What remains of the public/private divide? Mixed messages on the meaning of 'public authority'

Isabella Buono, Barrister with Cornerstone Barristers, ***analyses three recent decisions for answers to one of FOI's most enduring questions: when is a private body a public body?***

Copies of the decisions:

E.ON decision notice
www.pdpjournals.com/docs/888123

Heathrow Airport decision notice
www.pdpjournals.com/docs/888124

Poplar Housing Association
www.pdpjournals.com/docs/888125

When is a private body a public body?

It is a question which has long vexed public lawyers and generated uncertainty and complexity for those tasked with determining whether certain decisions are amenable to judicial review, and whether certain bodies can be categorised as 'public authorities' for the purposes of challenges under the Human Rights Act 1998.

Is the decision of a housing association to end the tenancy of a person living in social housing of a sufficiently public nature to be amenable to judicial review? What about the decision of a publicly-owned airport to exclude a bus operator from its site? Or the decision of a TV-broadcasting company to exclude particular political parties from its election debate? (The answers given by the courts to those questions have been, respectively: yes, yes and no).

Navigating the public/private divide is also an important task for those concerned with rights of access to information, as both the Freedom of Information Act 2000 ('FOIA') and the Environmental Information Regulations 2004 ('EIRs') confer entitlements that are exercisable only against 'public authorities'. As such, if — and only if — a person or body is a 'public authority' will it be obliged, under either FOIA or the EIRs, to provide certain requested information within a specified number of days, unless a relevant exemption or exception applies.

Three recent decisions — two of the Information Commissioner, one of the Upper Tribunal — have tried to tackle this issue, and, more particularly, the meaning of the phrase 'functions of public administration' which is used to delimit one category of 'public authority' captured by the EIRs. For those making and receiving requests for information, these three decisions will likely give rise to more questions than they do answers. Careful consideration, if not complete overhaul, of the topic is required.

'Public authority': statutory definition

As with any question of statutory construction, it is best to begin by reminding oneself of the language and architecture of the applicable statutory regime(s).

Section 3(1) of FOIA defines 'public authority' to encompass three categories of body.

The first category covers the 5,000-or-so bodies listed in Schedule 1 to FOIA. This includes everything from government departments to local authorities, from NHS trusts to Police and Crime Commissioners, from the Zoos Forum to the Wool Marketing Board.

The second category covers those bodies designated by order of the Secretary of State or the Minister for the Cabinet Office on the basis that the body exercises functions of a public nature, or provides under a contract made with a public authority any service whose provision is a function of that authority. The University and Colleges Admission Service ('UCAS') and Network Rail are among the small number of bodies that have been designated in this way.

The third category covers publicly-owned companies (whether wholly owned by the Crown, by the wider public sector, or by the Crown and the wider public sector together). Examples include the Post Office, London North Eastern Railway ('LNER'), and the Arm's Length Management Organisations ('ALMOs') that are commonly set up by local authorities to manage their social housing stock.

Regulation 2(2) of the EIRs defines 'public authority' in broader terms, such as to capture the following four categories of body:

- government departments;
- any other person or body that falls within the definition of public authority provided in section 3(1) of FOIA, apart from those persons or bodies that are listed in Schedule 1 only in relation to information of a specified description (such as the BBC and the Bank of England), and apart from those persons or

bodies that are designated by order of the Secretary of State or Minister for the Cabinet Office (such as UCAS and Network Rail);

- any other person or body that carries out functions of public administration; and
- any other body or person which is under the control of a person or body that falls within one of the preceding three categories, and which (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.

This definition is the domestic implementation of the definition of 'public authority' in Article 2(2) of Directive 2003/4/EC ('the Directive'). Its scope was considered by the Court of Justice of the European Union ('CJEU') in the well-known *Fish Legal v IC & Ors (*[2015] UKUT 52 (AAC) 19th February 2015) case.

