Neutral citation number: [2025] UKFTT 00634 (GRC)

Case Reference: FT/EA/2024/0393

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 13 and 14 May 2025
Decision given on: 04 June 2025

Before

JUDGE HARRIS
MEMBER CHAFER
MEMBER SAUNDERS

Between

NNB GENERATION COMPANY (HPC) LIMITED

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) FISH LEGAL

Respondents

Representation:
For the Appellant: Timothy Pitt-Payne KC
For the First Respondent: Laura John
For the Second Respondent: Estelle Dehon KC

Decision:

1. The appeal is Dismissed.

2. NNB Generation Company (HPC)_Limited must take the steps ordered by the Commissioner in paragraph 3 of decision notice IC-309040-F8F7 dated 5 September 2024 within 35 calendar days of the date this decision is sent to the parties.

3. Any failure to abide by the terms of the tribunal's decision may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Background to the Appeal

1. This appeal is against a decision of the Information Commissioner ("IC") dated 5 September 2024, reference IC-309040-F8F7.

2. The Appellant, NNB Generation Company (HPC) Limited ("HPC") is currently developing a nuclear power station known as Hinkley Point C ("the Power Station"). Provision for the development of the Power Station is made by a Development Consent Order, namely the Hinkley Point C (Nuclear Generation Station) Order 2013 (the "DCO").

3. On 12 March 2024, the complainant and Second Respondent, Fish Legal ("FL"), wrote to HPC, requesting information under the Environmental Information Regulations 2024 ("the EIR"). FL describes itself in its Response as a not-for profit association that uses the law on behalf of anglers to fight pollution and other damage and threats to the water environment. It requested information in the following terms:

   "We would be grateful if you could provide us with the following information:

   1) The date on which final designs for the cooling water intake for Hinkley C nuclear power station were signed off;

   2) Please provide a copy of the final construction design and any other designs for the cooling water intake and Acoustic Fish Deterrent (ADF) held by you:

   3) The date on which the construction of the cooling water intake was completed;

   4) Confirmation of whether a power supply for the ADF on the cooling water intake was included in the final intake as constructed;

   5) The date on which the cooling water intake was installed;

   6) Please also provide all correspondence between EDF (and its subsidiary), the Environment Agency and Natural Resources Wales in relating the selection of the named weirs in EDF's public consultation which closed on 29 February 2024.

   7) Please provide any information regarding the anticipated cost of maintenance of the proposed AFD system at this location?

   8) Please forward a copy of the initial 'long list' of compensatory measures sent to Natural Resources Wales, as referred to on page 5 of its 31 page consultation response of 29 February 2024"

4. NNB responded to the request on 9 April 2024. It stated that it "*[did] not consider that the EIR is applicable to your request*". Following an internal review, HPC stated that it did not consider itself a public authority for the purposes of the EIR.

5. On 23 May 2024, FL complained to the IC. The IC determined that HPC is a public authority for the purposes of the EIR in a Decision Notice dated 5 September 2024 (the "Decision Notice"), that the requested information was environmental information and therefore that HPC was under an obligation to respond to the request. He stated that he was satisfied that HPC has been entrusted with functions of public administration, in the granting of specific secondary legislation authorising it to construct a nationally significant infrastructure project, licences to construct and operate nuclear reactors and a licence to generate electricity. It has also been vested with special powers, beyond those available to ordinary private citizens to enable it to carry out these functions.

6. As it failed to provide any environmental information, the IC also found that HPC was in breach of Regulation 5(2) of the EIR.

Abbreviations used in this decision

"CJEU" means the Court of Justice of the European Union

"Convention" means the Aarhus Convention

"DCO" means the relevant Development Consent Order, namely the Hinkley Point C (Nuclear Generation Station) Order 2013

"Decision Notice" means decision notice IC-309040-F8F7 issued by the IC on 5 September 2024

"Directive" means Directive 2003/4/EC

"EA 1989" means the Electricity Act 1989

"EIR" means the Environmental Information Regulations 2004

"Electricity Licence" means the Electricity Generation Licence dated 17 December 2009 granted under Section 6A(5) of the EA 1989 to HPC

"FL" means the original complainant and Second Respondent, Fish Legal

"FOIA" means the Freedom of Information Act 2000

"FTT" means First-tier Tribunal

"IC" means the Information Commissioner, the First Respondent

"HPC" means NNB Generation Company (HPC) Limited, the Appellant

"NIA 1965" means the Nuclear Installations Act 1965

"Nuclear Licence" means the Nuclear Site Licence dated 3 December 2012 granted to HPC under the NIA 1965.

"ONR" means the Office for Nuclear Regulation

"Power Station" means Hinkley Point C power station

"UT" means the Upper Tribunal, Administrative Appeals Chamber

Procedural matters relating to the determination of this appeal

7. The appeal was heard by Cloud Video Platform (CVP)

8. The Tribunal considered a bundle of documents (912 pages) and a bundle of authorities (1068 pages). The Tribunal also had the benefit of skeleton arguments from all parties. Ms Dehon, with the consent of the other parties and the Tribunal, submitted a further written closing statement to reduce the length of her oral submissions.

The Appeal

9. HPC appealed the IC's decision to the Tribunal on 2 October 2024. While it accepted that the requested information was environmental information, it appealed against the other findings. It sought a determination that HPC is not a public authority for the purposes of the EIR and is therefore not required to take any further steps in relation to the request.

10. The Appellant's grounds of appeal summarised at paragraph 21 the test which must be applied to determine whether or not a person is a public authority within the meaning of EIR Regulation 2(2)(c) is that a person must satisfy two criteria:

11. Firstly, the person must be entrusted under a legal regime with the performance of services of public interest relating to the environment; ("the "entrustment test") and

12. Secondly, the person must be vested for that purpose with special powers which are beyond those usually applicable (the "special powers test").

13. In addition, HPC said that a "cross-check" should be carried out, which involves standing back and asking whether in all the circumstances of the case the combination of the factors identified by the European Court of Justice's ("CJEU") decision on CJ-279/12 Fish Legal and another v Information Commissioner and others [2014] QB 521 (hereafter Fish Legal CJEU) result in the relevant entity being a functional public authority.

14. HPC set out in its grounds of appeal that it considered the IC had erred in law in finding that HPC satisfied the entrustment test and the special powers test. Further, or alternatively, it argued that on the proper application of the cross-check (which was not addressed in the Decision Notice) the Commissioner should have held that HPC was not a public authority within EIR Regulation 2(2)(c).

15. In relation to the entrustment test, HPC made the following points

16. HPC is permitted to construct and operate the Power Station by the licences it holds to generate electricity (the Electricity Licence) and install and operate two nuclear reactors (the Nuclear Licence), as well as the permission it holds to develop the site under the DCO. It is not obliged to do so and this does not amount to "entrustment"

17. There are no statutory duties on HPC under the licences or DCO comparable to those imposed on water and/or sewage companies.

18. The fact that a sector is highly regulated does not of itself mean that the entrustment test is satisfied

19. The fact that HPC is a harbour authority under the DCO does not of itself determine whether the entrustment test is met

20. In relation to the special powers test, HPC argued that none of the matters relied on by the IC, either individually or cumulatively, were sufficient to satisfy the test. It made the following points:

21. HPC's power to carry out street works without a licence under the DCO during construction of the Power Station does not amount to a grant of special powers.

22. HPC will be required to seek consent for street works once the site is operational so is in the same position of any other body.

23. Permission granted to HPC to construct a jetty under the DCS is permission to carry out specific works, not a special power.

