IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

FISH LEGAL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

GROUNDS OF APPEAL

Introduction

1. This appeal is made against the decision by the Information Commissioner (IC), in his letter of 12th March 2010, in relation to cases FER0269130 and FER0272665, that two water and sewerage companies (WASCs) involved, Yorkshire Water Services and United Utilities (Yorkshire and UU), are not public authorities for the purposes of the Environmental Information Regulations 2004 (the 2004 Regulations).

2. The Appellant is Fish Legal, an unincorporated association of angling clubs and fishery owners. Fish Legal (formerly the Anglers' Conservation Association) was set up in 1948 and takes legal proceedings on behalf of member clubs and owners in relation to pollution of fisheries, including that caused by the WASCs, the recipients of the requests for environmental information and the subject matter of this appeal.

3. The WASCs operate many thousands of discharge pipes carrying a range of raw, partially-treated and fully-treated sewage, and storm sewage into the waters over which the Appellant's members own, lease or otherwise control the proprietary fishing rights.

4. The quantity and quality of discharges into these waters can have a direct environmental effect on the quality, amenity and financial value of fishing the Appellant's members enjoy.

5. The environmental information requested from Yorkshire and UU relates to hundreds of storm-sewage discharges still operating under temporary consents, granted at water privatisation in 1989, that, by common understanding, apply effectively no enforceable limits or conditions to the quality and quantity of the discharges made. These temporary consents were the subject of a Planning Inspectorate hearing in January 2010.

6. In these Grounds of Appeal, the Appellant has limited itself to the legal points at issue – (1) jurisdiction and (2) whether the WASCs should be considered public authorities pursuant to the 2004 Regulations.

7. In the event that the Tribunal wishes to consider the detail of the particular requests that led to the finding by the IC that the WASCs are not public authorities for the purposes of the 2004 Regulations, then the Appellant will willingly provide that detail, subject, of course, to permission from the Tribunal to amend these Grounds accordingly.

Does the Tribunal have jurisdiction ?

8. The Appellant anticipates that there may be some question as to whether the Tribunal has jurisdiction to hear this appeal. Indeed, the Tribunal itself may decide it does not have jurisdiction.

9. If the Tribunal does decide it has jurisdiction, legal challenge may conceivably still be raised by the IC or, more probably, by the WASCs themselves.

10. The failure of Yorkshire and UU to provide environmental information to the Appellant pursuant to the 2004 Regulations was referred by the Appellant to the IC on 8th September 2009.

11. On 8th October 2009, the IC explained to the Appellant by email that the status of WASCs was "undergoing careful consideration and the process involves submissions from various interested or expert parties. It is anticipated that the consultations will take a further two months....your case will therefore depend on the outcome of this ruling and you will be informed of the Commissioner's decision...until then your case will not be progressed but will remain in my work queue".

12. On 9th November 2009, in response to questions from the Appellant seeking clarification of the process, the Appellant was very belatedly invited to make any submissions, although the IC commented that "it is anticipated that the parties currently involved will have sufficient expertise to provide useful and relevant arguments".

13. The IC also cast doubt on whether any submission the Appellant would make would make any difference - "please be clear that this is not intended to be an iterative or adversarial process and the Commissioner may decide that the arguments are such that he can reach a decision without further consultation."

14. Further, the IC elected to treat part of the request for clarification as a request made under the Freedom of Information Act 2000 and it was not until 25th November, that the IC finally responded in full to the Appellant's request about the process, leaving wholly insufficient time for the Appellant to make submissions by the end of the month, as the IC had required.

15. To date, the Appellant has not been given sufficient, or indeed any real opportunity to be heard in relation to the referral made to the IC on 8th September 2009 concerning Yorkshire and UU and the IC's decision of 12th March 2010.

16. Although no formal Decision Notice has been issued by the IC in this matter, the IC has indicated that "should either party wish to pursue this matter further and, should the Information Tribunal be approached with a view to adjudicating on the matter, the Commissioner would not seek to take issue with the Tribunal's jurisdiction to consider whether a body is a public authority for the EIR."

17. The Appellant regards the Commissioner's letter of 12th March 2010 to be a decision, as defined by section 50 of the 2000 Act, albeit that the Commissioner has failed to describe it as a formal Decision Notice.

18. It was only at the time of the letter of the 12th March 2010 that the IC effectively decided that the WASCs were considered by him as not being public authorities. Prior to 12th March, the status of the WASCs had not been decided.

19. The decision was made by way of the letter of 12th March 2010. That letter states that "the Commissioner has decided that the various water utility companies are not public authorities for the purposes of the EIR". The decision was therefore made in accordance with section 50 of the 2000 Act.

