Neutral Citation Number: [2026] UKUT 241 (AAC)
Appeal number: UA-2025-001289-GIA

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Between:

NNB Generation Company (HPC) Ltd

Appellant

v

Information Commissioner

First Respondent

and

Fish Legal

Second Respondent

Before: Upper Tribunal Judge Jacobs

Decided on 26 June 2026 following an oral hearing on 29 April 2026.

Representation:

NNB Generation Co (HPC) Ltd:	Timothy Pitt-Payne KC, instructed by Herbert Smith Freehills Kramer LLP
Information Commissioner:	Laura John of counsel, instructed by the Commissioner's Legal Department
Fish Legal:	Estelle Dehon KC and John Fitzsimons of counsel, instructed by Geoffrey Hardy, Solicitor

DECISION OF UPPER TRIBUNAL

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	EA/2024/0393
Decision date:	4 June 2025
Hearing:	Remote
Panel:	Judge Harris with Members Chafer and Saunders

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

SUMMARY OF DECISION:

Information rights - Environmental information – general (93.7)

Environmental Information Regulations 2004 – whether body a public authority under regulation 2(2)(c) (yes) – whether entrustment requires a duty (no) – whether body's activities had to be inherently State-related (no) - whether special powers necessarily exclude mitigating a disadvantage (no) – whether cross check a separate legal requirement (no).

REASONS FOR DECISION

Abbreviations:

DCO	Development Consent Order
Fish Legal	refers to the decision of the Court of Justice of the European Union in *Fish Legal v Information Commissioner* (Case C-279/12) [2014] QB 521, unless otherwise stated
HPC	NNB Generation Company (HPC) Ltd

A. What this case is about

1. This case concerns the status of HPC under the Environmental Information Regulations 2004 (SI No 3391). Is HPC a public authority within regulation 2(2)(c) of the Regulations? The Information Commissioner decided that it was and the First-tier Tribunal confirmed that decision on HPC's appeal.

2. The issue for me is whether the making of the First-tier Tribunal's decision on the issue 'involved the making of an error on a point of law' under section 12(1) of the Tribunals, Courts and Enforcement Act 2007. I have decided that it did not. Accordingly, the decision of the First-tier Tribunal on the issue stands.

3. I do not need to set out Fish Legal's request for information. This has yet to be considered on its merits. Essentially, the questions relate to the protection of fish, including an acoustic fish deterrent and weirs.

B. About HPC

4. HPC is a private company within a group of companies and is responsible for constructing the Hinkley Point C Nuclear Power Station. It holds a licence to construct and operate a nuclear facility under the Nuclear Power Installations Act 1965. It has the benefit of a DCO contained in the Hinkley Point C (Nuclear Generating Station) Order 2013 (SI No 648), made under the Planning Act 2008. And it holds a licence to generate electricity under the Electricity Act 1989.

5. The First-tier Tribunal accepted the Information Commissioner's proposed list of special powers. The tribunal found that these were special powers under the DCO:

The power to carry out a wide variety of work, on a number of specified streets, without having to obtain a licence or the consent of the relevant street authority (DCO Articles 13-20).

The power to discharge into watercourses, and for that purpose to lay down, take up and alter pipes, and to make openings into and connections with the watercourse, public sewer or drain (DCO Article 21).

A number of powers of acquisition, including compulsory acquisition of land (DCO Article 24), compulsory acquisition of rights (DCO Article 27), acquisition of certain properties (DCO Article 31); entry onto and appropriation of the subsoil of, or airspace over, streets (DCO Article 32); and temporary possession of certain land and constructing temporary works (DCO Articles 33 and 34).

A number of powers of entry, including the power to enter and survey buildings to determine whether protective works are necessary or expedient (DCO Article 22(3)); and the power to enter land to survey and investigate, including by making trial holes on the land, and place on, leave on and remove from the land apparatus (DCO Article 23).

The power to fell or lop trees or shrubs near to the project, or cut back their roots, including trees subject to tree preservation orders (DCO Articles 41 and 42).