24. The fact that HPC is a harbour authority under the DCO does not of itself determine whether the special powers test is met

The IC's Response to the appeal

25. The IC responded to the appeal on 19 November 2024 and maintained its position that HPC is a public authority under Regulation 2(2)(c) of EIR because it *"is developing, and will operate, a nationally significant piece of infrastructure, that will play a vital role in Britain's future energy security. In so doing the Appellant is carrying out functions of public administration."*

26. In relation to the entrustment test, he said that *"the 'entrustment' comprises, either individually or cumulatively, the Electricity Licence, the Nuclear Licence and/or the DCO."* There is no requirement that the national law in question should oblige or require the

entity to perform the relevant services, so it is sufficient to meet the test if the entity is "*trusted, authorised or empowered under national law with the performance of services of public interest*".

27. The IC argued that HPC is entrusted in this sense with performing services of public interest. He said that the Electricity Licence empowers HPC to generate electricity so is sufficient to meet the entrustment test, but HPC is also subject to a wide range of obligations in performing this service. Similarly, the Nuclear Licence empowers HPC to operate a nuclear reactor which is a service of public interest and subject to wide ranging obligations. Thirdly the DCO empowers HPC to construct and operate a nuclear reactor and act as a harbour authority, both of which are services of public interest and subject to obligations. Each of these would be sufficient by themselves, but the DCO as a whole and/or in conjunction with the Electricity Licence and Nuclear Licence comprises an entrustment for the purposes of the test.

28. In relation to the special powers test, the IC contended that HPC does have special powers in relation to street works without licence, saying that it is relevant the HPC is able to achieve a particular outcome through a route that has been made available to it specifically. He also argued that permission to construct a jetty and other works under the DCO would not be possible under private law and a statutory instrument was required, giving HPC "*an ability that confers on it a practical advantage relative to the rules of private law*". Similarly, HPC has the power to act as a harbour authority and impose byelaws, which has no private law equivalent.

29. The IC stated that he followed the approach in ICO v Poplar [2020] PTSR 2081 (UT) which says that a separate cross-check is not required. He concluded that the relevant tests are met.

30. The IC's Response also dealt with the additional ground raised by FL in its response, which is that the IC erred in concluding there is no evidence in this case that HPC is under the control of another public authority under Regulation 2(2)(d). He reserved his position pending any Reply.

FL's Response to the appeal

31. FL responded to the appeal on 12 November 2024 and contended that the IC was correct to determine that HPC is a public authority under Regulation 2(2)(c) of EIR.

32. In relation to the entrustment test, FL sought to distinguish the position of HPC from the appellant in Heathrow Airport v Information Commissioner (EA/2020/0101). It said "*The Appellant is not operating a piece of infrastructure for the profits of its shareholders. Through the licences and consents which the Appellant has been granted, it generates electricity, it handles nuclear material and is authorised to handle and dispose of radioactive waste. The latter are plainly functions of the state that are only entrusted to a small number of licence holders through a very strict and rigorous regulatory system.*" It therefore contended that the entrustment test was met.

33. In relation to the special powers test, FL argued that the special powers identified by the IC in the Decision Notice were, individually and cumulatively, sufficient to satisfy the special powers test. It also noted that "*Article 12 of the DCO gives the Appellant a special defence to any summary criminal proceedings brought against the Appellant by a person aggrieved by statutory nuisance caused by noise under the Environmental Protection Act 1990. No order may be made or fine imposed if the Appellant can show that the noise relates to the premises used for the purpose of or in connection with the construction or maintenance of [the Power Station] and is a consequence of the use of the authorised project that cannot reasonably be avoided. This is a special power which goes beyond the normal rules of private law which apply to relations between any company or person.*"

34. In relation to the cross check, it said there was plainly a sufficient connection between the functions of HPC and those undertaken by entities that are part of the state, namely the generation of electricity, the lawful ability to handle nuclear material and its safe and lawful use and disposal. It argued that electricity companies are able to run to the same level of accountability to the public as the water sector.

35. FL further said that HPC is under the control of the ONR which is a public authority.

36. It also contended in the Response that HPC is a subsidiary of a company controlled by a government department (the French Ministry of the Economy and Finance having been spun off from the purchase of a company which was owned by the UK government, so is under the control of a public authority, thus falling within Regulation 2(2)(d)). This argument is no longer being pursued.

HPC's Reply

37. HPC filed a Reply to both Responses dated 3 December 2024, in which it maintained its position in relation to the appeal.

38. In relation to the entrustment test, it made the following points:

39. The IC's approach that the test would be satisfied in any case where a body was empowered to perform services of public interest, regardless of whether the body was obliged to perform these services or whether decisions whether to perform them took into account the body's own commercial interests is "*unreasonably and implausibly wide*".

40. There is nothing inherently governmental about generation or supply of electricity simply because they are activities which a government has in the past carried out or might choose to carry out in future.

41. The wide-ranging statutory duties on water and sewerage companies throughout extensive specified geographical areas in which they operate can be distinguished from and are not comparable with HPC's permission to construct a specific item of infrastructure at a particular location.

42. HPC will be operating a piece of infrastructure for the profits of its shareholders once the Power Station is in operation. It is the fact that HPC's activities are not carried out by a state body that gives rise to the need for extensive regulation.

43. In relation to the special powers test, it disagrees with FL that Article 12 of the DCO constitutes a special power for the purposes of EIR Regulation 2(2)(c)

44. In relation to FL's argument that HPC falls within Regulation 2(2)(d), the test is that set out in Fish Legal CJEU at paragraph 68, namely that HPC "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...is in a position to exercise decisive influence on the entity's action in the field". It goes on to make the following points:

45. Neither EDF nor the ONR exercises decisive influence over HPC's activities.

46. HPC is subject to the regulatory oversight of the ONR, but decision making within and control of HPC rest with its Board and management, not ONR.

Legal framework

47. Regulation 5(1) of the EIR provides that subject to certain other provisions "*a public authority that holds environmental information shall make it available on request*". This duty only applies to public authorities.

48. A public authority is defined in Regulation 2(2) of the EIR as follows:

> *(2) 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."*

49. Regulation 2(2)(c) gives effect to the definition of "public authority" in Article 2(2)(b) of Directive 2003/4/EC ("the Directive") which is given effect in the UK by the EIR. Public authority is defined in Article 2.2 of the Directive as follows:

"'Public authority' shall mean:... (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)."

50. As was noted in Poplar at [19], as the EIR seek to introduce the provisions of the Directive into domestic law, the regulations should be interpreted in light of the provisions of the Directive.

51. This provision of the Directive in turn gives effect to Article 2(2)(b) of the Aarhus Convention ("the Convention") which defines public authorities as follows *"(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"*.

52. The test which must be applied to determine whether or not a person is a public authority within the meaning of EIR Regulation 2(2)(c) is that a person must satisfy two criteria, as outlined in Fish Legal CJEU, which relates to the Directive Article 2(2)(b) and therefore to EIR 2(2)(c) in domestic law. The key passage at paragraph 52 is as follows:

"[T]he 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."

53. We therefore need to apply a two-stage test to determine whether HPC is a public authority and apply both of the entrustment tests and special powers test set out above.

54. In addition, HPC says that a "cross-check" should be carried out, which involves standing back and asking whether in all the circumstances of the case the combination of the factors identified by the CJEU in Fish Legal EU result in the relevant entity being a functional public authority. We discuss this further in relation to the relevant issue below.

