Recent decisions of the Information Commissioner and Tribunals

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highlight points of interest from decisions of the Upper Tribunal and First-Tier Tribunal from June and July 2020

Copies of links to the decisions covered in this update:

Information Commissioner v Moss and Royal Borough of Kingston upon Thames
www.pdpjournals.com/docs/888069

Webber v Information Commissioner
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Information Commissioner v (1) Poplar Housing Association and (2) People's Information Centre
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Information Commissioner v Moss and Royal Borough of Kingston upon Thames [2020] UKUT 174 (AAC), 15th June

Summary

When the First Tier-Tribunal ('FTT') on appeal substitutes a decision notice for that of the Information Commissioner, who is responsible for deciding whether the public authority has complied with that notice and taking action to enforce it? The Commissioner argued it is the FTT. The FTT said it is the Commissioner. The Upper Tribunal ('UT') concluded that it is the FTT.

Facts

Mr Moss succeeded in a case before the FTT in which the FTT substituted a decision notice to the effect that whilst the local authority had been justified in relying on section 12 of the Freedom of Information Act 2000 ('FOIA') in respect of Mr Moss' request, it was required to provide advice and assistance to Mr Moss (in line with section 16 FOIA) with a view to enabling him to bring his request within the cost limit.

Mr Moss claimed that Royal Borough of Kingston upon Thames ('RBKT') had failed to comply with the FTT's decision. He asked the Commissioner to enforce the decision, but she declined. Although not stated at the time, the Commissioner explained before the Upper Tribunal that whilst an un-appealed or unchanged notice is enforceable by the Commissioner, a substituted decision should be enforced by the General Regulatory Chamber ('GRC') via section 61 FOIA and Schedule 6 of the Data Protection Act 1998 ('DPA 1998' which applied at the time).

Mr Moss applied to the Tribunal for a contempt of court order to be issued against RBKT, and he followed this with an application a month later for the Tribunal to certify an offence of contempt of court as against RBKT and the Commissioner.

Those applications were consolidated by the Registrar of the GRC who struck them out. That decision was confirmed by the Chamber President and Mr Moss appealed to the Upper Tribunal.

Upper Tribunal decision

Mr Moss did not take a position on who was responsible for enforcement; he simply wanted to know who it was. His only submission was that the procedure should be clear, accessible and effective.

The Commissioner's argument consisted of two elements: first, that the FTT has the power to enforce its own decision; and second, that the Commissioner does not have this power. The UT agreed with both of these propositions and took each of them in turn.

On the first proposition, the UT observed that the FTT's power is conferred by section 61 FOIA and, by adoption, paragraph 8 of Schedule 6 to the DPA 1998. This effectively gives the FTT the same power as the Commissioner has under section 54 (1) to send a case to the High Court for contempt (under the DPA 2018, the provisions are largely the same, save for the fact that the power to commit for contempt now rests with the UT instead).

The UT observed that if section 61 does not cover failure to comply with a tribunal's decision, its function was questionable. The FTT already has power to refer failures in respect of giving evidence and producing documents to the UT under Rule 7(3) of the Civil Procedure Rules ('CPR'), and it has power to strike out proceedings, or bar a respondent from taking part in the proceedings under Rule 8 on account of failure to comply with its orders or to co-operate. As the UT noted, "that does not leave much else for section 61 to deal with, apart from the tribunal's decision."

Although RBKT was not a party before the FTT, the UT observed that the FTT's decision was nonetheless binding by virtue of both its terms — which imposed a duty on the local authority — and its status as a decision notice under FOIA, albeit a

'substituted' one. The power to punish for contempt is not limited to someone who was party to proceedings (Rule 70.4 of the CPR).

Turning to the Commissioner's second proposition that the Commissioner does not have power to enforce the FTT's decision, the UT noted that the Commissioner has power to enforce her own notices under sections 52 and 54 FOIA. In considering whether those powers could be used to enforce decisions of the FTT, the Commissioner submitted that the sections confer powers not duties; they are discretionary. However, the discretion would be entirely beyond the control of the FTT, even if the case involved a possible failure to comply with a decision notice substituted by that tribunal.