20. Specifically, the IC did not, pursuant to section 50(3)(a) "notify the complainant that he has not made any decision" in his letter of 12th March.

21. That the Tribunal has jurisdiction is strongly supported by the majority judgment in BBC v Sugar [2009] UKHL 9, per Lord Phillips of Worth Matravers, at 37: "Section 50 of the Act does not prescribe the form of a Decision Notice. I consider that this phrase simply describes a letter setting out the Commissioner's decision. That is precisely the letter that the Commissioner wrote to Mr Sugar. His letter does not suggest that the request or the complaint was not within the Act, or that the Commissioner had no jurisdiction to make a decision or that he was not making a decision... It is true that the Commissioner said that "The BBC is not a public authority under the Act" and that he referred to Mr Sugar's right to request a judicial review. These statements do not make his letter any less a Decision Notice."

22. Further, Article 6(1) of the Directive on Public Access to Environmental Information (2003/04/EC) ("the Directive") requires that "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" (emphasis added).

23. The WASCs have failed to undertake any internal review as required by Article 6(1).

24. Article 6(1) of the Directive therefore requires that the Appellant is heard by the Information Tribunal in relation to this decision to find the WASCs as not a public authority under the 2004 Regulations.

Are the WASCs 'public authorities' pursuant to the 2004 Regulations ?

25. The IC's decision of 12th March 2010 considered the definition of the term "public authority" in Regulation 2(2). There are two relevant arms of that Regulation - 2(2)(c) and 2(2)(d).

Regulation 2(2)(c); "any other body or other person, that carries out functions of public administration"

26. The IC is not correct in deciding that WASCs do not carry out functions of public administration.

27. The Secretary of State's Code of Practice – Environmental Information Regulations 2004, published in February 2005, states that "the range of bodies covered by the EIR is wider to allow for consistency with the EC Directive, and includes public utilities and certain public private partnerships and private companies, such as those in the water, waste, transport and energy sectors."

28. WASCs are largely governed by their own act - the Water Industry Act 1991 - and, pursuant to that Act, have many powers, duties and functions:

Section 3 – General environmental and recreational duties – gives the WASCs in their roles as statutory water or sewerage undertakers a number of overarching duties which a commercial company would not be given.

Section 4 - gives the WASCs duties and functions in relation to sites of special (nature conservation) interest.

Section 6 - the Secretary of State appoints the WASCs as water and sewerage undertaker

Section 7 - the Secretary of State can terminate the appointment of any WASC as a statutory water or sewerage undertaker.

Section 11 - the Director of Water Services can impose conditions on the appointment of statutory water or sewerage undertakers

Section 18 - provides for special enforcement against WASCs in the performance of their functions as statutory water and sewerage undertakers

Section 23 - allows for 'Special Administration Orders' whereby effective control of the WASCs may be taken by the Secretary of State if the provision of water and sewerage functions is threatened

Section 27 - gives the Director of Water Services a general duty to keep the functions of the WASCs under general review

Section 37 - gives undertakers a general duty to maintain water supply system etc

Sections 40 to 93 - contain a myriad of supplementary duties in relation to water supply to domestic and non-domestic supplies and section 59 "other public purposes" (including fire-fighting, roadworks etc)

Section 94 - gives the undertakers a general duty to provide sewerage services

Sections 95 to 117 - give the undertakers myriad further duties with respect to public sewerage

Sections 118 to 141 - give the undertakers functions with respect to the control of trade effluent discharges “into public sewer” (per section 118).

Section 157 – gives the water and sewerage undertakers byelaw making powers

Sections 193 to 207 - give the WASCs duties in respect of the provision of information

29. To carry out the supply of water and removal and treatment of sewage by public sewer, the WASCs need to be appointed statutory water undertakers or statutory sewerage undertakers pursuant to that Act, many of which are functions of public administration.

30. By way of one example only, Section 157 gives the WASCs byelaw making powers.

31. A second example is that of the administration by WASCs of the discharge of trade effluent to public sewers.

32. Sewage carried in public sewers is a mixture of domestic sewage and trade effluent. It is not simply domestic waste. Section 118 requires that any person seeking to discharge trade effluent to the public sewer must have the consent of the sewerage undertaker. Sections 119 to 141 govern the consenting by WASCs of such discharges. Section 118(5) makes it a criminal offence to so discharge without the consent of the sewerage undertaker.

33. The sewerage undertaker is the prosecuting authority for the purpose of section 118(5).

34. Section 196 requires that the WASCs, as sewerage undertakers, maintain a public register of trade effluent discharges.

35. The same sewer networks that receive these trade effluent discharges, consented and administered by the WASCs themselves, can discharge, untreated, via the same storm sewers, that are the subject matter of the Appellant's request to Yorkshire and UU, into the rivers and lakes where the Appellant's members own, lease or otherwise control the proprietary right to fish.