In that case, the CJEU held that the third of the above four categories of 'public authority' — as established by Article 2(2)(b) of the Directive and implemented by Regulation 2(2)(c) of the EIRs — applies to entities that (i) are entrusted, under the national law that is applicable to them "with the performance of services of public interest, inter alia in the environmental field" and (ii) 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."

"Since Fish Legal, practitioners, the Information Commissioner, and the tribunals have had to grapple with the meaning and effect of the tests, not always with complete success. The three most recent decisions — two of the Information Commissioner, one of the UT — have not brought an end to the uncertainty, but rather have sent mixed messages as to the meaning of 'public authority' for the purposes of Regulation 2 (2)(c) of the EIRs."

The CJEU also held that the fourth category — as established by Article 2(2)(c) of the Directive, and implemented by Regulation 2(2)(d) of the EIRs — applies to entities that do not determine, "in a genuinely autonomous manner", the way in which they provide public services relating to the environment.

Importantly, it was only in respect of that fourth category that the CJEU allowed for a 'hybrid' approach (an approach which allows for the categorisation of a body as a 'public authority' when performing some functions, but not when performing others). Accordingly, a body which falls within the third category on account of its public administrative functions will be a 'public authority' in relation to all of the functions it carries out — even those which are purely private and do not relate to public administration.

In contrast, a body which falls within the fourth category will only be a 'public authority' when exercising public functions or providing public services that relate to the environment, under the control of a first or second category body. When exercising all other functions and providing all other services, a fourth-category body will sit outside the scope of the EIRs.

When the *Fish Legal* case returned from Luxembourg to London, the Upper Tribunal ('UT') noted that "[t]he extent to which the CJEU's judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide."

On the facts, the UT decided that the water companies at issue were 'public authorities' within the meaning of the third of the above four categories. Only the 'special powers' limb of the CJEU's test was in dispute. The UT found the water companies did possess powers conferring "a practical advantage relative to the rules of private law", including the power to seek a compulsory purchase order, and the power to make byelaws in respect of the public use of their land or waterways, breach of which could constitute a criminal offence.

Since then, practitioners, the Information Commissioner, and the tribunals have had to grapple with the meaning and effect of the *Fish Legal* tests, not always with complete success. The three most recent decisions — two of the Information Commissioner, one of the UT — have not brought an end to the uncertainty, but rather have sent mixed messages as to the meaning of 'public authority' for the purposes of Regulation 2(2)(c) of the EIRs. Seven years on from *Fish Legal*, concerns that the scope of that provision is 'unclear and undecided, but potentially wide' are still too keenly felt.

The ICO's decision on E.ON

The first is the recent three-part series of decisions concerns the gas and electricity provider, E.ON UK plc ('E.ON').

By a decision notice dated 29th January 2020, the Information Commissioner found E.ON to be a 'public authority' for the purposes of Regulation 2(2)(c) of the EIRs (i.e. that it 'carries out functions of public administration' – the third of the four categories identified above).

At the time of the request, E.ON held an electricity generation licence and an electricity supply licence under the Electricity Act 1989, as well as a gas supply licence under the Gas Act 1986. The Information Commissioner took this to mean that

(Continued on page 6)

(Continued from page 5)

E.ON had been 'entrusted with services under statute.' Because those services were of 'particular importance to the citizens and economy of the UK', they could 'be considered services performed in the public interest.'

The Commissioner then decided that, "[f]or a function to relate to the environment...it is only necessary that the delivery of that service has an impact on the environment." This is a very broad approach for the Commissioner to take. Without articulating even a minimum threshold, any impact on the environment — however small — is deemed to be enough.

The Commissioner, unsurprisingly, considered that E.ON did have such an impact — not just because the generation of electricity has environmental effects, but also because "[t]he construction and maintenance of [E.ON's physical] infrastructure impacts on the environment", and because E.ON's introduction of smart meters "allows consumers to contribute to energy efficiency."

