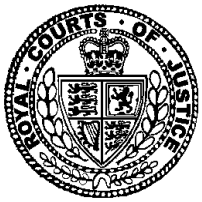

Neutral Citation Number: [2011] EWCA Civ 1606

Case No: C3/2011/1094

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
JUDGE EDWARD JACOBS
GIA/2098/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2011

Before:

LORD JUSTICE CARNWATH
LORD JUSTICE LLOYD
and
LORD JUSTICE SULLIVAN

- -

Between:

Birkett	**Appellant**
- and -	
The Department For The Environment, Food and Rural Affairs	**Respondent**

- -
- -

Mr Gerry Facenna and Ms Laura Elizabeth John (instructed by **Friends of the Earth Rights and Justice Centre**) for the **Appellant**
Mr. Jonathan Swift QC and Mr Alexander Ruck Keene (instructed by **Treasury Solicitor)** for the **Respondent**

Hearing dates: 28 & 29 November 2011

- -

Approved Judgment

Lord Justice Sullivan:

Introduction

1. When a public authority has initially relied upon a particular exception when refusing to release environmental information under the Environmental Information Regulations 2004 ("the Regulations") may it rely upon a different exception or exceptions in proceedings before the Information Commissioner ("the Commissioner") and/or the First-Tier Tribunal (General Regulatory Chamber) (Information Rights) ("the Tribunal")?

2. In this case the Tribunal decided that the Respondent could not rely on two new exceptions without the permission of the Tribunal, which it withheld. On appeal, the Upper Tribunal (Administrative Appeals Chamber) decided that the Respondent was entitled as of right to rely on the two new exceptions [2011] UKUT 39 (AAC). The Appellant appeals against that decision. He submits that a public authority may not rely on a new exception or exceptions in proceedings before the Commissioner and the Tribunal; it may rely only upon the exception or exceptions which were specified in its reasons for refusing the request.

The Regulations

3. The Regulations implement Council Directive 2003/4/EC on public access to environmental information ("the Directive"). The Appellant does not contend that, read purely as domestic statues, there is any provision in either the Regulations, or the enforcement and appeals provisions in the Freedom of Information Act 2000 ("the Act") which are applied by the Regulations, which prohibits reliance upon a new exception. Mr. Facenna submits on behalf of the Appellant that the Regulations must be interpreted in a purposive manner, and that permitting a public authority to rely upon a new exception before the Commissioner or the Tribunal would be contrary to the underlying purpose of the Directive. He relied on two judgments of the Court of Justice of the European Union ("CJEU"): Case C-233/00 Commission v France [2003] ECR 1-6625, and Case C-186/04 Housieaux v Délégués du conseil de la Région de Bruxelles – Capitale [2005] ECR 1-3299. The focus is therefore upon the Directive, and an outline of the Regulations will suffice for present purposes.

4. The Regulations impose a duty upon a public authority that holds environmental information to make it available on request (reg. 5). That duty is subject to a number of exceptions (reg. 12). A refusal of a request for environmental information must be made in writing as soon as possible and no later than 20 days (or 40 days in a complex case) after the date of receipt of the request (reg. 14). The refusal must specify the authority's reasons for not disclosing the information required including any exception relied on (reg. 14(3)). A person whose request has been refused may ask the authority to review its decision (reg. 11). The review decision must be notified as soon as possible, and not later than 40 days after receipt of the request for a review (reg. 11). If the refusal to disclose is maintained the person whose request has been refused ("the complainant") may apply for a decision from the Commissioner (section 50 of the Act as applied by reg. 18). The complainant or the public authority may appeal to the Tribunal against the Commissioner's decision notice (section 54 of the Act as applied by reg. 18). There is a further appeal on a point of law from the Tribunal to the Upper Tribunal.

The Facts

5. The Appellant is the founder of the cross-party Campaign for Clean Air in London. On the 22nd January 2009 he made a request for information from the Respondent. The request related to discussions between the previous Government and the Mayor of London on matters of air pollution and the UK's compliance with EU air quality laws. It is common ground that the information requested is environmental information as defined in the Regulations and the Directive.

6. On 1st April 2009 the Respondent refused the request relying on the exception contained in regulation 12(4)(e):

> " ….a public authority may refuse to disclose information to the extent that - …(e) the request involves the disclosure of internal communications."

On 1st May 2009 the Appellant requested an internal review. On 15th September 2009 the Respondent maintained its decision, relying on the exception in regulation 12(4)(e).