36. With respect to trade effluent discharges to and, ultimately, from public sewers, the WASCs patently carry our functions of public administration pursuant to Part IV Chapter III of the 1991 Act .

37. The IC relies on the judgment in Griffin. It is instructive to note that in that case, South West Water ("SWW") (a WASC) argued, unsuccessfully, that it was indeed a 'public administrative body' (so as to avoid being caught by the Collective Redundancies Directive), an argument that Blackburne J rejected.

38. The judgment of Blackburne J was not made in the context of environmental functions or access to environmental information, but that of employment law. The judgment did not consider the public administrative functions (eg trade effluent consenting, byelaw making powers) referred to above.

39. Nor is the status of *being* "public administrative bodies" as defined by the Collective Redundancies Directive, as referred to in Griffin, equivalent to Article 2(2)(b) of Directive 2003/04 - "*performing* public administrative functions under national law, including specific duties, activities or services in relation to the environment". (The 2004 Regulations use slightly different language – "carries out functions of public administration" - Regulation 2(2)(c)).

40. A legal person can clearly perform public administrative functions without necessarily being a public administrative body itself.

41. Indeed, the passage the IC from the judgment of Blackburne J acknowledges, SWW "'administers' a service (the supply of water and sewerage services)", but then finds that SWW is not a public administrative body itself.

Regulation 2(2)(d): "any other body or other person that is under the control of a person falling within subparagraphs a, b or c..."

42. The IC has also decided that the WASCs are not caught by 2(2)(d).

43. The IC's reasoning is that the WASCs "enjoy a high level of commercial freedom, and independence from decisive regulatory interference, such that they should not be considered to be under the control of any licensing or regulatory body."

44. This is incorrect.

45. The Director of Water Services was created and functions given to him, solely for the control of the WASCs and supply-only companies. He serves no other function.

46. Section 27 of the 1991 Act - General duty of Director to keep matters under review – makes it the duty of the Director "to keep under review the carrying on both in England and Wales and elsewhere of activities connected with the matters in relation to which water undertakers or sewerage undertakers carry out functions".

47. A range of relevant provisions exists in the 1991 Act as shown, but the degree of control can be best illustrated by sections 6 and 7 under which the Secretary of State can appoint and terminate the appointment of a WASC as a water and sewerage undertaker.

48. The power to appoint and terminate the appointment of a WASC as a statutory water and / or sewerage undertaker shows a very high level of control indeed. Contrary to the IC's conclusion that the WASCs enjoy independence from 'decisive regulatory control', the potential use of section 7 would patently be a very 'decisive regulatory interference' in a WASC. Whatever independence the WASCs may have actually enjoyed in practice, is only by gift of the Secretary of State.

49. Blackburne J in Griffin (the case the IC earlier refers to in support of his finding that the WASCs are not caught by Regulation 2(2)(c), yet strangely appears to ignore for the purposes of Regulation 2(2)(d)) is unequivocal:

> "The provisions of the 1991 Act and the conditions of SWW's licence, to which I have referred in some detail, indicate that SWW performs its public service as a water and sewerage undertaker under the control of the State and therefore that the 'control condition' is satisfied. The extent of that control seems to me to be at least as great as that which persuaded the House of Lords in *Foster* [1991] IRLR 268 that the British Gas Corporation performed its public service....under the control of the State".

The Aarhus Convention

50. The Implementation Guide for the Aarhus Convention also provides useful guidance on the definition of public authority.

> "The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken in to three parts to provide as broad a coverage as possible.

“Recent developments in “privatized” solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public involvement, information and participation.” (emphasis added)

51. The Guide goes on to state that:

“article 2, paragraph 2 (*c*) [*the equivalent definition in the Convention to Reg 2(2)(d)*], fills a gap found in the Directive, because it includes not only persons under the control of governmental authorities but also persons that might not be under the control of governmental authorities but are under the control of those persons referred to in article 2, paragraph 2 (*b*). Such can be service providers or other companies that fall under the control of either public authorities or other bodies to whom public functions have been delegated by law. For example, 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”.

52. The Guide uses the example of water privatisation in the UK to illustrate how a private company might still be caught by the Convention (and hence the Directive and 2004 Regulations).

Summary

The Information Commissioner's letter of 12th March is a decision under section 50 of the Freedom of Information Act 2000 and Environmental Information Regulations 2004.

That decision is wrong in law.

The Tribunal has jurisdiction to hear this appeal.

The water and sewerage companies (WASCs) should be considered to be public authorities as defined by both Regulation 2(2)(c) and 2)(2)(d) of the 2004 Regulations.

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