By focusing on those consequences, the Commissioner confused the nature of a function with the effect of its exercise. When the CJEU referred to functions in "the environmental field", or which otherwise "relate to the environment", it surely envisioned that the function was of an environmental kind or purpose — and not just that it produces (direct, or even indirect) effects on the environment.

The Commissioner's expansive approach yields some surprising results.

Many purely-private bodies perform activities which are licensed under statute, which are important to citizens and to the economy, and which have some impact on the environment. On the Information Commissioner's approach, these limbs would seem to be satisfied by, for example, a large firm of taxis which transports its customers in petrol-powered cars. But such a firm cannot, in any meaningful sense, be described as a public authority.

This leaves the 'special powers' limb of the *Fish Legal* test as the last bulwark of the public/private divide.

In that regard, the Commissioner decided that E.ON, as the holder of an electricity generation licence, was "vested with special powers which go beyond the normal rules of private law", including the power to carry out certain street works, to fell and lop trees on another person's land, and to compulsorily purchase land. E.ON had, however, since lost each of those powers, in consequence of having applied for its electricity generation licence to be revoked. The Commissioner nonetheless considered that E.ON would still be a 'public authority', because its residual ability to apply to the magistrates' court for a warrant of entry to inspect a meter or disconnect a supply was a 'special power'.

In reaching that conclusion, the Commissioner dismissed E.ON's argument that its ability to obtain such a warrant "merely remedie[d the] disadvantage" associated with the fact that the supply of gas and electricity, unlike the supply of (say) a telephone or internet connection, cannot be stopped without the supplier having physical access to the meter. The Commissioner proceeded on the basis that 'special powers' do not have to provide any 'net advantage' on the body in question — an approach which does not sit comfortably with the UT's decision in *Fish Legal* that a 'special power' is one which confers a "practical advantage relative to the rules of private law."

The ICO's decision on Heathrow Airport Ltd

Next, by decision a notice dated 3rd February 2020, the Information Commissioner decided that Heathrow Airport Limited ('HAL') is a 'public authority' for the purposes of Regulation 2(2)(c) of the EIRs.

Heathrow Airport was established as a private airport in 1930. It was requisitioned by the Air Ministry during World War II, and became the responsibility of the state-run British Airports Authority ('BAA') when that body was established by the Airport Authority Act 1965. By the Airports Act 1986, BAA was dissolved and its assets privatised. HAL was incorporated in 1986 and, as part of a hostile takeover in 2006, its holding company was acquired by the Spanish publicly-traded company, Ferrovial.

HAL's historical 'link' to BAA was sufficient to satisfy the Commissioner that HAL's ability to "operate Heathrow Airport was entrusted to [HAL] via the [Airports Act] 1986", for the purposes of the first limb of the *Fish Legal* test.

That reasoning is difficult to follow. HAL is not a creature of statute; though the government's one-time interest in Heathrow Airport was divested by statute, HAL was not itself constituted by, and does not now depend for its existence on, the Airports Act 1986 or any other legislation. It is not administered by or with the assistance of any government agency. Its identity, purpose and central business activities are not defined in legislation, in functional terms. It is a commercial entity which operates by and under its articles of association, for the benefit of its shareholders.

Without grappling with these matters, the Commissioner proceeded to the other limbs of the *Fish Legal* test.

On account of "the importance of the efficient provision of services at Heathrow Airport to the economy and citizens of the UK", the Commissioner decided that "the operation of [that] airport is a service of public interest."

The Commissioner was then satisfied that that service relates to the environment, on the basis that, "for a function to relate to the environment it is only necessary that the delivery of the service or function has to have an impact on the environment." In HAL's case, that impact was said to include "climate change emissions from aircraft and noise emissions from aircraft", as well as "environmental issues generated by congestion on local roads."

Again, this approach conflates the nature of a function with the effects of its exercise. Turning to the final limb of the *Fish Legal* test, the Commissioner decided that HAL possessed a series of "special powers...beyond those which result from normal rules applicable to relations between individuals under private law", including powers of compulsory purchase, and the power to make certain byelaws.