The power to construct a jetty in the Severn Estuary, to allow construction materials to be delivered by ship to the plant site (DCO Article 54). The power to engage in a variety of associated works, such as enclosing and holding the foreshore and seabed (DCO Article 56); constructing and maintaining ancillary works such as roads, buildings, walls, pipes, cables, electrical substations and weighbridges (DCO Article 60); and dredging (Article 62).

The power to act as a harbour authority, enabling it to impose byelaws including byelaws the breach of which is a criminal offence: particular Article 69(3). DCO Article 69.

A defence to proceedings in respect of statutory nuisance, and a statutory authority to override easements and other rights (DCO Articles 12 and 25).

The tribunal also found that these were special powers under the Electricity Licence:

The power to compulsorily acquire land (Electricity Act 1989, Schedule 3); and Standard Licence Condition 14.

The power to conduct street works, including installing, maintaining and replacing electrical lines and electrical plant, and structures for housing or covering such lines or plant; and the power to conduct incidental work including opening or breaking up any street or any sewers, drains or tunnels under any street, tunnelling or boring under any street; and removing or using earth and materials from in or under the street (Electricity Act 1989, Schedule 4; and Standard Licence Condition 15).

C. The environment legislation

6. This is regulation 2(2)(c) in its legislative context:

Subject to paragraph (3), ‘public authority’ means—

(a) government departments;

(b) any other public authority as defined in section 3(1) of the Act, 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.

7. Regulation 2(2)(c) implemented Article 2(2)(b) of Directive 2003/4/EC on public access to environmental information:

'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).

8. In turn, Article 2(2)(b) implemented the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998. The EU and the United Kingdom are both parties to this Convention. It is based on three pillars: access to information, public participation in decision-making, and access to justice. It applies to public authorities as defined in Article 2(2):

'Public authority' means:

(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.

D. The meaning of regulation 2(2)(c)

9. Regulation 2(2)(c) must be interpreted and applied in a way that implements Article 2(2)(b) of the Directive. This was considered by the Court of Justice of the European Union in *Fish Legal*. The Court said:

> 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.

10. It is important to remember that this is not a definition. As the Court said, the definition is in Article 2(2)(b). What the Court was doing was dissecting the characteristics of what was involved in performing administrative functions. The paragraph is essentially descriptive. It does not take the place of the definition. It must only be used to help decide if the definition is satisfied in the particular case. It may be convenient, even helpful, in a particular case to focus on individual characteristics. But this must not allow them to be separated from what the Court said as a whole.

E. Ground 1 – entrustment

11. This refers to the issue whether, in the language of *Fish Legal*, HPC was 'entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field'.

What the First-tier Tribunal said

12. This was the First-tier Tribunal's discussion and conclusions:

> 79. We were persuaded by Ms John's analysis and by our own analysis of the case law that the entrustment test is not talking about the imposition of duties, but about empowerment of a body to perform a particular function. We agreed with Ms John that there was nothing in the legislation which means a body needs to be obliged to perform a function in order to fall within the entrustment test. This approach was endorsed by the UT in Poplar at paragraph 79 (AB634).
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> 80. We agreed that there does need to be a separate act of entrustment empowering the body to perform public administrative functions and accepted that as a matter of fact the DCO, Electricity Licence and Nuclear Licence all did this. The DCO is itself a statutory instrument and the Licences are granted pursuant to powers expressly set out in the relevant statutes.
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> 81. We also accepted the IC's submission that all aspects of the powers related to the environment, as even the harbour authority powers, the only ones which HPC disputes are to do with the environment, have the potential to have a significant impact on the environment.
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> 82. For those reasons we agreed that the entrustment test was met.

The ground of appeal

13. There are five elements to this ground of appeal. I take the first three together, as they make the same point in different ways. This point is that the tribunal failed to appreciate the difference between a duty and permission. The fourth element is that nothing that HPC did was inherently State-related. The fifth element is that the First-tier Tribunal failed to take account of the wide-ranging consequences of its decision.