55. The test for control is set out in Fish Legal CJEU, which relates to Article 2(2)(c) of the Directive, the equivalent of EIR 2(2)(d), as follows: "*Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, 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.*"

56. So under EIR 2(2)(d) HPC will be under the control of a public authority if it does not determine in a genuinely autonomous manner how it provides those services because the public authority is in a position to exert decisive influence on their actions relating to the environment. The public authority in question must also be a body which falls with EIR 2(2)(a), (b) or (c).

Issues

57. The issues before the Tribunal are as follows:

58. Whether HPC is a 'public authority' within Regulation 2(2)(c) EIR. In particular:

59. Whether HPC has been 'entrusted' through the Electricity Licence and/or Nuclear Licence and/or DCO and/or some or all of these with performing services of public interest relating to the environment;

60. If so, whether HPC has been vested with special powers for the purposes of performing those services; and

61. Whether there is a separate requirement to conduct a 'cross-check' on the above conclusions and, if so, is there sufficient connection between HPC's activities and the actions of the State for it to be considered to be performing public administrative functions.

62. Whether HPC is a 'public authority' within Regulation 2(2)(d) EIR. In particular:

63. Whether on the facts, HPC is 'controlled' by the ONR; and

64. Whether it has public responsibilities relating to the environment; exercises functions of a public nature relating to the environment; or provides public services relating to the environment.

The role of the Tribunal

65. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

The evidence

66. HPC called two witnesses of fact, Ms Anne Lawrence and Mr Jeremy Stanford.

67. Ms Lawrence is the Technical and Safety Support Programme Manager for the Hinkley Point C project. Ms Lawrence was cross examined by Ms Dehon for FL.

68. Ms Lawrence described the Nuclear Licence conditions as being standard conditions which every nuclear licensee in the UK has. She explained that under these conditions, HPC makes arrangements for how it will meet the licence conditions and devises its own system within which it works. This involves an internal process of looking at the significance of the activity, though she accepted that there was no test for significance on the face of the licence conditions. HPC only needs to discuss a certain level of activity under the licence conditions but that effectively HPC self-regulates. She clarified on re-examination that HPC makes its own arrangements with regard to any changes. HPC has formally submitted some urgent safety matters to the ONR but not formally submitted others. She has experience elsewhere of the ONR asking for changes to proposed arrangements, but that what happened was that the ONR provided feedback and it was up to the licensee to take this through their own internal processes and resubmit.

69. She accepted that the wording of certain conditions provided for the ONR to direct a licensee in accordance with the stated purposes of ONR including safety. However, she stated that the role of ONR is about being a nuclear regulator and looking at safety and security. It is for HPC to make its own arrangements and this is not the responsibility of the ONR. When the ONR licences HPC, it regulates HPC in accordance with the arrangements HPC has made under the licence conditions. This means that HPC has always shared with ONR what its arrangements are as a stakeholder. She took the Tribunal to the ONR's permissioning document at OBC813 where at 2.1 it stated that ONR has primary powers to intervene and control licensees' arrangements and activities in the interests of safety, either by using its primary or derived powers.

70. Mr Stanford is the Acting Harbour Master for the Hinkley Point C Harbour Authority.

71. Mr Stanford was cross examined by Ms John. He described the jetty for which he is responsible in his role as Harbour Master as a steel piled structure about ½ a mile long with a concrete roadway on the top of it. The jetty terminates at the edge of the site security fence and there are bays for storage and a batching plant in close proximity. The main cargo which is unloaded consists of 10ml and 20ml aggregates for making concrete, sand which is dredged locally in the estuary and prefabricated Rebar cages. On 2 occasions it has also accepted abnormal indivisible loads which are too heavy or large to arrive by road. He accepted that under the Port Marine Safety Code, HPC does have some duties in relation to dangerous vessels but described HPC's activities as operating at a very low level of risk.

72. He explained the difference between capital dredging which removes material to deepen an area, for example for harbour development and maintenance dredging. He said that the powers HPC has refer to maintenance dredging if required to maintain a safe depth of water.

73. FL called one witness of fact, Mr Geoffrey Hardy. Mr Hardy was cross-examined by Mr Pitt-Payne.

74. Mr Hardy is an in-house solicitor for FL. He told the Tribunal that he had no legal specialism in relation to the nuclear industry or electricity generation, so his evidence was based on his consideration of documents in the public domain. Whilst he was clearly doing his best to assist when giving evidence, the Tribunal found his evidence of limited assistance because he had no personal knowledge of matters of fact pertaining to the case.

Whether HPC is a 'public authority' within Regulation 2(2)(c) EIR.

The entrustment test

75. The IC's guidance gives the following summary of entrustment "*Entrustment under the legal regime applicable to you. This means that you have been empowered with carrying out functions of public administration by virtue of a legal basis in a piece of legislation you are subject to. In other words, you have received an express delegation of statutory functions under the legislation applicable to you. For example, in the Fish Legal case mentioned above, the water companies in question were entrusted with the performance of public administrative functions by virtue of having been appointed as water and sewerage undertakers on the basis of the Water Industry Act 1991. For the performance of their duties, the companies were issued a licence, which could be withdrawn only under certain circumstances*"

HPC's submissions

76. HPC's case is that the Licences permit HPC to operate a nuclear power station and to generate electricity; they do not oblige it to do so. There is nothing to stop HPC ceasing to construct the Power Station, or to cease operating it if it stops being commercially viable to do so. The mere fact that a licence is required as a precondition for performing an activity does not mean that the licensee has been "entrusted" with anything for the purposes of EIR regulation 2(2)(c).

77. Mr Pitt-Payne for HPC submitted that underpinning this test in particular, but also the special powers test and the cross check, is the question of whether HPC is a functional public authority in the sense of whether it is in some way stepping into the shoes of the state and doing something which has characteristically been done by the state. He relied on Fish Legal CJEU , which did not deal with this issue but observed at paragraph 47 "*it is for the national court to determine whether, in certain circumstances, an organisation performs functions which may place it on the same footing as a "public authority"*." At paragraph 48 the CJEU observed that in that case factors which would indicate it is not include the private profit-making nature of the water companies which did not have executive or governmental powers before they were

privatised and continued "*in the context of the water service, only the regulatory authorities (OFWAT and the Environment Agency) perform public administrative functions and are by that token subject to the obligations laid down in Directive 2003/4*", However, these are simply observations and the UT in fact determined that the water companies were public authorities

78. HPC argued that its position is properly analogous to that of Heathrow Airport Limited ("HAL"), a company responsible for operating a significant piece of national infrastructure with obvious environmental implications, which was held not to be a public authority in Heathrow Airport. The Heathrow Airport case is a decision of the FTT and therefore does not bind the IC (or any other FTT); however, HPC contends that the legal analysis in that case is correct, and that a similar analysis ought to be applied in the present case.

79. In the Heathrow Airport case the IC concluded that HAL's main function was to operate Heathrow as was entrusted to it under the Airports Act 1986 and that this is a service of public interest. The IC also considered that for a function to relate to the environment it was only necessary that the delivery of the service or function had to have an impact on the environment which the airport undoubtedly did: see Heathrow Airport, paragraph 19. In relation to "entrustment", therefore, it appears that the Airports Act 1986 was relied upon by the IC rather in the same way that the IC relies upon the combination of the DCO and the Licences in the present case. The FTT disagreed. It considered that HAL was a commercial enterprise operating in a market; the fact that it was subject to regulation, and that the provision of airport facilities was at one time a function of the state, were not conclusive indications that there had been an entrustment: see Heathrow Airport paragraphs 89-97. A similar analysis should apply in relation to HPC in the present case. Mr Pitt-Payne submitted that in this case HPC has been given permission to construct and operate a particular item of infrastructure on a particular site; this is effectively planning permission. He distinguished this from the position of the water companies, which had powers covering all land within their area.