In that regard, the UT referred to *R(Evans) v Attorney General* [2015] AC 1787, noting that it would not be permissible for the Commissioner to use her powers of enforcement. In the context of FOIA, such use would be a breach of the fundamental constitutional principles set out by Lord Neuberger in *Evans*, as it would allow the Commissioner to control the enforcement of a tribunal's decision. While that control would be subject to judicial review, it would still leave open the possibility that the Commissioner might exercise her discretion against enforcement in a manner, and on grounds that were, beyond the control of review.

In conclusion, the UT explained that the FTT was right to strike out that part of the proceedings relating to Mr Moss's application for a contempt of court order, because it had no jurisdiction to make one. However, it was wrong to strike out the part of the proceedings relating to his application to certify an offence of contempt, because it had jurisdiction over that issue. The matter was remitted to the FTT to deal with the enforcement issue.

Points to note

This decision provides welcome and sensible clarity to those who may succeed in the Tribunal, but for whatever reason there is a failure to comply with the Tribunal's order. It means that successful litigants do not have to rely on the discretion of the Commissioner in enforcing such decisions, but can instead apply pursuant to section 61 FOIA for the Tribunal to certify an offence of contempt.

> ***"This decision means that successful litigants do not have to rely on the discretion of the Commissioner in enforcing such decisions, but can instead apply pursuant to section 61 FOIA for the Tribunal to certify an offence of contempt."***

Webber v Information Commissioner EA/2019/0369, 17th June

Summary

The London Borough of Barnet ('the Council') sought to withhold parts of its standard-form paragraphs available to its parking enforcement officers when making decisions following representations about the issue of Penalty Charge Notices ('PCNs'). It did so relying on section 31(c) FOIA and subsequently section 31(2)(c) via section 31(1)(g) FOIA. The FTT found that the public interest test in relation to the claimed exemption was not made out.

Facts

In early November 2018, Mr Webber made a FOIA request to the Council essentially seeking information relating to PCNs. The Council disclosed 129 standard-form paragraphs available to its enforcement officers when making decisions following representations about the issue of PCNs, but withheld seven, relying on section 31(1)(c) FOIA ('information whose disclosure would or would be likely to prejudice the administration of justice'). The Council upheld this decision on internal review, but instead relied on section 31(2)(c) FOIA.

On appeal to the Information Commissioner, the Commissioner held that the Council "has explained that there is a very strong public interest in withholding information that could assist in fraudulent practices, specifically in the case of Blue Badge fraud." Accordingly, the Commissioner held that the Council was entitled to rely on a combination of section 31(1)(g) and 31(2)(c) in relation to the withheld paragraphs (which by that stage had been reduced to six), and that the public interest favoured withholding them.

Decision of the Tribunal

Mr Webber essentially sought to challenge the application of the public interest test by the Commissioner. In considering the case, the Tribunal identified four main issues: is section 31 potentially in play; if so, is the Council entitled to rely on section 31(2)(c), via section 31(1)(g), in relation to the withheld paragraphs; similarly, is it entitled to rely on section 31(1)(a) in relation to the third withheld paragraph; and assuming that section 31(2)(c) and/or section 31(1)(a) are engaged, where does the public interest lie?

On the first issue, the Tribunal was satisfied that as the request did not relate to a specific investigation, but rather to information held by the Council for the purposes of dealing with challenges to PCNs in general, section 31 was engaged.

On the second and third issues, the Tribunal carried out the well-rehearsed exercise of identifying whether the Council's assertion that the disclosure 'would be likely to' prejudice its relevant interests was successfully established.

It observed that section 31(2)(c) is a 'somewhat clumsy provision', but that essentially the question for the Tribunal to consider was whether release of the paragraphs in question

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would make it more difficult for the Council to decide whether to take regulatory action in relation to parking offences.

The Council's position was that release of the paragraphs might encourage unscrupulous motorists to modify their behaviour so as to avoid a PCN or be able confidently to challenge one which is issued. The Tribunal also noted that the phrase 'justify regulatory action' in paragraph (g) is wide enough to encompass a decision whether to maintain a PCN, not simply issue it in the first place. Accordingly, the Tribunal found that section 31(2)(c) (via section 31(1)(g)) was engaged. The Tribunal further agreed that the likelihood of prejudice threshold was met in all but one of the withheld paragraphs.