Duty and permission – Ground 1(1)-(3)

14. As I understood Mr Pitt-Payne's argument at the hearing, it was that special powers meant special *duties*. There is a short answer to this argument: there is nothing to support it in the definitions or in *Fish Legal*. All the definitions refer to functions, which was no doubt why the European Court in *Fish Legal* spoke of the definition being *in functional terms*. Both the Convention and the Directive refer to *duties*, but qualified by *including* and linked with *activities or services*. Nor is there any support for in *Fish Legal* for limiting special powers to duties.

15. I need say no more than that, because Mr Pitt-Payne's written reply after the hearing shows that I misunderstood his argument. He draws a distinction between powers and permission. In the case of the former, the authority's exercise is subject to constraints as a matter of public law, such as not fettering its discretion whether or not to exercise the power. In the case of the latter, the authority is free to decide whether or not to exercise the permission and may do so by reference to its own commercial interests. Only the former are capable of being entrusted to a person or body. A permission 'is not capable of amounting to an entrustment: it does not in any case involve a body or person stepping into the shoes of the State.'

16. I do not accept that argument. I accept that there is a conceptual difference between power and permission as explained by Mr Pitt-Payne. I do not, though, accept that a permission, as defined by Mr Pitt-Payne, is incompatible with HPC being a public authority. Mr Pitt-Payne's argument removes the analysis from the context of a company being charged with building a nuclear power station. The ultimate flaw in this argument is that it presupposes a particular model of the State, of what a State does and how it does it. Building and running a nuclear power station is not the same as administering a social security system. The kind of freedom that Mr Pitt-Payne describes may be more appropriate for the former than the latter, but that does not mean that it cannot be a public administrative function within the meaning of the legislation. There is nothing about its nature that prevents it being entrusted.

Inherently State-related – Ground 1(4)

17. I accept Mr Pitt-Payne's argument that what HPC does is not *inherently* State-related. But that is not required. There is nothing in the legislation or in *Fish Legal* to suggest that it is, let alone require it.

18. Very few things are inherently State-related. Taxation and defence may be examples. The role of the State changes over time. Take railways. A century ago, in 1926, they were privately owned. Then they were nationalised under the Transport Act 1947, only to be privatised under the Railways Act 1993. Now in 2026, they are being brought back into public ownership under the Passenger Railway Services (Public Ownership) Act 2024.

19. The legislation, whether domestic, EU or international, has to be applied when a case arises. In this case, that means when Fish Legal made its request for information and HPC denied that it was a public authority. At that time, the issue was whether HPC was carrying out or performing public administrative functions. That required a decision whether what it was doing was part of public administration. And that had to be read with the benefit of *Fish Legal*, which referred to *services of public interest* and distinguished between special powers and normal rules. There is no need to identify something that is *inherently* a State-related function.

20. Mr Pitt-Payne argued that there was a distinction between a body being vested with special powers in order to perform services of public interest and State regulation. I accept that. But the State is free to use whichever approach it prefers or, for that matter, a combination. The issue for the Information Commissioner and the First-tier Tribunal was whether HPC was a public authority under regulation 2(2)(c).

Wide-ranging consequences – Ground 1(5)

21. Mr Pitt-Payne argued that on the tribunal's approach, the entrustment criterion 'would be satisfied in respect of: (a) any grantee of a DCO; (b) any grantee of an electricity generation licence; and (c) any grantee of a licence pursuant of section 1(1)(a) of the Nuclear Installations Act 1965.' He pointed out that there have been 140 DCOs granted and over 550 electricity generation licences. There are a number of aspects to this.

22. Mr Pitt-Payne may be right. However, the flaw in his argument is that it is limited to the entrustment criterion. That is only one aspect of deciding whether a body is a public authority. It is also necessary to consider whether the body is vested with special powers. At best, Mr Pitt-Payne has shown that a large number of bodies may satisfy one element of the definition of a public authority.

23. That aside, the issue is whether the body is carrying out functions of public administration. If the definition is satisfied in a large number of cases, so be it. The duty of disclosure will apply to them all.

