Appeal No.: GIA/1078/2019

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

ON APPEAL FROM:

First-Tier Tribunal (General Regulatory Chamber)
Information Rights (Case No.: EA/2018/0199)

Before:

MRS JUSTICE FARBEY CP

Appellant: The Information Commissioner

Respondents: (1) Poplar Housing and Regeneration Community Association

(2) People's Information Centre

Hearing date: 11 and 12 February 2020

Ms Laura Elizabeth John (instructed by **The Information Commissioner Legal Division**) appeared for the Appellant
Mr Rupert Paines (instructed by **Capsticks LLP**) appeared for the First Respondent
The Second Respondent did not appear and was not represented

DECISION

The appeal is dismissed. The decision of the First-tier Tribunal promulgated on 27 February 2019 under reference EA/2018/0199 did not involve a material error of law and is not set aside.

REASONS

Introduction

1. This is an appeal by the Information Commissioner against the decision of the First-tier Tribunal (General Regulatory Chamber) ("FTT") in which it concluded that the first respondent (a housing association to which I shall refer as "Poplar") is not a "public authority" within the meaning of article 2(2)(c) of the Environmental Information Regulations 2004 ("the Regulations"). In so finding, the FTT disagreed with the

Information Commissioner's decision that Poplar's failure to disclose information to the second respondent was in breach of its duty to make information available under the Regulations.

2. The FTT itself granted permission to appeal. The grounds of appeal concern the correct interpretation of article 2(2)(b) of Directive 2003/4/EC of 28 January 2003 on public access to environmental information ("the Directive") which in turn reflects article 2(2)(b) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters ("the Convention"). The emphasis on the Directive comes about because the Regulations transpose the Directive into domestic law and give it effect. The principal question that I must decide is whether the FTT made a material error of law by concluding that Poplar is not a "public authority" within the meaning of article 2(2)(b) of the Directive.

3. Poplar resists the grounds of appeal. In addition, Poplar relies on other grounds on which it was unsuccessful in the FTT. In the event, it has not been necessary for me to determine those other grounds.

Factual background

4. The relevant factual background may be taken from the FTT's decision. Poplar is a community benefit society incorporated under the Co-operative and Community Benefit Societies Act 2014. It was set up with a transfer of some of the housing stock of the London Borough of Tower Hamlets in 1998. It provides housing and is involved in joint ventures with private developers to redevelop and deliver a proportion of investment in new housing in the area. It is a private company limited by guarantee. It owns and manages about 9000 homes, as well as community facilities and commercial property.

5. Poplar is registered with the Regulator of Social Housing ("RSH") as a private registered provider of social housing. In its decision, the FTT observed:

> "12. A registered provider of social housing is in effect a landlord of low-cost rental or home ownership accommodation. Registered providers can be private entities or publicly owned, and may be for-profit or not-for-profit. Some manage properties originally derived from local authorities, some purchase and develop new social housing, some like Poplar do both.
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> …
>
> 14…. In the London Borough of Tower Hamlets, the local authority is the largest provider of social housing in the area, owning and managing over 28% of the social housing stock in the Borough. There are approximately 50 private registered providers of social housing… in the Borough, registered with the Regulator of Social Housing…. Poplar owns approximately 13% of the social housing stock in [Tower Hamlets]. Local authorities who own housing are automatically registered with the Regulator.
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> …
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> 22. Poplar received stock transfers of social housing from [Tower Hamlets] in 1998, 2000, 2006, 2007 and 2009. Poplar has certain

> contractual obligations [towards Tower Hamlets] in relation to this stock."

6. The FTT noted that Poplar, like all private registered providers, has certain statutory powers which are not available to non-registered landlords:

   i. The power to seek injunctions against anti-social behaviour under section 5(1)(b) of the Anti-social Behaviour, Crime and Policing Act 2014;

   ii. The power to seek parenting orders in respect of anti-social behaviour under section 26B of the Anti-social Behaviour Act 2003;

   iii. The power to seek demotion orders terminating assured tenancies under section 6A of the Housing Act 1988; and

   iv. The power to seek the grant of a family intervention tenancy under para 12ZA of Schedule 1 to the Housing Act 1988.

7. The FTT noted Poplar's evidence to the effect that:

> "these powers are intended to avoid repeated evictions: with social housing there is an impetus to try to manage the situation. Through the use of these statutory powers an attempt can be made to deal with problems or behaviour, rather than simply moving the individuals or families on, which would end up costing the state money either through homelessness or the courts."

8. On 25 February 2018, Mr Anthony Steig (on behalf of the second respondent which has played no part in the proceedings) 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. In relation to two named sites, Mr Steig requested a detailed breakdown of redevelopment costs and copies of any major contracts relating to development.

9. Poplar did not respond because Mr Steig's email was overlooked. Poplar has apologised for the lack of response. In a decision notice dated 14 August 2018, the Information Commissioner decided that the information requested was environmental and that Poplar was a "public authority" for the purposes of the Regulations. By failing to reply, Poplar had breached regulation 5(2) which stipulates that environmental information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.

10. On 11 September 2018, Poplar lodged a notice of appeal in the FTT. Following a hearing on 1 February 2019, the FTT allowed the appeal and substituted a decision that Poplar is not a public authority for the purposes of the Regulations such that Poplar was not required to take any action.