Turning to the fourth issue and the public interest test, the Tribunal noted that the Council's position, supported by the Commissioner, was essentially that the parking enforcement paragraphs do not constitute policy, but are instead tools for parking enforcement officers to use if they choose. They are not mandatory, can be ignored or edited and they may change from time to time. The paragraphs relate to specific situations, and therefore provide an insight into when the Council might exercise its discretion to waive a PCN.

While the Council accepted that the public has an interest in understanding how it enforces parking regulations and in transparency about how it conducts its affairs in general, it submitted that this was outweighed by the additional difficulty to enforcement which release of the withheld paragraphs would lead to. It noted that it already publishes more than most local authorities about parking enforcement.

"This decision emphasises the importance of transparent decision-making and fairness. Secret policies do not serve the public well and may advantage motorists with second hand knowledge of such policies, over others who are not aware of them. Local authorities would do well to take note of this decision, and acknowledge that case law and guidance on this issue point towards a greater public interest in disclosing, rather than withholding of such policies."

On the other hand, the Tribunal observed that as the Council had released 130 paragraphs, it followed that it does not fear adverse consequences from the public knowing their contents, and that there must therefore be something about the withheld paragraphs which puts them in a separate category. The Tribunal referred to the Court of Appeal decision in *Walmsey v Transport for London and others* [2005] EWCA Civ 1540 and the Supreme Court decision in *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, noting that they provide useful guidance about the importance of transparent policies — particularly *Walmsey*, as that was a case involving penalties for non-payment of the London congestion charge.

In considering first whether the paragraphs in this case constituted 'policy', the Tribunal noted that this is a term of art, and that "just as with an elephant, everyone thinks they know what a policy is even if they might struggle to define it." The Tribunal explained that its understanding of a 'policy' was that it is "a set of guidelines intended to steer decision-making in particular circumstances", and consequently it determined that the withheld paragraphs did constitute actual policies about the circumstances in which the authority will maintain or revoke a PCN. This was so particularly as there is an expectation that enforcement officers apply the guidance in the paragraphs, unless there is a good reason not to do so.

The Tribunal further noted that guidance issued by the Secretary of State for Transport under section 87 of the Traffic Management Act 2000 encourages local authorities to be open about how they enforce parking offences, so that motorists can know when to challenge a PCN. Para 10.4 of that guidance explains that "authorities should formulate (with advice from their legal department) and then publish their policies on the exercise of discretion". Accordingly, the Tribunal noted that the importance of transparency in both caselaw and guidance was a very weighty consideration, albeit not conclusive on the public interest question.

Although it acknowledged the Council's concerns that disclosing the paragraphs may encourage the unscrupulous to fabricate arguments, it explained (citing Sedley LJ in *Walmsley*) that this may have to be a price that is paid for transparency in public decision-making, so that everyone knows where they stand. On the question of Blue Badge fraud, while the Tribunal acknowledged that this is a widespread issue, it concluded that disclosure would only provide a small additional impetus to such fraud. As such, in all the circumstances, the Tribunal concluded that the public interest test weighed in favour of disclosure, explaining that motorists are entitled to know in what circumstances a PCN is likely to be revoked.

Points to note

While this is only a first instance decision, it may well have wide ramifications for local authorities up and down the country. PCNs represent an important source of revenue for many cash strapped local authorities and many are consequently keen to avoid publication of many of the ways in which they handle their enforcement.

However, this decision emphasises the importance of transparent decision-making and fairness. Secret policies do not serve the public well and may advantage motorists with second hand knowledge of such policies, over others who are not aware of them. Local authorities would do well to take note of this decision, and acknowledge that case law and guidance on this issue point towards a greater public interest in disclosing, rather than withholding of such policies.

Information Commissioner v (1) Poplar Housing Association and (2) People's Information Centre [2020] UKUT 182 (AAC), 9th July

Summary

In a decision that is likely to have wide-ranging implications throughout a number of sectors in which there are private bodies exercising public or quasi-public functions, the Upper Tribunal has found that a housing association, 'Poplar', is not a 'public authority' within the meaning of Article 2(2)(c) of the Environmental Information Regulations 2004 ('EIRs').

Facts

Poplar is a community benefit society incorporated under the Co-operative and Community Benefits Societies Act 2014. Established with a transfer of some of London Borough of Tower Hamlet's housing stock in 1998, it provides housing, owning and managing about 9000 homes, as well as community facilities and commercial property. It is a private registered provider of social housing (i.e. a landlord of low-cost rental or home ownership accommodation), and in the case of the Borough of Tower Hamlets, Poplar owns approximately 13% of the social housing stock in the Borough.

