus on the objective and purpose of the Directive.

17. In Fish Legal's submission that alone vitiates the UT's decision.

(ii) The UT was in any event wrong on the "hybrid" issue

18. As part of that flawed overall approach, the UT concluded at [102] – [104] that Regulation 2(2) did not allow for any "hybridity" in its application. In other words: a body was either entirely within the ambit of the Directive or entirely outside it.

19. That (if correct) would mean that it could not be the case that certain functions of a body fall within and other functions outside the scope of the Regulations.

20. Rather, the UT found Regulation 2(2) to require a global assessment of the body in question (here the water companies) against the tests in Regulation 2(2).

21. In Fish Legal's submission, this approach is untenable, is directly contrary to the Aarhus Convention guidance, and fails to take account (as above) to the diversity of ways in which the public powers in question are, or could be manifested across the EU.

22. On the approach taken by the UT so far, a body will only be a public authority for the purposes of the Regulations if it has sufficient functions *overall* to satisfy one of the applicable tests. Accordingly, the UT (earlier in the judgment) had accepted the submission that certain public administrative functions "ancillary" to a body's more "central functions" did not change the private nature of the body as a whole (at [76]).

23. However, on this approach, if a limited number of public administrative functions were passed to a private company performing predominantly private functions not otherwise falling within the Regulations, the Regulations would presumably cease to apply to the transferred public functions because the body *as a whole* would remain a body *overall* conducting private functions.

24. This result runs entirely contrary to the intention of the Aarhus Convention as stated in the Aarhus guidance:

"The Convention tries to make it clear that privatisation cannot take public services or activities out of the realm of public involvement, information and participation." (p32)

25. Yet the rejection of hybridity in favour of a one-off global assessment of all the body's functions would permit exactly that outcome.

26. The UT identified two reasons for its conclusions on the hybrid issue:

    a) the "application of regulation 2 would become time-consuming and problematic if a body was a public authority for some purposes...but not for others", and

    b) "as a matter of statutory interpretation...regulation 2 did not suggest that an organisation could be simultaneously both within and without the ambit of the EIR 2004" [104].

27. However, as for (a), administrative expedience is not a proper basis to interpret and apply the requirements of the law so as to create potentially significant gaps in the application of the Regulations or undermine a key objective of the Convention.

28. This is reinforced by CILFIT which (as above) makes clear that questions of interpretation are to be approached with the objectives of the Directive in mind and so as to secure a common result across the EU.

29. As for (b), Fish Legal simply notes that there is nothing in the language of the Regulations to preclude hybrid application – they are silent on the point.

30. Moreover, the comparison (which the UT made) with the wording of section 6 of the Human Rights Act 1998 should never have been made because that is to impermissibly make the meaning of the Directive vary according to the domestic law of the Member State.

31. As above, the Aarhus Convention guidance itself specifically envisages hybridity, at least in respect of the "control" limb of the public authority definition. It thus provides the following example specifically in respect of privatised water management functions:

> "water management functions might be performed by either a government institution or a private entity. In the latter case, the provisions of the Convention would be applicable to the private entity insofar as it performs public water management functions under the control of the governmental authority." (p. 33)

32. Fish Legal's concerns regarding the correctness of the UT's approach on the hybrid issue are supported by the Commission's letter, appended to the submissions, which states that:

"we would be very concerned if a decision was taken with regard to England and Wales to exclude all information held by water companies from public access under Directive 2003/4/EC".

33. That letter, which cannot be lightly dismissed, also raises the concern that, under the UT's approach, public functions can be taken out of the scope of the Directive by privatisation saying "Article 2(2) was deliberately drafted widely in order to ensure that environmental information such as this would not be privatised out of public access".

(iii) The UT's approach to "public administrative functions" under sub-paragraph 2(2)(c) of the Regulations erred in focusing exclusively on factors derived from domestic law

34. The erroneous approach is further seen by the fact that the UT's decision relied almost exclusively on a number of domestic sources - and in particular domestic case law relating to section 6(2)(b) of the Human Rights Act 1998 - to determine the meaning of "public administrative functions" (see [63]-[78]).

35. However, as the Aarhus guidance notes "the definition of public authority is important in defining the scope of the Convention" (p. 32). As such, Fish Legal submits that it must be the case that "public administrative functions" has some objective/autonomous Community-wide meaning, since otherwise the scope and equal application of the Directive/Convention across member states would be severely jeopardised.

