Hugh Craddock

v

The Information Commissioner

Application to the Upper Tribunal for leave to appeal

Grounds for appeal to Court of Appeal

A. Introduction

A.1. In *Hugh Craddock v Information Commissioner*,[1] the Upper Tribunal (UT) dismissed the appellant's appeal against the decision of the First-tier Tribunal (FTT),[2] in relation to a request made under the Environmental Information Regulations 2004 ('the EIRs') to Kent County Council ('the council') for tithe-map data ('the tithe information'). That request initially was refused by the council under r.6(1)(b) of the EIRs, and the refusal was upheld by the Information Commissioner and by the FTT, and now by the UT.

A.2. The key provision considered in the appeal was the effect of r.6(1)(b) of the EIRs, viz:

> 6 (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless — …
> (b) the information is already publicly available and easily accessible to the applicant in another form or format.

A.3. The UT found that, in accordance with that provision, the tithe information was already publicly available and easily accessible to the appellant in another form or format.

A.4. This document comprises the appellant's grounds for appeal against the decision of the UT.

A.5. Reference to a regulation ('r.') is a reference to that regulation of the EIRs. The EIRs implement Directive 2003/4/EC ('the Directive') of the European Parliament and of

1 [2024] UKUT 320 (AAC): UA-2024-000424-GIA

2 [2024] UKFTT 00009 (GRC): EA/2022/0455

the Council of 28 January 2003 on public access to environmental information.[3] The Directive was in turn intended to deliver (at least) the requirements of the Aarhus Convention ('the Convention') of 25 June 1998.[4]

B. The additional test for appeal

B.1. Permission to appeal must not be granted unless the prospective appellant demonstrates that an appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it.[5]

B.2. The question posed by the appellant in his skeleton argument before the UT is paraphrased in the opening paragraph of the UT judgment:

> [W]here a public authority holds environmental information in electronic form, can it effectively parry a request for the information to be supplied in that same format by instead inviting the requester to visit its premises and displaying the information on a computer screen at those premises?

B.3. The judge found that:[6]

> The short answer to that question (prefacing a long decision) is that in principle the public authority may do so (depending on the facts).

B.4. The appellant submits that the question, and the correct answer to it, is fundamental to the right conferred on the public, by the Convention, to obtain environmental information. When a requester seeks the disclosure of environmental information, is the requester entitled to have it supplied to him or her, or is the public body entitled to require the requester to view the information at its premises?

B.5. The distinction is highly consequential. On the one hand, under the interpretation of the EIRs contended for by the appellant, the requester in search of environmental information can ask a public body to supply that information, and expect to receive it

3 Available as retained law at: www.legislation.gov.uk/eudr/2003/4/contents/adopted.

4 Available via: unece.org/environment-policy/public-participation/aarhus-convention/text. See recital 5 of the Directive, which refers to the need for provisions of EU law to be consistent with the Convention.

5 See CPR 52.7; s.13 of the Tribunals, Courts and Enforcement Act 2007; and art.2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834).

6 [2]

generally in the form requested (typically, in electronic form, in a format which is requested because it is compatible with reuse by the requester[7]) within 20 working days.[8]

B.6. But, following the UT judgment, and that of the High Court in *Surrey Searches*[9] (hereafter referred to as the 'twin judgments'), the public body may require that the requester attends at its premises, possibly regardless of the distance which the requester must travel, and view the information in whatever form the public body chooses to provide it. This may be a display on a computer screen, and may be without any means for the requester to receive or take a copy of the information other than manually to write it down.[10]

B.7. The appellant submits that this interpretation common to the twin judgments, where it is applied by a public authority to the disadvantage of a requester, has a deeply chilling effect on the right to obtain environmental information, owing to the potential cost (of travel and opportunity cost of time taken to travel), inconvenience, delay and constraint on capturing and reusing the data. Nor is it counter-balanced by any manifest cost-saving to the public authority (a question which the FTT and the UT declined to examine in detail[11]) or other policy considerations put forward by the Information Commissioner.