7. On 3rd October 2009 the Appellant asked the Commissioner for a decision under section 50 of the Act. In a decision notice dated 2nd November 2009 the Commissioner, without having invited any representations from the Respondent, ordered the Respondent to disclose the information. The Respondent appealed to the Tribunal. In its Notice of Appeal dated 1st December 2009 the Respondent continued to rely on the exception in regulation 12(4)(e), but to the extent that the disputed information comprised information in respect of which legal advice privilege could be maintained, it also relied upon the exceptions in regulation 12(5)(b) and (d):

> "…a public authority may refuse to disclose information to the extent that its disclosure would adversely affect - … (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal nature"…. (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law".

8. Much of the disputed information had been released in three tranches, in December 2009, March 2010 and April 2010, prior to the hearing before the Tribunal on 11th May 2010. The Tribunal concluded that:

> "There is no obligation on the Tribunal to consider any exception relied upon by a public authority that had not previously been relied upon; exceptions or exemptions raised for the first time before the Tribunal should only be considered if there is a reasonable justification" (para. 27).

The Tribunal found that there was no reasonable justification for the Respondent "overlooking" the two new exceptions in regulation 12(5) (b) and (d), and therefore declined to consider whether the remaining disputed information fell within those exceptions (paras. 33 and 34).

9. The Respondent appealed to the Upper Tribunal. Its appeal was heard together with an appeal by the Commissioner against a decision by a differently constituted Tribunal that the Home Office was entitled to rely as of right on new exemptions in respect of non-environmental information falling within the Act. At the hearing of the appeals before the Upper Tribunal the Respondent contended that it was entitled as of right to rely on the new exceptions/exemptions; the Appellant contended that a public authority could not lawfully rely on new exceptions/exemptions before the Commissioner and the Tribunal; and the Commissioner adopted a middle course: while there was no right to rely on new exceptions/exemptions, a public authority could be permitted to do so at the discretion of either the Commissioner or the Tribunal.

10. The Upper Tribunal accepted the Respondent's submissions and rejected both the Appellant's and the Commissioner's submissions. The Upper Tribunal first considered the position under the Act in the context of the Home Office appeal. Having concluded that the Home Office was entitled to rely as of right on new exemptions, the Upper Tribunal considered whether the position was different under the Regulations. Having noted that the Directive gives effect to the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters ("the Convention"), the Upper Tribunal considered the relevant provisions of the Directive and the Regulations and the two decisions of the CJEU referred to above, and concluded that they did not justify, still less require, a conclusion that was different from that which resulted from an analysis of the Act.

11. The Commissioner did not appeal against the Upper Tribunal's decision in the Home Office case, and he has not participated in the Appellant's appeal. The course taken by the Commissioner is perfectly understandable, but it has two consequences which are relevant for the present appeal:-

(a) There is no challenge to the Upper Tribunal's decision that in respect of information which is not environmental information a public body is entitled as of right under the Act to rely on new exemptions. While Mr. Facenna did not accept the correctness of this decision, he made no attempt to demonstrate that it was wrong as a matter of domestic law.

(b) The appeal has been presented upon the basis that there is no "middle way", as advocated by the Commissioner before the Upper Tribunal. Mr. Swift QC submitted on behalf of the Respondent that, upon a proper interpretation of the Directive and the Regulations, there was no statutory justification for a "middle way". While Mr. Facenna was reluctantly prepared to accept the Tribunal's approach in the present case as a second-best option if his primary submission – that there was no power to rely on new exceptions – failed, he did not make any submissions in support of a "middle way".

The Directive

12. As noted by the Upper Tribunal, the Directive implements the access to environmental information provisions contained in the Convention, in particular Article 4, Access to Environmental Information, and Article 9 Access to Justice. Recital (1) of the Directive explains the purpose of giving the public access to environmental information:

> "to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."

13. Mr. Facenna also referred to recital (5) which refers to the need for community law to be compliant with the Convention, and to recitals (13), (16) and (19). It is unnecessary to set out the terms of those recitals, since for present purposes they add nothing to the relevant Articles of the Directive, which are as follows:

> Article 3
>
> **Access to environmental information upon request**
>
> "1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest
>
> 2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:
>
> (a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or
>
> (b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it.
>
> Article 4

Exceptions

1. Member States may provide for a request for environmental information to be refused if:

(a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon as possible transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;

(b) the request is manifestly unreasonable;

(c) the request is formulated in too general a manner, taking into account Article 3(3);

(d) the request concerns material in the course of completion or unfinished documents or data;

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

(b) international relations, public security or national defence;

(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

(e) intellectual property rights;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the

information to the public, where such confidentiality is provided for by national or Community law;

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

(h) The protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

5. A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3(2)(a) or, as the case may be, (b). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6.