80. Mr Pitt-Payne also drew the Tribunal's attention to paragraph 94 of the Heathrow Airport decision, which is not binding on the present tribunal as a decision of the FTT. This reads "*there is a public interest in large international airports being available to the public, and a public interest in them being run well and properly regulated. But it is the ensuring that they are available which is the public administrative function, a regulatory function, not the service provided*". In Heathrow Airport, the Tribunal accepted that HAL had a large number of powers conferred by various legal instruments, but did not find any instrument by which HAL had been made responsible by the state to act on its behalf to perform a service of public interest.

81. By contrast, Mr Pitt-Payne argued that the position of HPC is distinguishable from that of the water only or water and sewerage companies, which were held to be

public authorities in the Fish Legal and Shirley v Information Commissioner and others [2015] UKUT 52 (AAC) (hereafter Fish Legal UT). Likewise, the FTT in Heathrow Airport distinguished the position of those companies from that of HAL: see Heathrow Airport, paragraphs 86- 87. The water only/water and sewerage companies are statutory undertakers within the meaning of the Water Industry Act 1991. This Act imposes wide-ranging duties on these companies which are (broadly speaking) directed to ensuring that there are adequate water supplies and sewerage arrangements in the areas in which those companies operate: see generally Surrey Searches and others v Northumbrian Water Limited and others [2024] EWHC 1643, at paragraphs 83-111 of that decision [AB/17]. Mr Pitt-Payne argued that there are no comparable duties imposed on HPC under the relevant licences or under the DCO. Further, there are significant differences in the water and sewerage market, which does not have competition for residential supply (e.g. a person who lives in central London can only use Thames Water), compared to the electricity market, where any entity can seek planning permission/development consent for a generating station, obtain the necessary licences and (if successful) construct a generating station.

82. As to state involvement in electricity generation, he argued that the degree of involvement has fluctuated over time (as the Decision Notice itself makes clear). As to the levels of regulation, the mere fact that a sector is highly regulated does not of itself mean that the entrustment criterion is satisfied: see Poplar, at paragraphs 79-83 of that decision. In the light of Poplar, the Electricity Licence and the Nuclear Licence do not assist the IC: all that they show is that the operation of a nuclear power station to generate electricity is subject to extensive regulation.

83. Mr Pitt-Payne also drew the Tribunal's attention to the comments of the UT in Poplar at paragraphs 79-83, dealing with the IC's contention that it was wrong to conclude 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. The UT observed at paragraph 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."* Mr Pitt-Payne reiterated in his oral submissions that the mere fact that something is heavily regulated is not sufficient to establish an entrustment.

84. In relation to the role of HPC as a harbour authority under the DCO, HPC submitted that this is a minor aspect of the authorising consent applicable to HPC and is ancillary to the construction (but not the operation) of the Power Station. Hence this factor cannot of itself properly be determinative of whether the entrustment test is satisfied. Further, HPC's role as harbour authority is not environmental in nature. It is concerned with the safety of navigation at and around the jetty constructed by HPC, rather than with environmental matters, although Mr Pitt-Payne did accept that some aspects of the harbour authority role do have an "*environmental flavour*".

85. HPC submitted that it is not required to carry out functions; it is permitted to construct and operate an item of infrastructure. Nor does HPC carry out any functions that the state would more usually carry out itself; there is nothing inherently "state-like" about the generation of electricity or the construction and operation of a nuclear power station.

86. It concluded that HPC does not satisfy the entrustment test.

The IC's submissions

87. In relation to entrustment, Ms John for the IC pointed out that the wording of EIR 2(2)(c) refers expressly to a body that "carries out *"functions of public administration"*. She therefore submitted that the Tribunal should consider what HPC does rather than whether it is obliged to do something. There is nothing in the legislation that indicates there needs to be an obligation or duty for entrustment to be satisfied. HPC will meet the entrustment test if, when properly construed, it is about empowerment rather than duty.

88. She referred to the Fish Legal CJEU decision, taking the Tribunal first to the opinion of the Advocate General at paragraph 88 (AB503), which considers article 2(2)(b) of the Directive. This says that point 2(2)(b) refers to "*any natural or legal person performing public administrative functions under national law*" which in the opinion of the Advocate General "*relates to persons or bodies in whom national law, where relevant, has explicitly and formally vested public authority*" He goes on to say at paragraph 88 that in order to determine whether this applies, "*account must be taken of whether there is a formal and express legal act conferring official powers*".

89. The CJEU in its decision on Fish Legal CJEU at paragraph 48 said "*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 European Union law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept*". The UT in Cross v Information Commissioner and the Cabinet Office [2016] AACR 39 at paragraph 38 analysed this further and said "*there is no effective difference between an entity "performing public administrative functions" (the language of the Directive) and an entity that "carries out public administration (the language of the EIR). So this language of the EIR replicates the functional test under Article 2(2)(b) of the Directive at the regulation 2(2)(c) stage of the hierarchy or structure of the EIR*".

90. Commenting further on the Fish Legal CJEU test, the UT in Cross commented at paragraph 40 said "*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)". At paragraph 49, the UT indicated how this should be approached as follows: *"a starting point to that approach is to identify the functions and roles of the relevant entity ... under national law and then to ask on that Community law approach: Are they public administrative functions?".*

91. Significantly for the purposes of this case the UT in Cross concluded at paragraph 50 *"if the relevant functions are public administrative functions the relevant entity only falls within Article 2(2)(b) if it is empowered to perform them by virtue of a legal basis specifically defined in the national legislation which is applicable to it".* Ms John submitted that it was this empowerment which was important. She went on to note that paragraph 93-94 of Cross said *"what the entity does must have a sufficient connection with what entities that are organically part of the administration or the executive of the state do".*

92. Ms John argued that the case of Poplar was about the issue of entrustment, but on its own particular facts which she said HPC had taken out of context. Poplar concerned a social housing provider. Social housing is a complex area, in that it can be provided by a Local Authority, but also by a) private providers on a commercial basis and b) private providers who act on a commercial basis but have chosen voluntarily to register with the relevant regulator. Poplar Housing in that case was in this third category. In paragraphs 99-100 of the first instance decision in Poplar v Information Commissioner and another (EA/2018/0199), the FTT considered that it was bound by the tests set out in paragraph 48 of Fish Legal EU and approved by the UT at paragraph 50 of Cross (see above). It concluded that Poplar was not empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation. The UT confirmed on appeal that this was the correct approach.

93. The IC submitted that HPC holds a series of authorisations that are relevant to this appeal, Ms John submitted that these amount to entrustment, individually and cumulatively.

94. The first is the consent under which construction is taking place. The plant is being constructed under a specific legislative consent: the DCO. This is a statutory instrument, adopted by the Secretary of State for Energy and Climate Change, under sections 114, 115 and 120 of the Planning Act 2008. This consent is known as a "*development consent*" and it is the process by which "*nationally significant infrastructure projects*" are authorised.

95. The second authorisation that HPC holds is the Nuclear Licence to construct and operate a nuclear facility, granted by the ONR under the NIA 1965. This authorises HPC to use the Hinkley Point C site for the purposes of installing and operating a nuclear reactor, an activity which would otherwise be an offence

96. The third is the Electricity Licence to generate electricity, granted by the Office of Gas and Electricity Markets ("Ofgem"), under the EA 1989. This authorises HPC "*to generate electricity for the purpose of giving a supply to any premises or enabling a supply to be so given*", an activity which would otherwise be an offence.