B.8. The position effected by the twin judgments is in contrast to that which applies under s.11 of the Freedom of Information Act 2000 (FOIA), subs.(1)(a) of which confers a right on the requester to express a preference for:

> the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant, [and] the public authority shall so far as reasonably practicable give effect to that preference.

B.9. In *Innes v Information Commissioner*, the Court of Appeal found that subs.(1)(a) entitles an applicant to request more than simply permanent or non-permanent form. It extends to choosing to apply for hard copy or electronic form and, when the application is

7 Such as in the form of a spreadsheet, or a word-processing document.

8 R.5(2)

9 *Surrey Searches Ltd and others v Northumbrian Water Ltd and others* [2024] EWHC 1643 (Ch)

10 In *Surrey Searches*, Thames Water is recorded [689] as 'not permitting photography' of information displayed at its public access centre. As these complaints also surface in relation to other utilities [569, 591, 615, 696, 709], it may be inferred that such restrictions are widespread.

11 [55], and FTT at [55]

for disclosure in electronic form, the applicant has a right to choose the software format in which it is disclosed.[12]

B.10. It is submitted that it is unlikely to have been the intention of the Government, expressed in the EIRs, to impose on those requesting environmental information, four years after the enactment of the FOIA, a substantially less generous régime exclusively for environmental information, contrary to the intention of the Convention, and without plain words to give effect to such intention. Such plain words are absent from the EIRs. Moreover, the explanatory memorandum to the EIRs states that[13]:

> It was agreed by Ministers in November 2003 that when making the Regulations to implement the Directive, the Regulations and the Freedom of Information Act 2000 should be aligned as far as practicable. … The Regulations will strengthen the existing rights to access environmental information.

B.11. Noting the conclusion of the UT that leave has not been granted for an appeal in *Surrey Searches*,[14] there is no prospect that the question of interpretation of r.6(1)(b) will come before the Court of Appeal in relation to that case.

B.12. Accordingly, it is proposed that an appeal raises a matter which is of substantial public interest which merits the grant of leave.

C. Grounds for appeal: the UT erred in finding that 'already publicly available and easily accessible to the applicant' in r.6(1)(b) is to be given its ordinary meaning

C.1. The Convention provides that:[15]

> Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph

12 [2014] EWCA Civ 1086

13 *Explanatory Memorandum to EIRs*, s.7

14 [33]

15 Art.4(1) (*Access to Environmental Information*)

> (b) below, copies of the actual documentation containing or comprising such information:
>
> > (a) Without an interest having to be stated;
> > (b) In the form requested unless:
> >
> > > (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
> > > (ii) The information is already publicly available in another form.

C.2. The Convention thus enables a requester for environmental information to obtain 'copies of the actual documentation' subject to sub-para.(b) of art.4(1). The exception in sub-para.(b)(ii) is the model for that comprised in r.6(1)(b).

C.3. Extracting the key words of art.4(1):

> …public authorities [must] make [environmental] information available to the public…including…copies of the actual documentation containing or comprising such information…In the form requested unless…The information is already publicly available in another form.

C.4. If 'publicly available' is (as the twin judgments conclude) to be indistinguishable from 'make…information available to the public', sub-para.(b)(ii) becomes redundant: a public authority would be entitled to refuse a request for information in a form different to that requested, on the basis that it was already inevitably available in the original form. And the right for the requester to obtain 'copies of the actual documentation' is sterilised because the exception in sub-para.(b)(ii) becomes a complete answer to the exercise of that right — the information inevitably will be 'already publicly available' by virtue of being available to the public under para.(1).

C.5. (It may be said that the exception in sub-para.(b)(ii) kicks in only if the information is '*already* publicly available'. However, in the context of 'publicly available' having the same meaning as to 'make…information available to the public', the additional requirement of the information being *already* available is meaningless. If, for example, the information is publicly available because it is available on request by email,[16] then all environmental information is already publicly available, regardless of whether it has been previously

16 See *Surrey Searches* at [520], cited in the UT judgment at [38].

sought or disclosed. Alternatively, if the information is made available for inspection at a public authority's premises, it is impossible for the requester to establish whether that information genuinely is *already* publicly available, and as the information is kept in electronic form on the authority's servers, it may well be impossible for the authority to distinguish whether it is *already* publicly available — it simply is available when it is required.)