Article 6

Access to Justice

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore

> provide that third parties incriminated by the disclosure of information may also have access to legal recourse."

Discussion

14. Mr Facenna accepted that a public authority could rely upon a new exception at the reconsideration stage under Article 6(1) (internal review under regulation 11 of the Regulations). He submitted that once the matter progressed beyond reconsideration to administrative review under Article 6(1), or to legal review under Article 6(2), there could be no reliance upon a new exception. He acknowledged that no words to that effect could be found in the Directive, but he submitted that it was necessary to adopt such an interpretation in order to provide the complainant with an effective remedy. The Directive did not simply impose a duty to make environmental information available upon request. Recognising that the public utility of environmental information might be much diminished if its release was delayed, the Directive required release, or a refusal to release with reasons, within a tight timescale, at most a month, or two months in a complex case: see Articles 3(2) (a) and (b) and 4(5). It was essential that the reasons for refusal, and not merely a refusal, were provided within this timescale because, without the reasons for refusal, the person seeking the information would not know whether there was a case for seeking an administrative review under Article 6(1) or a legal review under Article 6(2). If the public authority was able to rely on new exceptions at the administrative review and/or the legal review stages under Article 6 it would render those remedies ineffective.

15. In support of these submissions Mr. Facenna relied upon the two decisions of the CJEU referred to above. Both of those cases were concerned with the earlier Council Directive 90/313/EEC which was repealed and replaced by the Directive on 28th January 2003. The earlier Directive did not (unlike Article 4.5 in the Directive) expressly require that the reasons for a refusal be notified within the two months period for a response to the request. Having regard to "the spirit of the Directive" the Court concluded in Commission v France that an interpretation of the earlier Directive which did not lay down any precise period within which reasons for refusal had to be given "would deprive Article 3(4) of Directive 90/313 of a substantial part of its effectiveness". (para. 117). Mr Facenna drew our attention to paragraphs 94-96 of the Advocate General's Opinion in that case:

> "94. In addition, a time-limit within which the public authorities must respond, such as that laid down in Article 3(4) of the Directive, is particularly conducive to legal certainty because it ensures that the person requesting the information is not left for an indefinite length of time in the dark as regards the outcome of his request and his legal position. In my view, this aspect merits special attention precisely in the context of a directive which is designed to guarantee public access to information held by the public authorities.

> 95. In that regard it should be assumed that the above mentioned requirement of legal certainty also arises in relation to the actual reasons for a refusal, especially where account is taken of the fact that Article 4 of the Directive provides for the possible review of both positive and negative responses issued by the public authorities and that the lawfulness of those responses must be assessed by reference to the reasons on which they are respectively based.
>
> 96. An interpretation under which a time-limit is not considered to apply to the requirement under Article 3(4) of the Directive to give reasons in the event of a public authority's refusal is not therefore compatible either with the spirit and purpose of that provision or with the Directive as a whole."

16. A similar point was made by the Advocate General in the Housieaux case:

> "32. The right to good administration creates for the administration an obligation to give reasons for its decisions. Such a statement of reasons is not merely a general expression of the transparency of the administration's actions, but is also intended, in particular, to give the individual the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in his applying to the courts. There is therefore a close connection between the obligation to give reasons and the fundamental right to effective legal protection.
>
> 33. Accordingly, it would be incompatible with both the right to good administration and the fundamental right to effective legal protection if a public authority could simply let the two-month time-limit provided for in Article 3(4) of Directive 90/313 expire and for this to be deemed to constitute a lawful refusal of a request for information on the environment. Logically, therefore, the Court has held that the individual must automatically be informed of the reasons for the refusal of his request, not necessarily at the same time as the actual refusal but in any event within the two-month time-limit.
>
> 37. If a public authority were permitted simply to let the time-limit prescribed for processing a request made to it expire rather than responding to it expressly, the obligation to give reasons which stems from Community law would be rendered meaningless. After all, contrary to the view taken by the defendants, a public authority's failure to respond cannot as such provide any explanation as to whatever reasons there may be for authorising or refusing

> the action requested. Thus under Article 3(2) and (3) of Directive 90/313, a request for information on the environment can be refused for a wide variety of reasons. The same applies to any refusal of access to documents under Article 4 of Regulation No 1049/2001. Indeed, a decision on the compatibility with the common market of a concentration or a measure of State aid generally requires the assessment of complex economic issues. The reasons which prompted the public authority in a particular case not to respond within the time-limit, if indeed it had formed an opinion at all within that period, could only be guessed at by those concerned by the decision (the applicant or third parties). Reliance on guesswork, however, would not satisfy the right of members of the public to good administration and their fundamental right to effective legal protection." (references omitted)