36. In any event, as above, it is plainly not permissible to construe EU provisions on the basis of domestic law.

37. Again, this is a concern specifically raised by the Commission's letter, which notes the potential unequal application of the Directive (even between England and Wales and Scotland and Northern Ireland) saying "furthermore, such information would presumably be available in other parts of the United Kingdom and other Member States where these functions had not been privatised leading to unequal access for what is effectively the same information".

(iv) The UT's interpretation of "under the control of" under sub-paragraph 2(d) of the Regulations is excessively narrow and wrong in principle

38. Further and in any event, the UT adopted a narrow interpretation of the meaning of "under the control of" in the Regulations, which focused on a contradistinction between governmental and executive functions on the one hand and private commercial entities which remain at arms length from the machinery of the State on the other.

39. The UT accepted a related (and in this case determinative) distinction between regulation and control to be implicit in this approach ([94]-[95]).

40. In Fish Legal's submission, this approach is excessively narrow, contrary to the approach indicated in the Aarhus guidance, and is moreover wrong in principle in so far as it excludes the fact of regulation as a relevant factor to identifying bodies "under the control of" a public authority.

41. First, the Aarhus guidance specifically identifies State regulation as relevant. For example, the Guidance states of the test "[f]urthermore, it may cover entities performing environment-related public services that are subject to regulatory control' (at p. 33). The Commission's letter likewise identifies regulation as a relevant consideration, stating:

> "Given the role played by water companies in England and Wales in providing water and sewerage services is regulated by legislation and carried [out] under the oversight of government and other public administrations such as OFWAT it would be of some concern if the information held by these companies was deemed to fall outside of public scrutiny".

42. Secondly, the UT's approach - which places significant reliance on the fact and manner of privatization and competition as it happens to have taken place in England (see [96]-[97]) - appears to run entirely contrary to the objective of the Aarhus Convention of ensuring that privatisation cannot take public services or activities out of the realm of public involvement, information and participation.

43. Or as the Commission's letter puts it: "Article 2(2) of the Directive was deliberately widely drafted in order to ensure that environmental information such as this would not be privatised out of public access".

44. Finally, the concern that the UT's approach is excessively narrow gains support from the Spanish language version of the test in the Directive, which uses the wording "bajo la autoridad de una entidad o de una persona", which translates to "under the authority of an entity or person", a wording suggestive of a broader approach than that adopted by the UT. The UT did not consider other language versions of the Directive in its decision as it was required to do under the approach set out in ***CILFIT***.

Making a reference for a preliminary ruling

45. The application for a reference to the CJEU will be set out in further detail if Fish Legal's request to have the appeal transferred under rule 19 is granted.

46. In outline only at this stage, therefore, the threshold for making a reference was recently summarised as follows by the Supreme Court in ***R (Edwards and ors) v the Environment Agency and ors*** [2010] UKSC 57:

"The appellant has submitted that, taken overall, no clear and simple answer is available to the question as to what is the right test. That indeed does seem to be the position. In any event it cannot be said to be so obvious as to leave no reasonable scope for doubt as to the manner in which the question would be resolved: *CILFIT (Srl) v Ministry of Health* (Case C-283/81) [1983] 1 CMLR 472. In these circumstances the Court will refer the issue to the Court of Justice of the European Union for a preliminary ruling under article 267 TFEU (ex article 234 EC)." (at [36], underlining added)

47. That threshold is very clearly crossed here as above including, in particular, in the light of:
    a) the letter from the Commission;
    b) the divergence from the Aarhus Convention guidance; and
    c) the UT's failure to comply with ***CILFIT***.

48. A lower court or tribunal (as opposed to a court of last resort such as the Supreme Court) has a discretion whether to refer a question to the CJEU. Halsbury's Laws Vol. 11 (2009) 5th Ed. at [1723] succinctly summarises the factors relevant to the exercise of this discretion from the case law as follows (references omitted):

"The most important factor in determining whether to make a preliminary reference will be the difficulty of the Community law point in issue. Other factors include which court is 'best fitted to decide the question', the importance of the point, delay, the expense, whether a similar question is pending before the European Court and the wishes of the parties...."