97. The IC also said that the Government's historical and ongoing involvement in this field reflects the public interest nature of the activities of electricity generation and supply, as is the fact that Hinckley Point C is a nationally significant infrastructure project. The activities with which HPC has been entrusted are manifestly services in the public interest. If, as HPC argues, the public interest is in making the service available rather than supply this would only ever bite on regulators and quasi-regulators which cannot be what was intended.

98. The wording of EIR 2(2)(c) requires that the services of public interest must relate to the environment. The EIR is narrower than the Convention wording on which it is based, which also includes some non-exhaustive examples of public administrative functions, which are "*specific duties, activities or services in relation to the environment.*" The FTT in Poplar applied this as follows at paragraph 123: "*Applying our conclusion to the facts in this case, do Poplar's public administrative functions include specific duties, activities or services relating to the environment? If we had concluded that Poplar had public administrative functions, they would have been the provision of social housing or the allocation and management of social housing. Do those functions include specific duties, activities or services relating to the environment? We would have concluded that they did: the activities of developing new housing and redeveloping and maintaining existing housing are activities that form part of the functions of managing or providing social housing. Using the definition of environmental information as guidance, we would have concluded that all those activities related to the environment, because they were likely impact on the state of the land, soil, the air and atmosphere*" This approach was not challenged on appeal, and indeed the UT expressly said that it was reluctant to depart from the FTT's "*well-reasoned conclusions*" on this point.

99. For the purposes of this appeal, however HPC only disputes that the harbour authority powers are to do with the environment, not its other powers under the DCO. Drawing on the evidence of Mr Stanford, Ms John submitted that all HPC's public administrative functions concerning its acting as harbour authority relate to the environment because they are activities likely to impact on state of land, water and marine areas including constructing the jetty, storage facilities and batching plant, Further, once the site is constructed the Port Marine Safety Code (OB895) sets out a general duty for harbour authorities "*to exercise their functions with regard to nature conservation and other related environmental considerations*." She argued, based on Mr Stanford's evidence, that this applies to everything HPC does as harbour authority and that this means everything is relating to the environment, even if its primary purpose is safe navigation.

100. The IC therefore concluded that the entrustment test has been met.

FL's submissions

101. FL agreed with the IC's conclusion and Ms Dehon adopted the submissions of Ms John in their entirety. FL further submitted that it has always emphasised the wider legislative scheme under which HPC operates [OB/A39]. In particular:

102. The entrustment test is plainly met by the Electricity Licence and Nuclear Licence combined with the fact that HPC generates energy and uses a site for the purpose of installing or operating any nuclear reactor pursuant to the requisite licences. It is the legislation and the licences, in combination, which amount to entrustment.

103. Additionally, HPC is not a 'mere' licensee under the Nuclear Licence, but is also under the statutory duties in section 7 of the NIA 1965, which are part of the legislative mechanism for "entrusting" a private body such as HPC with the construction and running of an installation with the level of safety risk and obligation of a nuclear power plant;

104. HPC is also not a 'mere' licensee under the Electricity Licence, but is additionally subject to the directions of the Secretary of State pursuant to section 34 of the EA 1989 which, in light of section 107 of the Act and the provisions of the licence, impose a duty on HPC to comply with the Standing Directions on securing supply and the Fuel Security Code.

Discussion and conclusions

105. 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).

106. 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.

107. 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.

108. For those reasons we agreed that the entrustment test was met.

The special powers test

109. The IC's guidance gives the following summary of the special powers test: "*This means that you have been given powers, created in law, that give you practical benefits which are not available to entities or persons whose relations are governed by the normal rules of private law... a special power gives an entity which has been granted it the ability to compel an action.... When considering if you have special powers for the purposes of regulation 2(2)(c), there is one key question to think about. That is whether – for the performance of the functions of public administration you have been entrusted with – you have been granted one or a range of powers which give you a practical advantage relative to the rules under private law. Another factor to take into account is that it is the fact that the powers are available to you that matters, not whether you actually use them or how often you do so*"

110. The person's activity must also be a service which is in the public interest; and the person must have been vested with special powers for the purposes of performing it. As the Upper Tribunal expressed it in Cross at [40] "*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*." See also Cross UT at [95].

HPC's submissions

111. Mr Pitt-Payne, referring to a view rather than a determined issue in the Poplar case, drew a distinction between powers that give a practical advantage and powers that mitigate a disadvantage. His starting point was that the general and default position is that large scale construction and generation of electricity facilities is not permitted. HPC is allowed to do those things because it has a licence, but the licence itself is not a special power. There is a regime in place where permission to do those things can in principle be granted to anyone who meets certain conditions. The permissions themselves are not special powers, but there are some ancillary matters of detail which potentially are.

112. HPC submitted that the power to carry out street works without a licence does not amount to a grant of special powers. It argued in its skeleton: "*Like any other person or body, HPC requires permission for street works: the difference is that permission is given to HPC by a particular route (via the DCO rather than on application to the street authority). To obtain permission via the DCO route, HPC had to undergo the arduous and complex process of obtaining a DCO, in accordance with the Planning Act 2008. Having undergone that process HPC does not have to make an application, because the subject-matter of the application has already been dealt with by another route.* "

113. In relation to street works once operational HPC is in the same position as any other person or body, in that it would require the permission of the street authority

to carry out such works: hence the specific provisions relied upon in the Decision Notice do not constitute special powers. HPC has permission to carry out such works as a result of having obtained the Electricity Licence (likewise an onerous process), rather than as a result of making a specific application to the street authority.

114. HPC argued that the right to go to arbitration is not a special power because it is not a mechanism that depends on the existence of a specific statutory right.

115. The permission to construct a jetty amounts to a grant of permission to HPC to carry out specific works. It does not constitute a "special power", any more than a grant of planning permission would amount to the conferral of special powers. It is ancillary to the construction permitted by the DCO. Being able to operate the jetty is not an advantage, but a mitigation of the disadvantage of the risk of bringing materials in by sea. Similarly, HPC's role as harbour authority is part of an overall scheme to facilitate the safe construction of the Power Station, authorised under the DCO which is itself a form of planning permission for large scale development.

116. The inclusion of a defence to proceedings for statutory nuisance relied on by FL is, HPC says, a standard provision for inclusion in a DCO. It does not confer any particular benefit on HPC: rather, it mitigates the disadvantage that HPC suffers, in that the construction and operation of the authorised project (the Power Station) gives rises to a risk that HPC would be accused of committing a statutory nuisance. This provision is, in substance, simply an aspect of the permission that is granted to HPC by the DCO.

117. Mr Pitt-Payne noted that the powers of compulsory acquisition under the DCO expired in 2018. The powers of entry conferred by the DCO are ancillary to the overall grant of permission and mitigate a disadvantage by enabling the safe construction of the site. He noted these are significantly less wide than those of the water companies in Fish Legal UT.

118. Mr Pitt-Payne concluded that if one or two special powers are identified then that should not in itself be sufficient to pass the special powers test. He also stated that being able to take a step back and look at the situation in the round was a key application of the cross check.