17. The Court in the Housieaux case noted with approval a further point made by the Advocate General: that the value of environmental information "depends to a large extent on the fact that individuals are able to obtain it as quickly as possible" (para. 28). It concluded that the two month time-limit in Article 3(4) of Directive 90/313 was mandatory (para. 29), and said:

> "35. It therefore follows from the judgment in Commission v France, cited above, that whereas, so as to grant effective judicial protection in accordance with Article 4 of Directive 0/313, the said directive does not preclude the fiction of implied refusal of a request for access to information where there has been a failure to respond within two months, by virtue of Article 3(4) of the directive it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In those circumstances, whilst the implied refusal does constitute a 'response' for the purposes of Article 3(4) it must be regarded as unlawful.
>
> 36. Accordingly, the answer to the third question must be that Article 3(4) of Directive 90/313, in conjunction with Article 4 thereof, does not preclude, in a situation such as that in the main proceedings, national legislation according to which, for the purposes of granting effective judicial protection, the failure of a public authority to respond within a period of two months is deemed to give rise to an implied refusal which may be the subject of a judicial or administrative review in accordance with the national legal system. However, by virtue of Article 3(4) it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In

> those circumstances, the implied refusal must be regarded as unlawful."

18. These two judgments are undoubtedly authority for the proposition that the time limits for notifying a refusal and for stating the reasons for refusal (including the exception or exceptions relied upon) are mandatory. A failure to give reasons within the time limit is unlawful. However, as Mr Swift pointed out, in neither of the cases did the CJEU have to consider what would be the consequence of such unlawfulness. On the Appellant's approach, a failure to give any reasons within the timescale would mean that, unless the omission was remedied on reconsideration under Article 6(1) (regulation 11 of the Regulations), no exception could subsequently be relied upon. Whatever the reason for the omission, and however grave the effect on the interest protected by the exception that might have been relied upon, the disputed information would have to be released.

19. I am not persuaded that a purposive interpretation of the Directive leads to the conclusion that in those cases where, for whatever reason, no exception has been relied upon in a notification of refusal, or where the wrong reason, or some but not all of the right reasons, have been relied upon, the error is incapable of correction in the review process under Article 6, regardless of the harm that might be done by disclosure. The Appellant's submissions focus upon only one aspect, admittedly a most important aspect, of the Directive: the need for an effective remedy if access to environmental information is delayed.

20. A purposive approach to the interpretation of the Directive must consider the Directive as a whole. Three features of the environmental information regime are immediately apparent:

    (1) The relatively short time within which the initial decision to release, or to refuse to release (with reasons) must be made.

    (2) The broad scope of the review process under Article 6.

    (3) The balance that has to be struck between the public interest in the prompt release of environmental information and the need to avoid harm to the other important public interests listed in Article 12(2).

21. All three points are interrelated. The Directive does not proceed upon the unlikely premise that within such a tight timescale the public authority will always "get it right the first time", hence the review process provided for by Article 6. While some decisions may be relatively straightforward, the question whether some information, and if so how much of that information, falls within one or more of the exceptions may well be a question of some complexity. Are documents protected by legal advice or litigation privilege, are there intellectual property rights in certain information, etc.? The exceptions are concerned with important public interests.

22. No doubt with these factors in mind, Mr. Facenna accepted that initial errors or omissions in a refusal can be corrected in a reconsideration undertaken under Article

6(1). He draws a distinction between internal reconsideration and the next stage under the Regulations, consideration by the Commissioner. He submits that once the latter stage is reached, the public authority is unable to correct any errors or omissions in its refusal notice. However, this distinction ignores the fact that under the Directive the Member States do not have to provide a three stage appeal process under Article 6: internal reconsideration, administrative review, legal review. The first stage of the procedure may provide for reconsideration or administrative review. If administrative review is the first stage of the process there would, on the Appellant's approach, be no opportunity for a public authority to correct errors or omissions in its refusal notifications. Such a limitation upon the scope of the administrative review process would not be realistic given the potential complexity, both factual and legal, of some of the issues raised by the exceptions in Article 12(2).

23. Notwithstanding the need for a speedy decision as to whether or not, and if not why not, environmental information is to be released, it is to be noted that the Directive does not set a precise time limit for reconsideration and/or administrative review under Article 6. Although that stage of the procedure must be "expeditious", there is no such requirement for the next stage: legal review under Article 6(2). This reflects the, inevitable, tension between the need for a speedy answer, and the need to obtain a correct answer which properly balances the important public interests which may be in conflict. Article 6 recognises the potential importance of these issues by providing for a thorough review process in which the merits, both factual and legal, of a decision to refuse to release environmental information will be reconsidered afresh by independent and impartial bodies, both administrative and legal. The Court or other legal body conducting the review under Article 6(2) is not reviewing the decision made by the administrative reviewer under Article 6(1), it is reviewing "the acts or omissions of the public body concerned." Thus, the court must consider de novo the propriety of releasing the information. Such a process is bound to discover errors and omissions in the exceptions relied upon in initial decisions, and it would be surprising, given the balancing exercise required by the Directive, if those errors were incapable of subsequent correction.