24. Finally, the argument is based on a misunderstanding of the nature of the exercise the tribunal had to undertake. It takes each element of the tribunal's reasoning and assumes that it would be decisive of itself and in isolation from any other factors. That is not how the legislation works. Individual factors have to be considered in combination with all other relevant factors and in the circumstances of the case as a whole. I explain this in more detail when I deal with Ground 3.

F. Ground 2 – special powers

25. There are several parts to this ground. Before I come to them, it is convenient to mention the *Fish Legal* case in the Upper Tribunal.

Fish Legal in the Upper Tribunal

26. Following the reference to the Court of Justice of the European Union, the *Fish Legal* case came back before a three-judge panel of the Upper Tribunal. Its decision is reported at [2015] UKUT 52 (AAC), [2015] AACR 33. I need only quote two short passages from the decision. Both relate to special powers.

27. At [106], the tribunal said of special powers: 'The issue is a practical one. Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law?'

28. And at [119], the tribunal said: 'The test refers to the powers that result from those rules [of private law], not to the powers that *could* result from the *exercise* of those rules.'

29. The First-tier Tribunal was bound by the Upper Tribunal's decision, including those passages. And, as the case was decided by a three-judge panel, so am I.

Inadequate reasons

30. Before the First-tier Tribunal, the Information Commissioner argued that HPC had a range of special powers under its DCO and its Electricity Licence. I have recorded those powers at paragraph 5 above.

31. This was the First-tier Tribunal's discussion and conclusions:

> 101. We rejected HPC's argument that a power could not be a 'special power' because it mitigated a disadvantage rather than conferring an advantage. This appeared to us to be a semantic rather than substantial distinction, because mitigation of a disadvantage may itself amount to an advantage.
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> 102. The wording of the Fish Legal CJEU test refers to 'special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.' We were persuaded by the IC's argument that in light of Fish Legal UT, the 'rules of private law' with which HPC's powers are to be compared are those that result from the rules, not those that could result from the exercise of those rules, like licences or, in this case, planning permission (Fish Legal UT at [119]). In other words, we accepted the IC's submission that it is the contrast between rules of private law and the powers vested in the body in question that renders those powers 'special'. Whether or not they are exercised, the powers which are entrusted to HPC under the DCO and Licences go far beyond what a private person without the benefit of such powers would be able to do in those circumstances, for example in empowering HPC to make byelaws, even if it opts not to do so. We were therefore satisfied that the special powers test was met.

32. Mr Pitt-Payne argued that the tribunal's reasons were inadequate for failing to make clear which of those it had accepted as special powers. I reject that argument. It is right that the tribunal did not use the words 'We accept the Information Commissioner's submissions in [93] and [94] and find that each of the powers listed is a special power.' But that is the only way that [102] can be read fairly.

Overarching contention

33. Mr Pitt-Payne's overarching contention was that HPC only had the powers listed by the Information Commissioner because the company had chosen to apply for the DCO and the Licence. I reject that argument. It ignores *Fish Legal* at [52]. Under the Court's test, the issue was whether HPC was *vested* with special powers. There is nothing in the definitions or in *Fish Legal* to exclude powers for which a company has chosen to apply. It matters not how the company came to have the powers that are

vested in it. Why should it? Taking a purposive approach, there is no rational reason for the classification of a body to depend on the means by which it acquired its powers.

Comparison of HPC's position with that under private law – Ground 2(1)

34. Mr Pitt-Payne relied on the reasoning of the Upper Tribunal in the *Fish Legal* case at [119]. The three-judge panel there said: 'The test refers to the powers that result from those rules, not to the powers that *could* result from the exercise of those rules.' Mr Pitt-Payne picked up on the examples given by the tribunal in this case at [102] of licences or planning permission. Building on that, he argued that an application for a DCO or Electricity Licence would not be governed by private law, but by statute.

35. I reject that argument. The tribunal found that HPC had powers, which it listed. It decided that they were not powers available to HPC as a matter of general private law. Having them, conferred a practical advantage on the company should it wish to use them. That made them special powers.