The IC's submissions

119. The IC submitted that HPC holds a number of powers under its authorisations which are relevant:

120. Under the DCO, HPC's powers include (all references to OB):

121. 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 sections 13-20 [B96-100];

122. 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 section 21 [B101];

123. A number of powers of acquisition, including compulsory acquisition of land (DCO section 24 [B105]), compulsory acquisition of rights (DCO section 27 [B107]), acquisition of certain properties (DCO section 31 [B110]); entry onto and appropriation of the subsoil of, or airspace over, streets (DCO section 32 [B112]); and temporary possession of certain land and constructing temporary works (DCO sections 33 and 34 [B112 and 114]);

124. A number of powers of entry, including the power to enter and survey buildings to determine whether protective works are necessary or expedient (DCO section 22(3) [B103]); 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 section 23 [B104]);

125. 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 sections 41 and 42 [B119-120]);

126. The power to construct a jetty in the Severn Estuary, to allow construction materials to be delivered by ship to the plant site: DCO section 54 [B130]. HPC also has power to engage in a variety of associated works, such as enclosing and holding the foreshore and seabed (DCO section 56 [B131]); constructing and maintaining ancillary works such as roads, buildings, walls, pipes, cables, electrical substations and weighbridges (DCO section 60 [B133]); and dredging: section 62 [B135]);

127. The power to act as a harbour authority, enabling it to impose byelaws including byelaws the breach of which is a criminal offence: particular section 69(3). DCO section 69 [B140], in h.

    a. a defence to proceedings in respect of statutory nuisance, and a statutory authority to override easements and other rights: DCO sections 12 and 25 [B95 and 106].

128. Under the Electricity Licence HPC also has the following powers:

129. The power to compulsorily acquire land (Electricity Act 1989, Schedule 3 [Auth/2]; and Standard Licence Condition 14 [B377]); and

130. 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 [Auth/2]; and Standard Licence Condition 15 [B379]).

131. The IC submitted that Fish Legal UT makes clear that the "special powers" test imports a practical test, under which:

132. One must consider substance, rather than form: Fish Legal UT, at [106];

133. One must consider whether particular powers "g*ive the body an ability that confers on it a practical advantage relative to the rules of private law*" (at [106]).

134. The *'rules of private law'* are '*the normal rules applicable in relations between persons governed by private law*' (at [102]) and "*The test refers to the powers that result from those rules, not to the powers that could result from the exercise of those rules*", such as by acquiring a licence or easement: at [119];

135. The term "*special*" does not import any additional element into the test.

136. It is the contrast between rules of private law and the powers vested in the body in question that renders those powers "*special*": at [103];

137. It is not necessary to establish that any of the powers has recently been exercised, only whether it has value to HPC: at [108];

138. The characterisation of a particular power as a "*special power*" "*is not limited to activities or outcomes, but includes the means by which they may be secured*": [109];

139. "The power need not be unique to a particular body, sector or industry"

140. It will be relevant to consider if the powers include a power to compel, or effectively compel: at [121]; and whether they include powers that operate outside any existing private law relationship and without any practical limit: at [125].

141. The IC argued that in the light of Fish Legal UT, none of these arguments alter the conclusion that HPC has special powers. While a private individual might be able to do some of the same things as HPC by obtaining planning permission, the UT held that 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]). It is true that anyone can apply for a DCO and that if they succeed in obtaining one then it may contain similar powers to HPC's; but HPC's powers do not need to be unique to a particular entity or sector in order to be "special powers" in the relevant sense (Fish Legal UT at [110] [Auth/10]). The fact that HPC has to meet certain conditions, including obtaining approval from the Secretary of State, before it can exercise some of its powers also does not mean the powers are not "*special powers*". For example, in Fish Legal UT the power to make byelaws was only exercisable by the water undertakers with the approval of the Secretary of State, and the Upper Tribunal held explicitly that it was a special power (see paragraph 31(e) above). The powers can still confer an advantage on HPC relative to the rules of private law, even if there are certain constraints on how and when HPC is able to exercise that advantage.

142. For the same reasons outlined above Ms John submitted that all HPC's powers relate to the environment.

143. The IC concluded that HPC has been vested with special powers and so the special powers test has been met.

FL's submissions

144. As for entrustment, FL adopted the submissions of the IC, with which it agreed.

145. FL additionally submitted that the special powers are not limited to activities or outcomes, but include the means by which they may be secured, for example, the making of byelaws, which are not available under the rules of private law (Fish Legal UT §109). The special powers do not have to relate to the services of public interest in the environmental field (Cross UT §88).

Discussion and conclusions

146. 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.

147. 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.

The cross-check

148. What HPC describes as the cross-check is set out in the case of Cross at paragraph 100 as follows. *"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"

149. An alternative approach is reflected in the decision of Poplar at paragraphs 84-86 which states

" 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."

HPC's submissions

150. HPC submits that any matters that might support the application of the entrustment test or the special powers test are not of sufficient significance, in the context of the construction and operation of the Power Station as a whole, to lead to a conclusion that HPC carries out functions of public administration. It relies on the case of Heathrow Airport which illustrates how the cross-check should work: see at paragraphs 105- 106 [AtB/15]:

"105. Even were we to accept, standing back, that HAL had been vested with special powers for the purpose of performing public interest services we do not consider applying the cross-check that the appellant is a functional public authority. It is a commercial business which operates for a profit in competition with airports in the United Kingdom and outside. It is in competition in terms of expanding its services and we have not been shown any information that it is, for example, compelled to accept an airline who wishes to use it.

106. We accept that, as the ICO submits, and as HAL states in its evidence, Heathrow is a crucial part of the national infrastructure, but we do not accept that it follows from that that it is an organic part of what the state does. We respectfully disagree that operating an individual airport is a "natural monopoly"; no proper evidence or argument has been put forward to support that assertion, and for the reasons given above, there is no proper analogy

between the provision of an airport, even a large hub airport, and the provision of water and sewerage services. Nor do we accept that the close regulation by the CAA militates in favour of the ICO. Many entities are subject to a wide range of regulation, some of it very close, but to suggest that is enough to make a body a public authority is, again, an attempt to avoid the need for entrustment. It results in uncertainty, as regulation can vary in its intensity over time. "

151. Likewise, standing back, even if HPC has to some extent been vested with special powers (contrary to the submissions made above), it is a commercial company constructing (and in due course operating) a piece of national infrastructure. It is a for- profit enterprise engaged in competition in the electricity market. It is not an "*organic part of what the state does*". The fact that it is closely regulated does not in itself bring it within EIR regulation 2(2)(c).

152. Mr Pitt-Payne argued that if the Tribunal would otherwise be minded to hold that the role of HPC as harbour authority involves a grant of special powers to HPC, then HPC relies on the points it has made in support of the contention that, on the application of the cross-check, this is not a matter that should bring HPC within the scope of EIR regulation 2(2)(c). Alternatively, if the (obiter) statement in Poplar (at paragraphs 84-86 of that decision) is correct, that the cross check is not a separate stage of the analysis but rather reflects the need to apply the relevant criteria in a flexible rather than a rigid way, then HPC argues that the same outcome should follow from a proper application of the criteria themselves.

The IC's submissions

153. The IC submits that in this case, as in Poplar, a separate analysis does not add anything. Simply applying the principles set out above, it is clear that the relevant legal test is met in this case.

154. Ms John drew the Tribunal's attention to paragraph 99 of Cross which said that the test in Fish Legal CJEU should not be applied in place of the tests set out in the Directive or EIR, but it is important and binding guidance on what those tests mean and how they are to be applied. Instead the Fish Legal CJEU test 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."*

155. In relation to the cross-check described in paragraph 100 of Cross, Ms John said the IC's main submission was that it does not apply because it is clear on the facts of this case that HPC is carrying out public administration functions and this is consistent with the wording and purpose of the legislation. Even if that is not accepted, the IC's position is that if the elements of the Fish Legal CJEU test are met, then the test is met and HPC will be a public authority within the definition.

156. She noted that at paragraphs 85-6 of Poplar, the UT said that on the facts of that case it was difficult to ascertain the benefit of the cross-check. Ms John submitted that

was also the position in the current case, on the facts of which the cross-check would not change the overall conclusion.