Legal framework

11. Article 1 of the Convention provides:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in

> decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

12. The Convention places duties in relation to environmental information on public authorities. A "public authority" is defined in article 2 as meaning:

> (a) Government at national, regional and other level;
>
> (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
>
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
>
> (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention."

13. In a section dealing with the meaning of "public authority", the Aarhus Convention Implementation Guide (second edition, 2014, p.46) states that:

> "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 into three parts to provide as broad 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 information, participation or justice."

14. In relation to article 2(2)(b), the Guide continues:

> "'Public authority' also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities, as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Though the subparagraph expressly refers to persons performing specific duties, activities or services in relation to the environment as examples of public administrative functions and for emphasis, any person authorized by law to perform a public function of any kind falls under the definition of 'public authority.'"

15. The Preamble to the Directive states in its first recital:

> "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

16. In relation to the definition of a public authority, the eleventh recital refers to the principle in article 6 of the Treaty establishing the European Community that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities. It follows that:

> "the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment."

17. This expanded definition is found in article 2(2) of the Directive:

> "'Public authority' shall mean:
>
> (a) government or other public administration, including public advisory bodies, at national, regional or local level;
>
> (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
>
> (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

18. Subject to an immaterial exception, regulation 2(2) of the Regulations defines a public authority as meaning:

> "(a) government departments;
>
> (b) any other public authority as defined in section 3(1) of the Freedom of Information Act 2000, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding–
>
> (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
>
> (ii) any person designated by Order under section 5 of the Act;
>
> (c) any other body or other person, that carries out functions of public administration; or

> (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and–
>
> (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."

19. As they seek to introduce the provisions of the Directive into domestic law, the Regulations should be interpreted in light of the provisions of the Directive (*Office of Communications v The Information Commissioner* [2010] UKSC 3, [2010] Env. L.R. 20, para 3).

***Fish Legal*: judgment of the CJEU**

20. The definition of "public authority" under the Directive was considered by the Grand Chamber of the Court of Justice of the European Union ("CJEU") in CJ-279/12 *Fish Legal and another v Information Commissioner and others* [2014] QB 521 (hereafter *Fish Legal CJEU*). Requests had been made to two water companies for information on subjects such as clean-up operations, emergency overflow and sewerage capacity. The water companies did not provide the information. Following complaints by the requestors, the Information Commissioner held that the water companies were not public authorities for the purposes of the 2004 Regulations and that he therefore could not adjudicate on the complaints. The requestors' appeals to the FTT were dismissed.

21. On further appeal, this Chamber referred five questions to the CJEU for a preliminary ruling. Each of the five questions related to the definition of "public authority" under article 2(2) of the Directive. It is convenient to set out the questions here:

> "1. In considering whether a natural or legal person is one 'performing public administrative functions under national law' [for the purposes of article 2(2)(b) of Directive 2003/4], is the applicable law and analysis purely a national one?
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> 2. If it is not, what EU law criteria may or may not be used to determine whether: (i) the function in question is in substance a 'public administrative' one; (ii) national law has in substance vested such function in that person?
>
> 3. What is meant by a person being 'under the control of a body or person falling within article 2(2)(a) or (b)' [for the purposes of article 2(2)(c) of Directive 2003/4]? In particular, what is the nature, form and degree of control required and what criteria may or may not be used to identify such control?
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> 4. Is an 'emanation of the state' (under para 20 of the judgment in [*Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405; [1990] ECR I-3313]) necessarily a person caught by article 2(2)(c)?
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> 5. Where a person falls within [article 2(2)(b) or (c) of Directive 2003/4] in respect of some of its functions, responsibilities or services, are its obligations to provide environmental information confined to the information relevant to those functions,

> responsibilities or services or do they extend to all environmental information held for any purpose?"

22. Referring to its earlier case law, the CJEU observed (at para 35 of its judgment) that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities. In adopting that Directive, the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention (para 36). It follows that, for the purposes of interpreting the Directive, the "wording and aim" of the Convention should be taken into account (para 37).

23. The CJEU held (at para 45) that the determination of the persons obliged to grant access to environmental information to the public was required to be subject to the same conditions throughout the European Union, and therefore the concept of "public administrative functions", within the meaning of article 2(2)(b) of the Directive, cannot vary according to the applicable national law. Nevertheless, the performance of public administrative functions must be "based on national law" (para 47).

24. The CJEU went on to hold (at para 48):

> "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) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute 'public administrative functions' within the meaning of that provision must be examined in the light of EU law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept." (Emphasis added)

25. In a key part of its reasoning, the Court defined "public authority" in article 2(2)(b) in functional terms, more specifically the legal "entrustment" to the authority of the performance of "services of public interest":

> "52. The second category of public authorities, defined in article 2(2)(b) of Directive 2003/4, 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***." (Emphasis added)

26. This key passage – which lays down a functional test and refers to the entrustment of powers - formed the bedrock of the dispute between the parties in the present case. I shall return to it below. The CJEU went on to hold:

> "53. In the present instance, it is not in dispute that the water companies concerned are entrusted, under the applicable national

> law, in particular the 1991 Act, with services of public interest, namely the maintenance and development of water and sewerage infrastructure as well as water supply and sewage treatment, activities in relation to which, as the European Commission has observed, a number of environmental Directives relating to water protection must indeed be complied with.
>
> 54. It is also clear from the information provided by the referring tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.
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> 55. It is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers."