C.6. It is submitted that, under the Convention, information being 'publicly available' must have a meaning distinct from such information being 'available to the public', and that the only plausible meaning is that it has a more restrictive ambit: the 'something more' argument put forward by the appellant and to which the judgment refers.[17] That analysis is supported by the *Aarhus Convention — an implementation guide*[18], which gives an example of:

> information…publicly available in another form, such as in a government-published book that may be found in a public library. …Informing an applicant about the existence of a single copy of a book in a library 200 kilometres from his or her residence would probably not be a satisfactory response.

C.7. Yet the twin judgments readily contemplate the possibility of a requester being required to travel 200 kilometres to view environmental information at the premises of a public authority, notwithstanding that the same information could be communicated by email at the stroke of a keyboard.

C.8. The appellant's contention is supported by the position of the Convention's compliance committee in three decisions cited in the appellant's skeleton argument before the UT, and a further decision cited in oral submissions. The position of the committee consistently expressed is that electronic information must, under the Convention, be made available to a requester.[19]

C.9. In *Walton v Scottish Ministers*, Lord Carnwath (who gave one of three speeches, the court being unanimous) said that[20]:

17 [26-27]

18 Second edition, 2014, via: unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition.

19 ACCC/C/2009/36; ACCC/C/2009/44; ACCC/C/2009/69; also ACCC/C/2008/24 referred to at p.81 of the Convention *implementation guide* (see fn.18 above)

> Although the Convention is not part of domestic law as such (except where incorporated through European directives), and is no longer directly relied on in this appeal, the decisions of the Committee deserve respect on issues relating to standards of public participation.

C.10. It is submitted that art.4(1) of the Convention is intended to confer a broad right on citizens to request environmental information in a form convenient to their purpose, and that the constraint imposed by sub-para.(b)(ii) is required to be interpreted as a tightly-drawn exception which cannot come into operation merely because information is made available under art.4(1) itself.

C.11. For the purposes of this application for leave to appeal, it is suggested that it is unnecessary for the prospective appellant to define the precise parameters of 'publicly available' as used in art.4(1) — it is sufficient to show that the contention that it has a more restricted meaning has reasonable prospects of success.

C.12. For the reasons which follow, it also is submitted that the UT was mistaken to find no ambiguity in the terms of r.6(1)(b), and ought to have had regard to the meaning of the parent provisions in the Convention and the Directive, and the compliance committee's findings.

C.13. Neither the Directive nor the EIRs contains express provision for disclosure of 'copies of the actual documentation'. Both instruments make equivalent provision to art.4(1)(b) of the Convention (in the Directive, in art.3(4), and in the EIRs, in r.6(1)). Those provisions are intended to ensure that a requester can opt to choose the form of disclosure — whether printed copy, electronic copy, or by way of inspection, so that express replication of the Convention's entitlement to 'copies' is unnecessary.

C.14. Again, both the Directive and the EIRs allow for exception to the entitlement to specify form of disclosure.[21] But the effect of the twin judgments is that what was intended to be a right for the requester to specify the form of disclosure, is transformed into a right for the public body to determine the form of disclosure — potentially, where that form is by way of inspection on the premises, a form which is prejudicial to the requester's exercise of the right to have environmental information made available.

20 [2012] UKSC 44 at [100]. There is no reason to infer that Lord Carnwath intended to distinguish decisions on 'issues [under the Convention] relating to standards of public participation' as deserving greater respect than those relating to access to information.

21 Art.3(4)(a) and (b) of the Directive; r.6(1)(a) and (b)

C.15. It is submitted that, not only is this not the meaning of the Convention, but it is not the correct interpretation of the Directive nor of the EIRs.

C.16. The Directive provides that[22]:

> …environmental information shall be made available to an applicant…[and] Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:
>
> > (a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants… [.]

C.17. The Directive must be interpreted consistently with the meaning of the Convention[23]:

> EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union[.]