36. This is an opportunity to deal, once and for all, with a theme of Mr Pitt-Payne's argument. He argued that HPC was no different from anyone else. Anyone could apply for the licences it had been given. That is true, in a sense, but it is unrealistic because it ignores the context. On his approach, applying for a licence to generate electricity is just like applying for a television licence. It is not. He also argued that the DCO was no more than a special version of a grant of planning permission. Again, it is not. Being allowed to build a nuclear power station is not comparable to buying a television licence or being given permission to build an extension on a house or undertaking any other activity in which people generally engage.

Mitigating a disadvantage – Ground 2(2)

37. In the First-tier Tribunal, Mr Pitt-Payne argued that the provisions identified by the Information Commissioner were not special powers. Rather, they mitigated a disadvantage to HPC rather than conferred a practical advantage. The tribunal rejected this in [101] as *semantic* rather than *substantial*.

38. The distinction between mitigating a disadvantage and conferring an advantage is said to derive from the Upper Tribunal decision in *Information Commissioner v Poplar Housing and Regeneration Community Association and People's Information Centre* [2020] UKUT (AAC). At [88], the judge listed submissions made by Mr Paines, who appeared for Poplar. She went on:

> 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.

39. The issue for the First-tier Tribunal in that case was whether the provisions identified vested Poplar with special powers. That was the issue, and the judge quoted the test identified by the Upper Tribunal in *Fish Legal*. Her reference to mitigating a disadvantage was a reason why, in the context of that case, she thought that the test for special powers was not satisfied. She was not identifying a separate category of cases in which a provision mitigated a disadvantage. Still less was she setting up a dichotomy between special powers and those that mitigated a disadvantage. There is no reason in principle why a provision may not both mitigate a disadvantage and confer a practical advantage. That is what the First-tier Tribunal said in this case and it was right.

40. This is not the only example of Mr Pitt-Payne attempting to create a concept out of a comment and a principle out of a particular. More on this under Ground 3 – the cross check.

41. Mr Pitt-Payne criticised the tribunal for not explaining why the individual provisions did not mitigate the disadvantages that HPC would otherwise experience. He is right that the tribunal did not do so, but there was no reason why it should. His entire argument was based on the assumption that there was a binary question: were these special powers or did they mitigate a disadvantage? Having identified the underlying flaw in that approach, the tribunal did not need to analyse the argument for each provision. It had made the point once and would not have added value to its reasons by repeating it for each provision.

42. HPC's case could have been presented differently to the First-tier Tribunal. The argument could have been that the mitigation element of a provision was sufficient in the circumstances of that case to prevent the provision being a special power. But that was not the case put and there was no need for the tribunal to explain how it would have dealt with it if it had been.

G. Ground 3 – the cross check

What Mr Pitt-Payne said

43. Mr Pitt-Payne criticised the First-tier Tribunal's reasoning, arguing that: (a) it should have carried out a cross check as 'a distinct, third stage in the analysis'; and (b) its approach 'deprived the cross check of any content'. This, he argued, led it into numerous errors.

What the Upper Tribunal has said about a cross check

44. This ground relies on what the Upper Tribunal said in *Cross v Information Commissioner* [2016] UKUT 153 (AAC), [2016] AACR 39.

> 99. *Rigidity / flexibility*. In our view, the general approach to the interpretation of a Directive and Regulations to implement it carries over to the interpretation and application of the functional test as set or described by the CJEU with the result that the CJEU description should not be applied in place of the tests set by the Directive and the EIR. Rather, it is important and binding guidance on what those

tests mean and how they are to be applied, and like the test set by the Directive, the test set by the CJEU (which contains concepts and words that have a range of meaning) should be applied so as to give effect to the underlying objectives and purposes of the Directive including those relating to its breadth and the public interest in environmental information being made available to the public.

> 100. It follows that the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR 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. The key issue on that approach is whether taking these factors together there is a sufficient connection between the Sovereign's functions and powers that are relied on and what entities that organically are part of the administration or the executive of a state do.

In particular, the ground relies on the reference to a cross check in the first sentence of [100].