27. The CJEU proceeded to answer the first two referred questions together at para 1 of the operative part of the judgment:

> "In order to determine whether entities such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of article 2(2)(b) of…Directive 2003/4/EC…, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."

28. The CJEU considered the concept of "control" in article 2(2)(c). In doing so, it considered the relationship between the various parts of article 2(2) as a whole:

> "67. Thus, in defining three categories of public authorities, article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the state itself, an entity empowered by the state to act on its behalf or an entity controlled by the state.
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> 68. Those factors lead to the adoption of an interpretation of 'control', within the meaning of article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority

> covered by article 2(2)(a) or (b) of the Directive is in a position to exert decisive influence on the entity's action in that field."

29. On this basis, the CJEU answered the third and fourth questions together (at para 2 of the operative part of the judgment):

> "Undertakings…which provide public services relating to the environment are under the control of a body or person falling within article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of article 2(2)(c) of that Directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by article 2(2)(a) or (b) of the Directive is in a position to exert decisive influence on their action in the environmental field."

30. It is therefore plain that "control" in article 2(2)(c) means that an entity has no genuine autonomy. As to the fifth referred question, the CJEU held (at para 3 of the operative part of the judgment):

> "Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies…, which are capable of being a public authority by virtue of article 2(2)(c) of the Directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within article 2(2)(a) or (b) of the Directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services."

Fish Legal: decision of the Upper Tribunal

31. Following the CJEU's judgment, *Fish Legal* returned to this Chamber. A three-judge panel promulgated its decision on 16 February 2015: *Fish Legal and another v Information Commissioner and others* [2015] AACR 33 (hereafter *Fish Legal AAC*). Other than a question of jurisdiction which is irrelevant to the present case, the only issue before the Tribunal was (as expressed at para 101 of its decision) whether each of the water companies was a "legal person performing public administrative functions under national law" within article 2(2)(b) of the Directive. The Tribunal applied what it called (at para 102 of its decision) the "special powers test." It applied this test by reference to para 1 of the operative part of the CJEU's judgment, above, which refers to special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

32. The Tribunal noted that the CJEU did not define the term "powers" but concluded that the term was used in the general sense of an ability to do something that is conferred by law (para 104). Looking to substance rather than form, the Tribunal (at para 106) formulated the test for special powers as being:

> "Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law?"

In this regard, what matters are "the practical benefits" that a power gives to the entity (para 107).

33. The Tribunal held that special powers are not limited to activities or outcomes but include the means by which they may be secured (para 109). For example, the water companies' power to make and deploy a byelaw in relation to the use of land, breach of which would constitute a criminal offence, was not comparable to powers of private landowners to enforce land rights through the civil law (para 109).

Cross v Information Commissioner

34. As I have mentioned, *Fish Legal AAC* was decided by a three-judge panel (Charles J as Chamber President together with Upper Tribunal Judges Jacobs and Gray). In *Cross v Information Commissioner and another* [2016] AACR 39, the appeal against the Information Commissioner's decision had been transferred to this Chamber by the FTT. The panel comprised two judges (Charles J and Judge Gray) and one non-legal member. In considering the refusal of Mrs Cross's request for the minutes of the Royal Household's Social Responsibility Committee meetings, the Tribunal held that the Royal Household served the Sovereign who, not being a part of the government, was not a public authority under the Regulations. The Tribunal therefore upheld the Information Commissioner's decision and dismissed the appeal.

35. In reaching its decision, the Tribunal held that, although the Directive, and so the Regulations, are intended to have a wide reach, they nonetheless were not intended to give a right to request environmental information from anyone (para 26). The three categories of public authority in article 2 of the Directive form an important hierarchy. That hierarchy indicates that, if the functions or services of public interest with which the relevant entity is entrusted do not have a sufficient link with the public administration or executive of the State, it would be surprising if the Directive and the Regulations applied to the environmental information held by that entity, even though there was a strong public interest in it being disclosed (para 36).

36. The Tribunal held that there is no effective difference between an entity "performing public administrative functions" (the language of article 2(2)(b) of the Directive) and an entity that "carries out public administration" (the language of regulation 2(2)(c) of the Regulations). The language of the Regulations thereby replicates the functional test of the Directive (para 38).

37. The Tribunal explained (at para 39 of its decision) the effect of para 52 of *Fish Legal EU* as expounding the functional test:

> "Paragraph 52 of the judgment of the CJEU describes that functional test. The second part of the paragraph has to be read with and is informed by, the overarching description of the entities as *administrative authorities*. Paragraph 52 provides that it is the combination of the following that make an entity a functional administrative authority and so a public authority:
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> i) the entity is a legal person governed by public or private law,
>
> ii) the legal regime applicable to date has entrusted it with the performance of services of public interest, inter alia in the environmental field, and

> iii) it has been vested with special powers."

38. Applying the functional test on the basis of para 52 of *Fish Legal EU*, the Tribunal (at para 40 of its decision) held that:

> " i) the special powers also have to be vested in the entity by the legal regime applicable to the entity, and
>
> ii) it is the vesting of special powers that makes a service of public interest an administrative function that counts or qualifies in determining whether the entity is an administrative authority (and so a public authority under the functional definition)."