As with other private registered providers, Poplar enjoys certain statutory powers which are not available to non-registered landlords such as: the power to seek injunctions and parenting orders under Anti-Social Behaviour legislation; powers to seek demotion orders terminating assured tenancies; and powers to seek the grant of a family intervention tenancy.

In 2018, Mr Steig on behalf of the second respondent made a written request to Poplar seeking a list of addresses of Poplar's empty properties and plots of land earmarked for redevelopment or disposal. He received no response, and Poplar's evidence was that his email had been overlooked. The Information Commissioner determined that the information requested was environmental, that Poplar was a 'public authority' for the purposes of the Regulations, and that by failing to reply, Poplar had accordingly breached Regulation 5(2) of the EIRs.

Poplar appealed to the FTT successfully. It found that Poplar is not a public authority for the purposes of the Regulations. The key question that the FTT considered was the definition of 'public authority' in Article 2(2)(b) of Directive (2003/4/EC) which was considered by the Court of Justice of the EU ('CJEU') in CJ-279/12 *Fish Legal*. In that case, the CJEU explained:

"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)…"

Further, it noted that "the second category of public authorities, defined in Article 2(2)(b)…concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."

The above section of the judgment — which lays down a functional test and refers to the entrustment of powers — formed the bedrock of the dispute in this case.

Applying the above passages, the FTT concluded that Poplar had not been empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation. It did not accept that the regulatory framework, including statutory regulation, and the powers granted specifically to registered providers of social housing, could be described as a 'legal basis specifically defined in national legislation' as required by paragraph 48 of the *Fish Legal* decision or paragraph 50 of *Cross v Information Commissioner and another* [2016] AACR 39.

However, the FTT also noted that if it had not been constrained by authority, it would have taken a broader approach to identifying an entrustment by a legal regime. It accepted the Information Commissioner's argument that Poplar had been entrusted with providing social housing by the applicable legal regime. It also remarked that Poplar met the other necessary elements of the definition of 'public authority', noting in particular that the provision of social housing is a 'service of public interest', and that the power to apply for orders in relation to anti-social behaviour and other matters was sufficient to vest Poplar with a 'special power' which was not available in private law, and which enables Poplar to carry out the public interest task which it has been entrusted.

Finally, the FTT applied the 'cross check' as advocated in paragraph 100 in *Cross.* This involves stepping back, looking at all the circumstances, not applying the CJEU's test rigidly and looking at the underlying objectives and purposes of the Directive and the EIRs. However, despite carrying out this exercise, the FTT concluded that it could not ignore the clear statements in *Fish Legal* CJ-279/12 and *Cross* in light of its conclusions on the question of entrustment.

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Grounds of Appeal

The Information Commissioner pursued an appeal on three grounds. First, the Commissioner submitted that the FTT was legally incorrect to conclude that there must be a legislative entrustment of public interest services to an entity in order for the entity to fall within Article 2(2)(b) of the Directive. Second, she argued that the FTT made an error of law in concluding that the requirement for Poplar's public interest services to have a legal basis specifically defined in applicable national legislation must be equated with an express delegation of statutory function, and cannot by met by a regulatory framework. Third, the FTT was said to have misdirected itself in relation to its 'cross check' as to whether — upon standing back — Poplar is a public authority in all the circumstances of the case.

The Upper Tribunal's Decision

In considering the first ground, the Tribunal carefully examined the CJEU decision in *Fish Legal* and noted that the test it set down was clear. The test had separate elements, namely the entrustment of public functions and the vesting of special powers.

The UT rejected the Commissioner's argument that the purposes of the Aarhus Convention and the Directive included the widest possible access to environmental information, increased awareness of environmental matters, and increased responsibility and accountability for environmental matters. For the Commissioner, it followed that if the definition of public authority does not encompass the modern State's use of privatisation and outsourcing, the availability of environmental information would be unduly constrained, contrary to the objectives of the Convention and Directive. The UT characterised this submission as "too broad" and simply "not what *Fish Legal* EU says."