What the First-tier Tribunal said in this case

45. This is what the First-tier Tribunal said:

> 114. We agreed with the IC and FL that the cross-check is in essence a 'sense check' or 'reality check'. It is there to give an opportunity to correct manifestly inappropriate application of the two-part test in Fish Legal CJEU, but, in our view, it is not there to displace this test. If the test is met, then in practice the cross-check is unlikely to yield a different outcome overall. We therefore applied the cross-check in that we took a step backwards and looked at all the evidence in the round, but found that this did not displace our conclusion that the entrustment and special powers limbs of the Fish Legal CJEU tests were met.
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> 115. Because we were satisfied that both limbs of the test had been met, and that the cross-check would not result in a different finding, we therefore concluded that HPC is a public authority within the meaning of EIR 2(2)(c) and was not entitled to refuse a request for information relying on the fact it was not.

Why I reject this ground of appeal

46. I reject this ground because: (a) it fails to take account of the nature of the exercise that the First-tier Tribunal had to undertake; (b) it therefore misunderstands what the Upper Tribunal meant in *Cross*; and (c) it elevates a mere descriptive phrase to the level of a legal requirement.

47. This case involves a conceptual fact. By that, I mean a fact that is not observable through the senses, usually by sight or sound. Conceptual facts abound in law. In this case, the conceptual fact is *functions of public administration*. Others that come before the Upper Tribunal include: whether people share a *household*; whether a transaction is *in the nature of a trade*; and whether a person is a *worker*.

48. These and numerous other instances in law share a feature. Whether or not the fact exists depends on the combined effect of a variety of factors. Some of those factors will favour finding the fact. Others will not. And the rest will be equivocal. No one factor is decisive. Whether the tribunal makes a finding will depend on the effect of the factors

in combination and in the circumstances of the case. The factors are not significant for themselves, but only in so far as they go to show whether the conceptual fact is established. That is inherent in the mental process undertaken by the tribunal. It operates throughout the process of assessing the evidence. It will be in the minds of the panel both during the analysis and at the end of it.

49. This is what the Upper Tribunal was saying in *Cross* at [100]. It emphasised, as I have just done, that it is the *combination* of the factors *in the circumstances* of the case that determines the outcome. The tribunal also noted, as I have done earlier, the importance of the language of the definitions. And that that language, like all language in EU legislation, must take account of its objectives and purposes.

50. Any attempt to describe the process of making such a finding inevitably separates out the component parts, which can create the appearance of a staged process. This is what has happened with the statement in *Cross*. The Upper Tribunal was making the point that the factors are not relevant in and of themselves, but only in so far as they are relevant to the nature of the exercise that the tribunal was describing. As I have explained that is an essential aspect of the analysis the First-tier Tribunal had to undertake. I have no problem with the idea of taking a final look to make sure that the finding has been properly made, or not made. That is always wise. What I do have a problem with, and reject, is elevating what the Upper Tribunal said into a separate, legal requirement.

51. Having explained why a cross check is not a separate stage or legal requirement, it would be folly to replace it with something else. Doing so would inevitably lead to an Upper Tribunal Judge in 2036 explaining why I was not identifying or creating an additional step in the fact-finding process. That is why I am not going to approve the use of sense check or reality check. It is sufficient to say that the tribunal was doing nothing more than attempting to describe the nature of the fact-finding process that it had undertaken. Given its analysis of the entrustment and special powers issues, there was only one conclusion that the tribunal could properly have reached. That is what it was saying in [114]-[115].

52. So, throughout the process of analysing the evidence to decide whether to find that a body is carrying out functions of public administration, the tribunal is limited to relevant factors. Those factors were set out in *Fish Legal* at [52]. Mr Pitt-Payne's argument for a separate legal requirement allowed him to try to bring in additional matters that would not otherwise be relevant. These included, but were not limited to, proportionality. Insofar as they would not have been relevant otherwise, that attempt must fail. As those matters do not arise, I do not need to deal with them.

Edward Jacobs
Upper Tribunal Judge

Authorised for issue on 26 June 2026