39. The Tribunal interpreted para 52 of *Fish Legal EU* as meaning that an entity will not qualify as a "public authority" unless two conditions are satisfied: first, that the entity is entrusted with the performance of services of public interest; and secondly that it has been vested with special powers (para 95). The Tribunal referred to these two conditions as "combined factors" (para 96).

40. In order to ensure that the objectives of the Directive are achieved, the Tribunal in *Cross* referred to the need for a "cross check":

> "100. It follows that the CJEU test should not be applied rigidly or without reference to, and a cross check with, the words of the Directive and the [Regulations] and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU in its test result in the relevant entity being a functional public authority."

41. Applying the cross check, the key issue was formulated (at para 100 of the Tribunal's decision) as being whether there was a sufficient connection between the Sovereign's functions and powers and the functions of entities that are "organically" part of the administration or executive of the State.

The FTT's decision

42. In its consideration of whether Poplar is a public authority in the relevant sense, the FTT in the present case considered in detail the meaning of entrustment under a legal regime, in the light of *Fish Legal EU*, *Fish Legal AAC* and *Cross*. It 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 para 48 of *Fish Legal EU* and para 50 of *Cross*.

43. The FTT said that the requirement for a legal basis specifically defined in "national legislation" amounted to an artificially narrow interpretation of the wording in article 2(2)(b) of the Directive which referred only to "national law." The tribunal commented that it would be a serious limitation if a body which is carrying out a service of public interest in the shoes of the State, but which does not have what it called "an express delegation of statutory functions", falls outside the Regulations. If the tribunal had not been constrained by authority, it would have taken a broader approach to identifying an

entrustment by a legal regime. It would have accepted the Information Commissioner's argument that Poplar had been entrusted with providing social housing by the applicable legal regime.

44. The tribunal made clear that, if permitted to apply a broader approach than taken by existing case law, it would have held that Poplar's regulatory duties as provided by statute, and its contractual obligations by which it stepped into the shoes of the local authority by taking over housing stock, effectively meant that Poplar had been entrusted with the function of providing, allocating or managing social housing. The fact that registration is voluntary would not have prevented such a conclusion. On the basis of authority, however, the FTT concluded that the test for entrustment was not met, such that this element of the definition of a public authority was not made out.

45. The FTT went on to consider obiter dictum the other necessary elements of the definition of "public authority" and concluded that they would be satisfied. In particular, the allocation and management of social housing, or more broadly the provision of social housing, is a "service of public interest." The power to apply for orders in relation to anti-social behaviour and other matters were 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 with which it has been entrusted.

46. The tribunal went on to apply the "cross check" as elucidated at para 100 of *Cross*. It considered whether the cross check enabled it to adopt a broader approach to the words "under national law" in article 2(2)(b) of the Directive but concluded that the cross check did not allow the tribunal to ignore the clear statements in *Fish Legal EU* and *Cross*. Given its conclusion on entrustment, it held that Poplar is not a public authority within the Regulations and allowed the appeal.

The grounds of appeal

47. There are three grounds of appeal. Under Ground 1, the Information Commissioner submits that the FTT was wrong in law to conclude that there must be a legislative entrustment of public interest services to an entity in addition to a legislative vesting of special powers in the entity, in order for it to fall within article 2(2)(b) of the Directive. Under Ground 2, the Information Commissioner contends 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 functions and cannot be met by a regulatory framework. Under Ground 3, it is submitted that the FTT 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 cross check had been wrongly applied and had led the FTT to an unlawful conclusion.

The parties' submissions

48. In relation to Ground 1, Ms John submitted in writing and orally that the FTT had made an error of law in concluding that article 2(2)(b) of the Directive required an entrustment in national legislation separate from the grant of special powers under national legislation: there was no need (indeed it made no sense) to require two separate sets of legislative powers, one set relating to entrustment and the other to special powers. It is sufficient to establish an entrustment that an entity is vested with special powers under national legislation for the purpose of performing services in the public interest. The relevant

national legislation is the vehicle for the special powers through which public administrative functions are entrusted, and the evidence of that entrustment.

49. Contrary to the dual or two-stage test in *Cross*, para 1 of the operative part of the CJEU's judgment in *Fish Legal EU* laid down a single or one-stage test, which is whether an entity is vested under national law with special powers beyond those which result from the normal rules applicable in relations between persons governed by national law. As it is not the decision of a three-judge panel, the dual test in *Cross* is not binding on me and I should decline to follow it.

50. Ms John submitted in the alternative that I should interpret the reasoning of the judgment in *Fish Legal EU* in a way that is consistent with the operative part. A consistent reading in which the CJEU lays down a one-stage test is possible: the references in the rest of the judgment to national legislation mean that the special powers must be legislative, which is not the same as a requirement for some further and additional legislative entrustment. It is plain from passages such as para 56 of *Fish Legal EU* (which is in the same terms as para 1 of the operative part) that, in order to decide whether an entity is performing public administrative functions under national law, the tribunal must ask only one question, namely whether national law vests that entity with special powers.