C.18. The Directive was conceived by the European Commission[24] with the objective to:

> lead to strengthened legislation in the Member States. It also aims to align Community legislation with the Aarhus Convention so as to enable the Community to ratify that Convention. Proper implementation of any new Directive, as well as its effective application, will be of the utmost importance in securing improved rights to information across the European Union.

C.19. The Directive was amended by the European Parliament so as to confer additional protection for the rights of requesters. By this means, art.3(4)(a) was amended to introduce the italicised words following in relation to information 'easily accessible *by the applicant*'.[25]

22 Art.3(2) and (4)(a)

23 *European Investment Bank v Client Earth and European Commission* (C–212/21 P and C–223/21 P, at [66]

24 *Experience gained in the application of Council Directive 90/313/EEC, on freedom of accesss to information on the environment*: COM(2000)400

25 Recommendation for Second Reading on the Council common position for adopting a European Parliament and Council directive on public access to environmental information and repealing Council

C.20. The Directive is consistent with an intention that 'its provisions are intended specifically to give effect to an international agreement concluded by the European Union'.[26]

C.21. The concluding words to art.3(4):

> For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

reinforce the contention that the Convention right for a requester to seek disclosure of 'copies of the actual documentation' in electronic form was replicated in the Directive. A position that a public authority may refuse disclosure of information in electronic form, and instead insist on personal inspection, is not consistent with 'all reasonable efforts to maintain environmental information…in forms or formats that are readily reproducible and accessible by computer telecommunications'.

C.22. In turn, it is submitted that an interpretation of the EIRs contrary to the meaning of the Convention and the Directive is mistaken for three reasons:

C.23. First, the interpretation of the EIRs is subject to the *Marleasing* principle — that national courts must, as far as possible, interpret national law in the light of the wording and purpose of the relevant EU directive in order to achieve the result envisaged by the directive.[27]

C.24. Secondly, the EIRs evince no other intention but to copy out the requirements of the Directive. The explanatory memorandum to the EIRs states that: 'These draft Regulations have been prepared to implement the Directive', and discloses no purpose of 'gold plating'.[28]

C.25. Thirdly, r.2(5) provides that:

Directive 90/313/EEC (11878/1/2001 REV 1 – C5-0034/2002 – 2000/01: Amendment 22. Subsequently amended by the Commission to '…by applicants'.

26 See para.C.17 above.

27 *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C–106/89)

28 *Explanatory memorandum* to the EIRs. See para.B.10 above.

> Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

C.26. The key language of r.6(1)(b) is almost identical to art.3(4)(a) of the Directive, viz:

Directive, art.3(4)(a)

> …it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants[.]

EIRs, r.6(1)(b)

> …the information is already publicly available and easily accessible to the applicant in another form or format.

C.27. The key words — 'already publicly available', 'another form or format', and 'easily accessible', are therefore assigned the meaning which they attract in the Directive (arguably, 'easily accessible *by applicants*' and 'easily accessible *to the applicant*' attract the same meaning too).

C.28. Accordingly, it is submitted that the replication of the Convention rights in the Directive is also present in the EIRs, and that the UT was in error to find that r.6(1)(b) of the EIRs displays no ambiguity in its meaning which would enable the UT to 'cast the interpretative net any wider'.[29] On the contrary, the requirement of r.2(5) is that the 'interpretative net' must be cast over the same words used in art.3(4)(a) of the Directive, and that for the reasons given, they must be construed to evince the meaning contended by the appellant.

D. FOIA régime

D.1. The appellant considers, as set out in section C above, that the interpretation of r.6(1)(b) is key to any appeal, and as set out in section B above, the correct interpretation of that provision raises a matter which is of substantial public interest which merits the grant of leave.

29 [32]

D.2. By contrast, the appellant accepts that the construction of s.21 of the FOIA is a subsidiary matter which does not raise the same wider public-interest considerations. Accordingly, no leave is sought to appeal in respect of that matter.

E. Conclusion

E.1. Leave to appeal is sought on the basis that an appeal would satisfy the additional test in section B above and that the UT erred in finding that 'already publicly available and easily accessible to the applicant' in r.6(1)(b) is to be given its ordinary meaning (as set out in section C above).

Hugh Craddock
22 November 2024