49. That points to the making of a reference here:

    a) The novel question of the correct approach to the definition of public authority under the Directive is evidently of considerable difficulty;

    b) The question is of considerable importance, going to the scope of application of the whole Directive and (as the Commission's letter notes) raising questions regarding the equal application of the Directive across (and even within) Member States;

    c) The CJEU is, for obvious reasons, better placed than the UT, or any other domestic court, to provide guidance on this general question of principle;

    d) Any delay to determination of Fish Legal's appeal due to the making of a preliminary reference would not cause any party to the appeal prejudice;

    e) A preliminary reference would entail considerably less expense by the parties and expenditure of scarce judicial resources than would any appeal to the Court

of Appeal in respect of the ***Smartsource*** decision (which, as noted above, would itself likely lead to a reference of the question to the CJEU in any event); as above, Article 6(1) of the Directive mandates the taking of such an approach:

> "Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive." [Underlining added]

f) As far as Fish Legal is aware, there is no case pending before the CJEU raising the same point (though it seems that certain other questions regarding Article 2(2) of the Directive have been referred to the CJEU by the German Bundesverwaltungsgericht in the case of ***Flachglas Torgau GmbH v Federal Republic of Germany*** (C-204/09);

g) It is to be hoped that the ICO will support the application for a preliminary reference which would clarify a difficult and important point of Community law at the earliest possible opportunity; and

h) Both the domestic courts and the CJEU have made clear that it is preferable to make a reference after the facts of the case have been found, which, following the UT decision in ***Smartsource***, is the case here (at least in respect of the nature and functions of the water companies). To the extent that any further factual findings regarding Fish Legal's appeal are necessary these could be made or indeed (very likely) agreed between the parties.

50. Ultimately, in Fish Legal's submission, there is a strong case for a preliminary reference in order to resolve the evident uncertainty regarding the correct approach to the novel question of the definition of public authority under the Regulations/Directive. In light of the recent decision of the UT in ***Smartsource***, in Fish Legal's submission, the UT is best placed to make such a reference.

Procedure

51. As noted above, Fish Legal requests that its appeal be referred to the UT pursuant to rule 19, which applies to appeals from decisions of the ICO under the EIA Regulations (see Rule 19(1)).

52. Rule 19(2)-(3) provides:

> "(2) [In any other case] The Tribunal may refer a case or a preliminary issue to the President of the General Regulatory Chamber with a request that the case or issue be considered for transfer to the Upper Tribunal.
>
> (3) If a case or issue has been referred by the Tribunal under paragraph (2), the President of the General Regulatory Chamber may, with the concurrence of the President of the appropriate Chamber of the Upper Tribunal, direct that the case or issue be transferred to and determined by the Upper Tribunal.

53. A Joint Office Note has been issued providing guidance on such references (Joint Office Note: [GRC Office Note [No. 2]] [AAC Office Note [No. 2]]).[1]

54. The note makes clear that "cases or issues will only be suitable for transfer where some special feature merits this course. Examples may be where a case is of considerable public importance or involves complex or unusual issues" ([3]).

55. For the reasons given above, Fish Legal submits that this appeal falls squarely within this class of cases. This is especially so since the request for a preliminary reference concerns the correctness of a recent decision of the UT.

56. In Fish Legal's submission, it would be fair and just in the circumstances of this appeal (in particular being a proportionate way of dealing with the important and complex issues raised by this appeal) for the Tribunal to grant Fish Legal's request for the appeal to be transferred pursuant to rule 19(2).

57. The Joint Office Note provides further guidance on the procedure for referral requests at [4] - [6], which Fish Legal draws to the Tribunal's attention. In particular, paragraph 6 makes clear that, until the appeal is finally transferred under the above procedure, responsibility for case management remains with the FTT.

58. The ICO's application to strike out the appeal should be dismissed.

59. Further directions would need to await the outcome of the rule 19 transfer request.

Summary

60. In summary, the Tribunal is requested to transfer this appeal to the UT pursuant to rule 19(2) of the Rules in order for the UT to consider making a preliminary reference to the CJEU regarding the correct approach to the definition of public authority under the Directive.

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[1] Available at http://www.informationtribunal.gov.uk/Documents/19_AAC_GRCOffNoteDiscretTrans_25Nov10.pdf

61. The ICO's application to strike out the appeal is resisted on the basis that a preliminary reference should be made (and the UT is likely to make such a reference) and accordingly it cannot be said that the appeal has no reasonable prospect of success.

DAVID WOLFE
MATRIX

31 JANUARY 2011