51. Alternatively. if the reasoning of the CJEU's judgment cannot be read in a manner which is consistent with the operative part, a preliminary ruling from the CJEU would be required in order to clarify the internal inconsistency.

52. In relation to Ground 2, Ms John submitted that if, contrary to her submissions on Ground 1, there were to be a separate requirement to show entrustment in national legislation, the FTT misinterpreted article 2(2)(b) of the Directive and article 2(2)(c) of the Regulations in holding that the entrustment must amount to "an express delegation of statutory functions." There is entrustment in circumstances where a statutory regulator is established for the purposes of pursuing a particular public interest and the entity in question conducts itself in accordance with regulatory objectives. That is sufficient for its public administrative functions to be entrusted under national law.

53. In relation to Ground 3, Ms John submitted that the FTT erred in holding that it was not permitted in its cross check to conclude that Poplar is a public authority. The FTT ought to have concluded that there is a sufficient connection between the national legislation applicable to Poplar and what State entities do by way of providing social housing. In a point which loomed larger in her oral submissions than her grounds of appeal and skeleton argument, Ms John submitted that the Tribunal in *Cross* had made an error of law by introducing the need for a cross check. This sort of check is not appropriate in cases where a tribunal is considering the application of the law - as opposed to the exercise of discretion or judgment.

54. On behalf of Poplar, Mr Paines submitted that the judgment in *Fish Legal EU* is clear and that it was correctly interpreted in *Cross*. The public administrative functions must be entrusted specifically in national legislation. The Information Commissioner's approach, which equates the vesting of special powers with the entrustment of services of public interest, is not what the judgement says. The Information Commissioner's argument that I should adopt only the wording of the operative part rests on a misconception of the interpretation of the operative part which must be construed in the light of the grounds of judgement: C-526/08 *Commission v Luxembourg* [2010] ECR: I-6151, para 29.

55. The full extent of the Court's reasoning was not reflected in the operative part of the judgment in *Fish Legal EU* because it was not in dispute that the water companies were entrusted with environmental services of public interest under national legislation and had powers for that purpose. The operative part was directed expressly to the position of entities such as the water companies and it addressed the remaining question which the referring tribunal should answer.

56. In relation to Ground 2, Mr Paines submitted that the regulatory scheme does not show entrustment. Individuals and entities in very many fields are regulated such as legal professionals, data controllers, teachers and others. State regulation of an entity does not demonstrate a conferral of administrative functions. The question of regulation was considered at length by the CJEU and this Chamber in the context of article 2(2)(c) of the Directive in the *Fish Legal* cases. There is no suggestion in either judgement that regulation was relevant to article 2(2)(b). It would be surprising if both the CJEU and this Chamber had omitted to mention the decisive nature of statutory regulation for the purposes of article 2(2)(b) if they had considered such an argument even possibly well-founded.

57. As to Ground three, the cross check is a paradigm example of the exercise of discretion by the FTT. Its conclusion may only be challenged on grounds of perversity. The Information Commissioner cannot demonstrate perversity in the present case. Mr Paines submitted that there was no need for this Chamber to refer to the CJEU any matter raised in the appellant's grounds of appeal as the law is clear and a reference would repeat matters already considered by the CJEU in *Fish Legal EU*. Were Poplar's interpretation not considered correct, a reference to the CJEU would be necessary.

Analysis and conclusions

Ground 1: Entrustment

58. The Tribunal in *Cross* interpreted para 52 of *Fish Legal EU* as setting down two distinct but necessary criteria for determining whether an entity is a public authority: the entrustment of the performance of services of public interest (on the one hand) and the vesting of special powers (on the other hand). If I am bound to follow *Cross*, the Information Commissioner's submission that entrustment is not conceptually distinct from vesting of special powers is bound to fail. *Cross* was not however the decision of a three-judge panel and the question arises as to whether I am bound to follow it.

59. In *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC), a three-judge panel presided over by HHJ Gary Hickinbottom CP (as he then was) set down certain guidelines on the binding effect of decisions of this Chamber on other Upper Tribunal judges. A single Upper Tribunal Judge shall follow a decision of a three-judge panel on questions of legal principle unless there are compelling reasons why he or she should not do so, such as a decision of a superior court affecting the legal principles involved (see para 37(iii)). Ms John submitted that, as one member of the panel which decided *Cross* was a non-legal member not a judge, it is not the decision of a three-judge panel and should not be regarded as binding under *Dorset Healthcare*. Alternatively, in so far as *Cross* is not consistent with *Fish Legal EU* or *Fish Legal UK*, there are "compelling reasons" under para 37(iii) of *Dorset Healthcare* for not following it.

60. Three-judge panels are convened where the Senior President of Tribunals or Chamber President considers that an appeal involves "a question of law of special difficulty or an

important point of principle or practice, or that it is otherwise appropriate" (Senior President of Tribunals, Practice Statement, Composition of Tribunals in relation to Matters that Fall to be Decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26 March 2014, which is materially the same as the composition statement considered in *Dorset Healthcare*).

61. Where an appeal is transferred to this Chamber from the FTT, and the same test of special difficulty or important point of principle or practice is satisfied, the appeal may be heard by two judges and a non-legal member. The requirement for a non-legal member is readily comprehensible in an appeal which will not have had the benefit that a specialist member provides in the FTT. *Dorset Healthcare* does not deal with this situation. I am therefore not bound by the *Dorset Healthcare* guidelines to follow *Cross* in the same way as a decision of a three-judge panel.