FL's submissions

157. FL submitted that the cross-check is a reality check which is only there to correct manifestly inappropriate application of the Fish Legal CJEU test, not to displace it.

158. FL submitted that the EIRs part implement the Convention, to which the United Kingdom remains a party. The Supreme Court in R (Finch) v Surrey County Council [2024] PTSR 988 [AB/16] recently emphasised the crucial importance of public participation in environmental decision-making, to which access to environmental information is crucial. Public participation *"is necessary to increase the democratic legitimacy of decisions which affect the environment."* (§21). This is a strong consideration in relation to environmental information about the operation of a facility like a nuclear power station, in which there is, rightly, a high degree of public interest, given the seriousness and controversy of the potential environmental impacts which such a facility can cause. Entities such as HPC are quintessentially the type of body which should be subject to an obligation to provide access to environmental information. It therefore argued that the cross-check was passed in this case and that HPC should have to provide the information.

Discussion and conclusions

159. 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.

160. 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.

Whether HPC is a 'public authority' within Regulation 2(2)(d) EIR.

161. There are two aspects to consider in determining whether HPC is a 'public authority' within Regulation 2(2)(d) EIR, namely 1) whether it is controlled by the ONR and 2) whether it has public responsibilities relating to the environment; exercises functions of a public nature relating the environment; or provides public services relating to the environment.

Whether on the facts, HPC is 'controlled' by the ONR

162. The test for control is set out in Fish Legal CJEU, which relates to Article 2(2)(c) which is brought into domestic law by EIR 2(2)(d), as follows: "*Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, 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.*"

163. The CJEU also clarified at paragraph 71 that "*If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management.*"

164. In Fish Legal UT) the UT summarised this test as follows: "*We read the judgment as laying down a single test with two elements that identify cause and effect: is a body performing its functions in 'a genuinely autonomous manner' (the effect) 'since a public authority … is in a position to exert decisive influence on their action in the environmental field' (the cause)?*". It went on to comment "*autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business....Being subject to a degree of influence is not incompatible with a company having genuine autonomy in its decision-making. It is not just a case of taking account of the potential extent for intervention.*"

165. The UT in that case rejected the argument that water companies were public authorities within the meaning of Article 2(2)(c). The UT rejected the suggestion that it should look at control or supervision over functions the companies were required to perform (in the sense of being required to perform certain functions either by statute or under the terms of their Licences) and emphasised that the focus should instead be on the manner of performance of those functions. The UT considered that the test required them to "*take an overall view of whether in practice the companies operate in a genuinely autonomous manner in the provision of the services that relate to the environment. It is not sufficient to show that they do not do so in one or two marginal aspects of their business. Nor is it necessary to show that they do not do so in almost every aspect of their business.*"

166. The UT concluded at paragraph 155 "*The control test is a demanding one that few commercial enterprises will satisfy. The companies' functions may be fixed by law and by their Licences, but the test is concerned with the way in which they exercise those functions.*

They are subject to stringent regulation and oversight and there is the potential for extensive involvement and influence over the way in which they perform their services. But the evidence falls far short of showing that the Secretary of State, OFWAT and the EA influence their performance, individually or collectively, whether by actual intervention or by more subtle forms of influence, to such an extent that the companies have no genuine autonomy of action".

167. The IC's guidance says the following: "*Being under the "control" of another public authority means that you have no genuine autonomy in deciding how you perform your functions because that is determined by the public authority that controls you. This means that you lack independence in your decision-making over how you carry out in practice the actions relating to the environment you are responsible for. Being subject to stringent regulation or a high level of oversight does not necessarily mean that you are under the control of a public authority. Most businesses must operate in a legal environment, within the limits of a regulatory framework, and face sanctions when they fail to meet their legal obligations. For example, they may face closure of business operation or receive an order to take certain actions (eg a legally binding notice telling them to cease or change a particular activity). This is different from exercising control, because the government or a regulator in the relevant sector cannot determine how they have to operate to comply with existing regulations. The key question to ask when considering whether you are under the control of a public authority is whether the authority's level of influence is such that it takes away your freedom of action in how you operate in practice. It does not have to extend to every aspect of your day-to-day management.*"

168. HPC submits that it does not fall within EIR regulation 2(2)(d), since the regulatory oversight that the ONR exercises over HPC does not amount to "decisive influence". HPC is subject to regulation but nevertheless determines the way it performs its functions in a genuinely autonomous manner. HPC is subject to the regulatory oversight of the ONR in various respects but decision-making within and control of HPC rest with its board and management, not with the ONR. The ONR does not dictate HPC's strategic decisions, including whether to proceed with constructing and operating the Power Station. Mr Pitt-Payne submitted that even if HPC is wrong on this, it relies on the same matters as for 2(2)(c) in relation to why there is not a sufficiently public element.

169. Mr Pitt-Payne reviewed the role of the ONR and argued that HPC is regulated by ONR but not under the control of ONR to the extent it has no authority. He said that the general nature of regulation is that it is not prescriptive; it is for HPC to decide how the objectives set by ONR should be met and there are lots of different ways to do this that suit HPC's particular circumstances. The policy approach underlying this is intended to make it easier for licensees to innovate and this focus on innovation is inconsistent with deprivation of autonomy. He commented that in her evidence Ms Lawrence showed there was a good and constructive cooperative relationship between HPC and ONR, with HPC having continuing dialogue and exchange of information with its regulator.

170. Following the Fish Legal UT case, HPC argued it is what is happening in practice which is relevant to the test of control; the fact that the ONR has powers which it could potentially use but does not exercise is not sufficient to demonstrate lack of autonomy. Mr Pitt-Payne submitted that the Tribunal needs to look at the specific licence conditions in the context of the non-prescriptive regulatory scheme. ONR's powers of supply chain inspection amount to regulatory oversight, not control, because ONR is not telling HPC who its suppliers should be. He remarked that it would be truly extraordinary, in a situation where safety is a primary issue, if control was vested in an offsite regulator while the on-site regulated entity was deprived of autonomy. This is incompatible with ONR's policy statements, for example at OB766 in its document on Licencing Nuclear Installations, about how "*we require that a licensee retains overall responsibility for control and oversight of the nuclear and radiological safety and security of all its business.*"

171. The IC submits that the evidence of Ms Lawrence in her witness statement (paragraphs 17-26) indicates that, looked at in the round, the ONR's regulatory oversight is outcome focused. It imposes a strict obligation on HPC to achieve a particular result but leaves it to HPC to determine how it goes about achieving it. The IC does not consider this to be a sufficient level of control by the ONR to amount to the exertion of "*decisive influence*", or a determination of "*the way in which [the Appellant] must perform the public administrative functions*". He concludes that although HPC is a body under Regulation 2(2)(c) EIR, it does not separately fall under Regulation 2(2)(d) EIR.

172. FL contends that, additionally, HPC is a public authority because it is under the control of the ONR, because it does not determine in a genuinely autonomous manner a wide variety of matters concerning the construction and running of the site. The ONR therefore exerts a "*decisive influence pursuant to the powers which it has been allocated by the national legislature*" (Fish Legal CJEU §69). It is not necessary that the ONR be in a position "*to determine [the] day-to-day management*" of the company in order for the requisite decisive influence to be in place for the control test to be met (§71).

173. It also contends it is irrelevant for the purposes of the control test that the ONR does not have the power to oblige HPC to deliver the power station [OB/C677] – such a wide-ranging power of control is not required, and was not included in the forms of power listed by the CJEU that indicate the exercise of a decisive influence (Fish Legal CJEU §69).