24. I have referred to the importance of some of the public interests protected by Article 12(2). Suppose a public authority mistakenly fails to rely in its refusal notification upon an adverse effect upon public security or national defence because it did not realise the significance of the information; or it fails to rely on an adverse effect upon a criminal inquiry or upon the ability of a person to receive a fair trial because it is unaware of the inquiry or the impending trial; or if it fails to rely on the commercial confidentiality of information which is only raised as an issue by a third party during the review process; or it fails to rely on exception (h) because it does not initially appreciate that the release of the information might endanger a rare species; would a purposive interpretation of the Directive preclude the review process under Article 6 from considering those exceptions however grave might be the adverse effects of disclosure? In my judgment, the answer to that question must be "No" if the Directive is read as a whole.

25. Mr. Facenna submitted that such failures to rely upon exceptions would be rare, and that disclosure would not be ordered by the Commissioner or the Tribunal in any case where disclosure would infringe any person's fundamental rights under the

European Convention on Human Rights (ECHR): eg. the right to a fair trial. While there is some potential overlap between the rights protected by the ECHR and the public interests protected by Article 12(2), the Directive does not require only those rights that are conferred by the ECHR to be balanced against the public interest in the disclosure of environmental information.

26. Moreover, I do not accept the premise underlying Mr. Facenna's submission: that permitting a public authority to rely on a new exception in the administrative and legal review processes under Article 6 deprives the person seeking the information of any effective judicial control, and thereby destroys the effectiveness of the process. There is a strong public interest in prompt disclosure, but that is not the only public interest in play. At the administrative review stage (which must be expeditious, see Article 6(1) above) the Commissioner has ample power to regulate the proceedings before him, eg by imposing a time limit for a response (if any) by the public authority. In the present case, the Commissioner responded to the complaint on 3rd October 2009 with a decision notice on 2nd November 2009.

27. An appeal to the Tribunal is governed by The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). A notice of appeal must be received by the Tribunal within 28 days of the Commissioner's decision notice: rule 28(1). The notice of appeal must include the grounds on which the appellant relies: rule 22(2)(g). If the person seeking the information is appealing against a decision by the Commissioner that the information should not be released, the public authority's response must be received within 28 days after the date when it receives notice of the appeal, and that response must include any grounds for its opposition to the appeal which are not contained in another document provided with the response: rule 23(1) and (3).

28. Thus, whether the public authority is the appellant or the respondent in an appeal to the Tribunal, the Rules ensure that any new exception, if it is to be relied upon, is identified at the outset of the appeal, and within a relatively short time. Any application by the public authority to rely upon a new exception made after the time limit for its grounds of appeal/response would be subject to the Tribunal's case management powers under rule 5; see also rules 22(4) and 23(5) which deal with the submission of notices of appeal and responses out of time. The Tribunal is a creature of statute. Not only is there no need for a non-statutory discretion such as that purportedly exercised by the Tribunal in the present case; there is no scope for the exercise of such a discretion in a statutory scheme which requires the public authority to set out its grounds of appeal, or grounds of opposition in response to an appeal, within a particular timescale, and which expressly envisages in the case of the latter that those grounds may not be contained in another document provided with the response, i.e. that they may contain new reasoning.

Conclusion

29. For these reasons, the Respondent was entitled to rely as of right on the exceptions referred to in its Notice of Appeal to the Tribunal. For my part, I would dismiss the appeal. I do not consider that there is any need to refer the issue to the CJEU.

Lord Justice Lloyd:

30. I agree that the appeal should be dismissed for the reasons given by Sullivan LJ.

Lord Justice Carnwath:

31. I agree that on the arguments as presented the appeal should be dismissed for the reasons given by Sullivan LJ, and I agree with him that a reference to the CJEU is unnecessary to resolve that debate. I feel some regret that neither party, nor the Information Commissioner, felt able to present positive submissions in favour of a "middle way". There would have been attractions in an alternative approach, which could have reconciled the need for urgency, implicit in the CJEU case-law, with the need for flexibility in the operation of the scheme. However, in the absence of such submissions I do not think it is open to the court to attempt to devise such a solution.