62. Mr Paines emphasised that the panel in *Cross* included Charles J (as Chamber President) and Judge Gray. Both had sat on the three-judge panel in *Fish Legal AAC*. The parties in *Cross* were permitted to attend and make submissions on the public authority point in *Fish Legal AAC* (as explained in para 12 of *Cross*). The two cases were intended to be read together. There would be sound policy reasons for expanding the *Dorset Healthcare* guidelines to cover two-judge panels in transferred cases.

63. There is force in Mr Paines's submissions but, as a single judge, I am reluctant to expand the *Dorset Healthcare* guidelines in this case. I accept Ms John's submission that, as a single judge, I am bound to follow *Fish Legal AAC* but not bound to follow *Cross*. The *Dorset Healthcare* guidelines say that a single judge in the interests of comity normally follows the decisions of other single judges but is not bound to do so if it would lead to the perpetuation of legal error. By implication, the same comity should extend to the two-judge decision in *Cross*. However, in the interests of avoiding the risk of perpetuation of legal error, I take the view that it is necessary or at least prudent that I should do more than look for answers in *Cross*.

64. Are the answers to be found in *Fish Legal AAC*? The first part of *Fish Legal AAC* deals with a jurisdictional issue that is not relevant to the present case. The second part deals with the public authority issue. After setting out the law, the Tribunal considered whether the water companies were public authorities by virtue of having been vested with special powers. Having set out its reasoning, the Tribunal held at para 130:

> "For these reasons, we have decided that the companies had special powers. The powers we have mentioned are sufficient, collectively in themselves and as examples of powers of the same type, to satisfy the test laid down by the CJEU. As such, the companies are public authorities."

65. The Tribunal went on to consider the concept of "control" which features in the third part of the hierarchy of public authorities defined in article 2(2) of the Directive. It concluded (at para 155) that the "control test is a demanding one that few commercial enterprises will satisfy." The focus on special powers and the control test – and not on the concept of entrustment under the functional test in article 2(2)(b) – reflects the issues which the Tribunal had to decide. As the Tribunal itself remarked (at para 97), its decision was given in the context of a particular case and was not intended as a treatise on any particular issue. In the present case, I am asked to consider specifically the relationship

between entrustment and the vesting of special powers in a way which does not appear to have been considered and was not decided in *Fish Legal AAC*.

66. In any event, the Tribunal in *Fish Legal AAC* followed and applied the reasoning in *Fish Legal EU*. I heard detailed submissions on the effect of *Fish Legal EU* in which the CJEU interpreted the Directive in light of the objectives of the Convention. For all these reasons, I have reached the conclusion that the foundation of my decision should lie in the relevant paras of *Fish Legal EU.*

67. Ms John relied on the absence of any reference to entrustment in the operative part of the CJEU's judgment as demonstrating that the vesting of special powers was the determinative test. I am asked in effect to ignore those aspects of the non-operative parts of the judgment that are different from the operative part or at least to hold that they are not legally binding. As Mr Paines submitted, such an approach would be inconsistent with cases such as *Commission v Luxembourg*, above, which make clear that the operative part of the judgment must be construed in the light of the grounds of the judgment. I shall therefore consider the effect of those parts of the CJEU's judgment which are relevant to the questions that I have to decide.

68. In my view, the critical part of *Fish Legal EU* is para 52 which defines what constitutes a public authority under article 2(2)(b) of the Directive. The test is functional. Public authorities are: "administrative authorities…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."

69. The Court's reference to public authorities as being "administrative authorities" reflects the judgment in C-204/09 *Flachglas Torgan GmbH v Federal Republic of Germany* EU:C:2012:71. In that case, the Court stated (at para 40) that, in referring to "public authorities", the authors of the Directive "intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions." It is not obvious that Poplar may reasonably be regarded as an administrative authority. Neither its obtaining local authority housing stock nor its contractual relations with a London borough nor its status as a registered provider of social housing would seem apt to convert it from a company that supplies housing to an administrative authority.

70. In relation to entrustment, the Court in *Fish Legal EU* drew attention to a disparity between the English and French versions of article 2(2)(b) of the Directive reflecting the divergence between the two versions in the Convention. The Court observed at para 44:

> "In the French version of article 2(2)(b) of Directive 2003/4, the phrase 'under national law' is linked to the verb 'perform', so that, in this version, the provision's terms cannot be understood as making express reference to national law as regards the definition of 'public administrative functions'. In the English version of the same provision, that phrase is, by contrast, placed after the words 'public administrative functions' and is consequently not linked to that verb."

71. In my view, the Court means that, on the basis of the French version, it is clear that the entity's competence to perform its functions must be founded on national law. This is supported by perusing the relevant text in the French version where the verb "perform" and the phrase "under national law" are linked: "qui exerce, en vertu du droit interne, des

fonctions administratives publiques." The reference in French to national law ("droit interne") is juxtaposed with, and connected as a matter of syntax to, the verb ("exerce") rather than the concept of public administrative functions ("des fonctions administratives publiques") which follows. The emphasis on the French version in para 44 of *Fish Legal EU*, so as to highlight the link between the verb "perform" and the phrase "under national law", supports the conclusion that the competence to perform functions must be founded on national law

72. Para 44 casts light on the Court's reasoning in para 52. In essence, para 52 says the same thing, namely that the applicable legal regime must entrust the performance of services of public interest to an entity. National law underlies the ability to perform public administrative functions. The definition of what may or may not be a public administrative function is a different and second question.