174. FL argued that HPC's evidence established that the ONR exercises at least two of the powers listed by the CJEU as indicators of a public authority having a decisive influence over a private company, namely:

175. *The power to require prior authorisation of decisions of HPC:* there are a number of examples, including:

176. HPC requiring the consent of the ONR to the conveyance, assignment, transfer, letting or parting with possession of the site or any part of the site, or granting any property licence in relation to the site [OB/C692];

177. HPC being required to submit any part or parts of its management systems or quality management arrangements to the ONR for prior approval as the ONR may specify, and once approved, they cannot be altered or amended without further approval [OB/697];

178. Pursuant to the numerous licence conditions that require HPC to "make and implement adequate arrangements" to achieve an outcome, which require HPC to submit to the ONR for prior approval any part or parts of the arrangements as it specifies (including in relation to construction and installation of new plant, or modification of existing plant, which may affect safety); and such arrangements can only be amended with the further approval of the ONR [OB/C678];

179. *The power to issue directions to HPC:* the ONR has the power to issue directions including halting the construction of the plant or shutting down the operation of the plant [OB/C678]. It is irrelevant that these powers are to be used where absolutely necessary to maintain safety – indeed, in the context of a nuclear installation, it is unsurprising that this is the context – the fact is that, unlike any other private body faced with a serious safety incident, HPC is subject to the direction of the ONR.

180. FL submitted that the ONR regulates HPC's supply chain, carrying out inspections to gain confidence in HPC's supply chain management, construction management and arrangements for plant and equipment, including having the power to visit all of HPC's "Tier 1" suppliers, separately verifying their competence management arrangements [OB/C760]. As set out in the evidence of Mr Hardy, HPC is highly restricted in its autonomy relating to the delivery of its services [OB/C447-449].

181. FL argues that HPC's evidence emphasises that the ONR applies a "goal setting approach" [OB/C678]. Great care must be taken with this. It rests on drawing out a single sentence in a 99-page document – "How we Regulate Radiological and Civil Nuclear Safety in the UK" [OB/C467-565], and only one of the eight aspects of nuclear regulation covered therein [OB/C477]. The fact that nuclear regulation is outcome-focussed, and sets goals, rather than a "more prescriptive, standards-based regime" [OB/C485] does not mean that the outcome-focussed regulation is not prescriptive – in fact the use of the word "more" accepts that it is prescriptive, although other approaches are more so. In any event, the goal-setting regulation does not dilute the powers set out above, or the fact that parts of the regulatory regime are standards-based [see, eg, OB/C491; OB/C492].

182. Additionally, FL argued that HPC is required to allow the Civil Nuclear Constabulary to operate on the site and to maintain a 24/7-armed response [OB/C449; OB/C596-598].

183. In its written closing submissions FL repeated these arguments. In support of its arguments that the ONR exercised decisive influence, it pointed to the limited number of times the ONR has so far exercised its primary powers of approval in relation to HPC's arrangements. It noted Ms Lawrence's evidence that the ONR was a "*stakeholder of particular concern*" with whom HPC was regularly sharing information proactively It also noted that HPC voluntarily includes within its arrangements a role for the ONR to make ongoing permissioning decisions. While Ms Lawrence tried to position HPC's actions as just good practice, Ms Dehon submitted that the reality is that commercial entities do not proactively invite regulation – the reason for HPC's approach is, as Mr Hardy aptly described it, because the ONR has the whip-hand.

184. Ms Dehon argued that while HPC has flexibility in producing the various arrangements required for the construction and operation of the site, it does not have genuine autonomy because of the decisive influence that the ONR is exercising in a significant number of areas, including influencing the HPC to makes its arrangements to give the ONR administrative powers to permission certain activities on the site. It is for the ONR to determine what is in the interests of safety; it is for the ONR to decide what actions to take in light of those interests.

185. Ms Dehon also emphasised the "goal setting approach" applied by the ONR and the non-prescriptive nature of the regulatory regime.

186. In support of her contention that the control test is met, Ms Dehon noted the powers of direction which certain of the Nuclear Licence conditions give the ONR arguing that , unlike any other private body that is constructing and operating an industrial process or large infrastructure, the ONR can direct HPC, in accordance with the requirements of safety, in relation to its organisational structure and resources; whether it can undertake a large range of property transactions in relation to the land; who it can allow onto the site; how it fences the site; what plant it constructs or installs and how it modifies that plant; the disposal of radioactive waste and the shutting down and decommissioning of the plant. The ONR also has a large number of powers to require that HPC not make a decision or adopt a method of working without the ONR's prior approval

187. Ms Dehon argued that should the ONR choose to exercise these primary powers, that would effectively amount to the ONR having the power to give prior approval for the design and construction of the nuclear power plant, as well as prior approval for property transactions, and organisational and financial changes, appointment and qualifications of certain personnel and whether they continue to act. These go well beyond the 'usual' regulatory powers, even of highly regulated industries.

188. Additionally, she said the ONR has the power to regulate HPC's supply chain, carrying out inspections to gain confidence in HPC's supply chain management, construction management and arrangements for plant and equipment,

including having the power to visit all of HPC's "Tier 1" suppliers, separately verifying their competence management arrangement.

189. Finally on this aspect, it does not make a difference that the manner in which this decisive influence is achieved by the ONR is through the "arrangements" concerning HPC's property transactions, or concerning changes to HPC's human resources or financial resources, rather than via some other mechanism, and that the ONR achieves its control via making the licensee amend the arrangements until it gets them right, rather than, for example, re-drafting the arrangements itself.

190. All parties relied on their previous submissions in relation to EIR 2(2)(c) in relation to whether HPC's responsibilities, functions or services relate to the environment.

Discussion and conclusions

191. We considered whether HPC is able to operate in *'a genuinely autonomous manner'* (described in Fish Legal UT as the effect) *'since a public authority … is in a position to exert decisive influence on their action in the environmental field'*(the cause).

192. Taking the cause first, we were not persuaded by Ms Dehon's arguments on behalf of FL that the fact that the ONR has powers which it can choose to exercise over HPC's business means that ONR can exercise decisive influence over HPC.

193. The nature of the particular regime under which ONR regulates HPC is such that the ONR exercises oversight and has powers to intervene if required. However, in practice, the regime places the primary responsibility for compliance with regulatory requirements and standards on the licensee, here HPC. A goal setting or outcome focused regime means the regulator sets regulatory standards, objectives and goals at a high level. The regulator, here ONR, does not prescribe how those standards should be met in the context of any particular business; that is a matter for the business and its senior management. An example of this for HPC is that ONR reviews and verifies HPC's competence through talking to its Tier 1 suppliers; it does not dictate who those suppliers should be or the terms on which they should conduct business.

194. In applying this to the effect on HPC, we gave particular weight to the comment in Fish Legal UT) that *"autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business....Being subject to a degree of influence is not incompatible with a company having genuine autonomy in its decision-making. It is not just a case of taking account of the potential extent for intervention."*

195. As the UT concluded in Fish Legal UT, the threshold for the control test is a high one which will rarely be met. Taking into account all the evidence, we were not persuaded that ONR's oversight of HPC was such that it deprived HPC of being able to conduct its business in a genuinely autonomous way.

196. As we determined HPC was not controlled by the ONR, there was no need to go on and consider whether or not its functions, services and responsibilities relate to the environment. Even if we had done so, for the same reasons explained under EIR 2(2)(c) above we would have concluded that they did. This would, however, have made no difference to our conclusion because both limbs of the test need to be satisfied.

197. We therefore concluded that HPC is not a public authority for the purposes of EIR 2(2)(d).

Signed: Judge Harris Date: 4 June 2025