The UT explained that the Commissioner's submission would amount to an expansion of the definition beyond what emerges from *Fish Legal,* and that the Directive (and so the Regulations) are intended to have a wide reach, but they were not intended to give rise to a general right to request environmental information from any entity that holds it. The UT concluded that *Cross*, in setting down a dual test, had faithfully applied Fish Legal. This dual test required there to be (a) entrustment and (b) vesting with special powers. It followed that on the facts of this case, the first ground was dismissed.

> ***"The decision is worth noting because of the way in which the UT treats the 'cross check' analysis in Cross. Although the UT has not departed from the test, the clear deprecation of it within the judgment indicates that it is unlikely to be of much value to those seeking to rely on it in the future."***

Turning to the second ground, the Commissioner had made the submission that 'national law' could include not only express legislative powers but also regulatory schemes. The UT rejected this argument, noting that no authority had been cited to support this proposition, and neither the CJEU nor the Tribunal considered the role of regulation in the context of Article 2(2)(b). The UT agreed with Poplar that it would amount to a surprising lacuna if a statutory regulatory scheme could properly have been regarded as a decisive factor in the definition of public authority.

The UT thus concluded that it did not discern how the mere existence of statutory regulation can convert a service provider into a public authority. It noted that it is a matter of context and the effect of the regulatory scheme in question. In the context of this case, the UT found that it is not clear how the regulation of social housing causes Poplar to be regarded as an administrative authority. The second ground was dismissed.

As to the third ground, the UT questioned the utility of the cross-check set out in *Cross,* noting that the UT was not directed to anything in *Fish Legal* which laid the groundwork for it, and observing that a cross check is less appropriate for reaching conclusions of law compared to decisions resting on the exercise of judgment or discretion. In this regard, the UT questioned whether the test added anything to well-established existing principles of EU and domestic public law. It suggested that it adds a "layer of complexity at the risk of detracting from the focused application of the words of the Directive and Regulations."

The UT observed that if it were necessary for it to decide whether a cross check formed a distinct and freestanding element of any legal test or condition in Article 2(2)(b) of the Directive or Regulation 2(2)(c) of the EIRs, it would have departed from *Cross*. However, the question ultimately did not arise, as it agreed with the FTT that the application of the cross check could make no difference in the present case. The third ground thus failed.

In summary, the UT observed that the FTT concluded that Poplar has not been empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation. In holding that the first part of the dual test in *Cross* — i.e. the requirement for a legal basis specifically defined in national law — was not met, the FTT's conclusion was 'unimpeachable.'

Finally, the Commissioner invited the UT to refer the case to the CJEU for a preliminary ruling on the interpretation of Article 2(2)(b). The UT's view was that the question it was asked to refer — on the relationship between entrustment and vesting of special legal powers — would not be identical to any of the questions referred in *Fish Legal*.

However, because *Fish Legal* provided a detailed analysis of a 'public authority', part of which simply does not apply to Poplar, the reference would serve no material purpose, because the CJEU has already in effect dealt with the point of law in question.

Points of interest

This case confirms that the UT will continue to take a narrow definition of 'public authority' for the purposes of the EIRs. It is a definition with which the FTT was clearly uncomfortable, and one which the Commissioner, in her 2019 Report to Parliament ('Outsourcing Oversight? The case for reforming access to information law') has already expressed concern. At page 3 of that Report she commented:

"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. Maintaining accountable and transparent services is a challenge because the current regime does not always extend beyond public authorities and, when it does, it is complicated. The laws are no longer fit for purpose."

However, for bodies exercising public functions but not subject to an 'express entrustment' by statute, the decision will come as a welcome clarification of the scope, if any, of their information law duties.

The decision is also worth noting because of the way in which the UT treats the 'cross check' analysis in *Cross*. Although the UT has not departed from the test, the clear deprecation of it within the judgment indicates that it is unlikely to be of much value to those seeking to rely on it in the future.

Finally, from a procedural perspective, the judgment also addressed a preliminary issue as to whether or not the decision in *Cross*, decided by a three-judge panel, was binding on the single judge hearing this case. The UT rejected that argument. While it accepted that, as per *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC), three judge panels should be followed by a single judge unless there are compelling reasons not to do so, it noted that the panel in *Cross* comprised two judges and a non-legal member. The UT thus declined to extend the *Dorset* principle from three judge panels to three member panels.

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