73. The view that an entity's power to performs its functions must be set down in national law is consistent with other passages of the Court's judgment. The words "by virtue of a legal basis specifically defined in the national legislation which is applicable to them" (at para 48; see above) relate to the empowering of an entity to perform functions, as does the reference to "an entity empowered by the state to act on its behalf" (at para 67; see above). The Court's reference (at para 49) to *Flachglas Torgan* demonstrates that article 2(2(b) refers to entities which are administrative authorities as established in national law and not to entities which may carry out some of the same functions as are performed by the State but which cannot be regarded as bound by legislation to do so.

74. This view is also consistent with the structure of para 52 of the Court's judgment in *Fish Legal EU*. I accept Mr Paines's submission that entrustment is considered in one part of para 52 and vesting of special powers in another part. They are two separate concepts in two separate parts of a sentence.

75. Ms John submitted that the purposes of the Convention and Directive include the widest possible access to environmental information, increased awareness of environmental matters, and increased responsibility and accountability for environmental matters. Citing p.46 of the Implementation Guide (above), she submits 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.

76. In my view, this submission is too broad. It is not what *Fish Legal EU* says. The calibration in article 2(2) and the hierarchy of entities that are defined within it are inconsistent with an expansion of the definition beyond what emerges from *Fish Legal EU* which would be the logical outcome of Ms John's submission. I agree with the Tribunal in *Cross* (para 26) that the Directive (and so the Regulations) are intended to have a wide reach but that they were not intended to give rise to a general right to request environmental information from any entity that holds it.

77. In her 2019 report to Parliament ("Outsourcing Oversight? The case for reforming access to information law"), the Information Commissioner commented at p.3:

> "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."

This Tribunal's task, however, is to interpret the applicable legal instruments in light of the relevant case law. The policy underlying outsourcing is not a matter for the Tribunal.

78. For these reasons, I have concluded that the CJEU in *Fish Legal EU* lays down a dual test in so far as entrustment is different from the vesting of special powers. The dual test is expressed in *Cross* which faithfully and correctly applies *Fish Legal EU*. Irrespective of whether it is binding on me, I take the view that *Cross* was correctly decided in so far as it laid down a dual test of (a) entrustment and (b) being vested with special powers. Ground 1 is therefore dismissed.

Ground 2: the role of regulation

79. In Ground 2, the Information Commissioner criticises the FTT for equating entrustment under national law with the "express delegation of statutory functions" (para 102 of the FTT's decision). Read in context, that criticism is one of linguistics not substance. It is plain from an overall reading of the decision that the FTT applied the correct test as expounded in *Fish Legal EU*. The wording in para 102 may not be felicitous in so far as this part of the FTT's decision does not precisely reflect the *Fish Legal EU* test and may (if undue formalism is applied to reading the decision) represent an unduly narrow gloss. However, in my view, the choice of words in this passage does not imply or otherwise demonstrate that the FTT misdirected itself in any material way.

80. However, under this ground, Ms John made the wider submission that "national law" under article 2(2)(b) could include not only express legislative powers but also a regulatory scheme as being an indirect way of causing entities to perform public functions. She submitted that there is entrustment where there is national legislation conferring public administrative functions in circumstances where a statutory regulator is established for the purpose of pursuing a particular public interest objective. This would not cast an unduly wide net because it is only if that entity's public administrative functions also include specific duties, activities or services in relation to the environment, and it is vested with special powers, that it should be considered a "public authority" within article 2(2)(b) of the Directive. She submitted that it is these two additional factors that distinguish barristers, nurses and other regulated persons who no one would suggest should be made subject to the Regulations.

81. Ms John cited no authority for the proposition that compliance with a regulatory scheme may amount in itself to the entrustment of public administrative functions under national law. *Fish Legal EU* and *Fish Legal AAC* both considered the regulatory scheme which governed the water companies. In *Fish Legal EU*, the CJEU held that the State's regulation of the water companies would amount to "control" under article 2(2)(c) of the Directive if it meant that the companies did not have genuine autonomy vis-à-vis the regulatory authority (paras 68 and 71). The question of whether the companies had genuine autonomy was a question for the referring Tribunal (para 72).

82. In answering the question, the Upper Tribunal in *Fish Legal AAC* concluded that the water companies were the subject of stringent regulation and oversight. There was the potential for extensive involvement and influence over the way in which they performed

their services through the regulatory scheme with which they were compelled to comply. That scheme was, nevertheless, not indicative of control under article 2(2)(c). Neither the CJEU nor the Tribunal considered the role of regulation in the context of article 2(2)(b) of the Directive. I agree with Mr Paines that that 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.