The Commissioner also included in that list of 'special powers' HAL's ability "to exercise certain permitted development rights to undertake some classes of development without the requirement to obtain planning permission, under the Town and Country Planning (General Permitted Development) Order 2015" ('GPDO') and "the right to be notified by local planning authorities about any relevant planning application in the area… and [then] to comment on the safety of the proposed development."

Those were surprising items to include. The GPDO does not grant powers to landowners, be they domestic homeowners or airport operators, but rather affords them the benefit of planning permission for certain classes of development. Similarly, all members of the public have the ability to comment on applications for planning permission, and certain persons (including neighbouring residents) must be given notice of applications to facilitate that consultation process. Neither of these matters afford HAL any 'special power': they are broadly-shared entitlements which form part-and-parcel of our general system of planning law.

The Tribunal's decision on Poplar Housing Association

The third instalment in this trilogy came from the UT on 8th June 2020 in *Information Commissioner v Poplar Housing and Regeneration Community Association* [2020] UKUT 182 (AAC).

There, the UT decided that Poplar Housing and Regeneration Community Association ('Poplar'), a registered provider of social housing ('RP'), is not a 'public authority' for the purposes of Regulation 2(2)(c) of the EIRs.

The UT clarified that, to be "entrusted...with the performance of services of public interest" within the meaning of the *Fish Legal* test, an entity's 'competence' must be "set down in national law." There was no such entrustment in Poplar's case. Its status as an RP and its associated acquisition of local authority housing stock did not "convert it from a company that supplies housing to an administrative authority." Neither did the Commissioner's policy preference for ever-wider access to information.

That would seem to strike a body-blow to the Commissioner's conclusion that HAL is "entrusted...with the performance of services of public interest", purely because the government's one-time interest in Heathrow Airport was divested by statute.

In *Poplar,* the UT also gave some guidance as to the meaning of 'special powers'. As an RP, Poplar has certain statutory powers that ordinary landlords do not, including the power to seek injunctions against, and parenting orders in respect of, anti-social behaviour. The UT commented (obiter) that these are not 'special powers' for the purposes of the *Fish Legal* test, as rather than conferring a 'practical advantage relative to the rules of private law', they 'mitigate a disadvantage' suffered in consequence of it being more difficult for RPs to evict their tenants than it is for ordinary landlords to evict theirs.

This would seem a strike a significant blow to the Commissioner's conclusion that E.ON's ability to obtain a warrant of entry is a 'special power', because it is not necessary for such a power to confer a 'net advantage.'

What next for FOI of the private sector?

Those making and receiving requests for information would be justified in feeling confused as to where the outer limits of the EIRs now lie. The Information Commissioner's decisions on E.ON and HAL deviate from the statutory language and from the approach of the CJEU in *Fish Legal*. It is doubtful whether those decisions survive the UT's decision in *Poplar.* It is perhaps unsurprising that E.ON and HAL are each in the process of appealing the Information Commissioner's decisions to the First-tier Tribunal.

It is to be hoped that the Tribunal will take that opportunity to remind information rights practitioners — and regulators — that:

- for a body's functions to have been 'entrusted' by statute, its ability to act must be established and defined by statute, it not being enough just for the government's one-time ownership of that body to have been divested by statutory means;
- for a function to 'relate' to the environment, it must be of an environmental kind and not just have environmental effects; and
- for a power to constitute a 'special power', it must not be widely-shared amongst most persons, and must confer a net advantage to the particular person concerned.

Given the scale of the obligations imposed on bodies captured by the EIRs, coherence, clarity and certainty are greatly needed in answers to these questions of scope.

Isabella Buono
Cornerstone Chambers
ibuono@cornerstonebarristers.com

The issues considered in this article are different to those raised in the case concerning Heathrow Airport which is currently before the UK Supreme Court. All views (including any errors) are the author's own.