83. I do not discern how the mere existence of statutory regulation can convert a service provider into a public authority. It is a matter of context and the effect of the regulatory scheme in question. As to the present context, I agree with the FTT's observation that the information before it on the regulatory regime under which housing associations operate was limited; nor was I taken in any detail to the effect of the regulatory scheme. On the documents before me, it is not clear how the regulation of social housing causes Poplar to be regarded as an administrative authority. I was not persuaded by Ms John's submissions on the role of regulation. Ground 2 is dismissed.

Ground 3: Cross check

84. The FTT at para 141 of its decision considered whether the cross check required by *Cross* would yield the conclusion that Poplar had been entrusted with the performance of services of public interest under national law. It concluded that a cross check did not permit it to ignore what it regarded as the clear statements in *Fish Legal EU* and *Cross* to the contrary.

85. It is difficult to ascertain the benefit of a cross check - in the sense described in *Cross* - in the context of the present case. Nor was I directed to anything in *Fish Legal EU* or in *Fish Legal AAC* which laid the groundwork for a cross check as a discrete exercise. In my view, there is force in Ms John's submission that a cross check is less appropriate in reaching conclusions of law as opposed to decisions which rest on the exercise of discretion or judgment. To the extent that the cross check requires decision-makers and judges to adopt a flexible rather than rigid approach, and to have the objectives of the Convention in mind, it would add nothing to the existence of well-established principles of EU and domestic public law. As a freestanding exercise, it adds a layer of complexity at the risk of detracting from the focused application of the words of the Directive and Regulations.

86. If it were necessary for me 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 Regulations, I would have departed from *Cross* (under *Dorset Healthcare*, para 37(iii)). However the question does not arise for decision because I agree with the FTT that application of the cross check could make no difference in the present case. In my view, the FTT was correct to reach the conclusion that a cross check could not add anything to its legal analysis. This ground of appeal fails.

87. In summary, 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. It held 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. In my view, its conclusion was unimpeachable.

Other reasons for upholding the FTT's decision

88. Mr Paines' grounds of opposition to the appeal deal with the remaining aspects of the FTT's decision which were adverse to Poplar but which were obiter dicta. He submitted that, contrary to the FTT's view, the provision of social housing is not a service of public interest. The FTT was, moreover, wrong to conclude that Poplar performed specific duties, activities or services in relation to the environment within the meaning of article 2(2)(b) of the Directive. It had made an error of law in concluding that Poplar had special powers and in concluding that (if Poplar did have such powers) they were not required to be "environmental."

89. Like the FTT, I do not need to decide these questions. They should await resolution in a case where they are live issues. I would have disagreed with the FTT about whether Poplar is vested with special powers in the form of the power to obtain orders in relation to anti-social behaviour and other matters. The test is whether the powers confer on Poplar "a practical advantage relative to the rules of private law" (see *Fish Legal AAC*, para 106). The additional powers on which the respondent relies reflect Poplar's status as a housing association regulated by the RSH. Under the regulatory scheme, Poplar is required to grant tenants at least periodic assured tenancies, which afford tenants substantive protections from eviction. Non-registered landlords may grant shorthold tenancies under which they can obtain civil injunctions against misbehaving tenants and secure evictions more easily if needed. I agree with Mr Paines's submission that Poplar's powers do not give it a practical advantage relative to non-registered landlords but rather they mitigate a disadvantage. On other issues, I would have been reluctant to depart from the well-reasoned conclusions of the FTT but, as I have said, these issues will be more effectively determined in the context of a case in which they would make a difference to the outcome.

Should the Tribunal make a reference to the CJEU?

90. Ms John submitted that, if I were to reject the Information Commissioner's submissions on entrustment, I should refer the case to the CJEU for a preliminary ruling under article 267 of the Treaty on the Functioning of the European Union. The CJEU's ruling would be required on the interpretation of article 2(2)(b) of the Directive and, in particular, on the relationship between entrustment and vesting of special powers. Although *Cross* held that entrustment and vesting of special powers are different concepts in a dual test, the Tribunal cannot with "complete confidence" say that the matter is clear (*R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex parte Else (1982) Ltd* [1993] QB 534, 545D). A reference would achieve legal clarity in a more efficient and expedient manner than domestic proceedings in the Court of Appeal. Mr Paines submitted that the material parts of *Fish Legal EU* are clear and had been clearly applied in *Fish Legal AAC* and *Cross*.

91. The parties agreed that neither the Withdrawal Agreement nor the European Union (Withdrawal) Act 2018 presented a legal or practical bar to a reference. I shall proceed on that basis. It is not in dispute that the decision as to whether the Upper Tribunal should make a reference is discretionary as there is a judicial remedy against my decision in national law (*C.I.L.F.I.T. v Ministry of Health* [1982] ECR 3415, para 13).

92. The question which I am asked to refer – on the relationship between entrustment and the vesting of special powers – would not be identical to any of the questions referred in *Fish Legal EU*. However, *Fish Legal EU* provided a detailed analysis of the definition of a

public authority. Part of the definition is that a public authority in the sense laid down by article 2(2)(b) of the Directive is an administrative authority performing its functions under specific national legislation. That does not apply to Poplar. In my view, a reference would serve no material purpose because the CJEU has already in effect dealt with the point of law in question (*C.I.L.F.I.T.*, above, para 14).

93. In conclusion, this appeal is dismissed.

THE HON MRS JUSTICE FARBEY
Chamber President
8 June 2020