FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(Information Rights)

Appeal Number: EA/2020/0101

Heard via CVP
On 29 March 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
TRIBUNAL MEMBER CREEDON
TRIBUNAL MEMBER RAZ EDWARDS

Between

HEATHROW AIRPORT LIMITED

Appellant

– and –

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Philip Coppel QC
For the Respondent: Ms Laura John

DECISION

1. For the reasons set out below the Tribunal allows the appeal against the Decision Notice and issues the following substitute decision notice.

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SUBSTITUTE DECISION NOTICE

Organisation: Heathrow Airport Limited

Complainant: CMS Cameron McKenna Nabarro Olswang LLP obo Arora Group

The Substitute Decision – FER0844872

For the reasons set out below Heathrow Airport Limited ("HAL") is not a public authority for the purposes of reg 2(2)(c) of the Environmental Information Regulations 2004. No action is required.

REASONS

Preliminary matters

Abbreviations

Arora	Arora Group (the complainant)
Convention	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998
Directive	Directive 2003/4/EU
EIR	Environmental Information Regulations 2004 (SI No 3391)
FOIA	Freedom of Information Act 2000
HAL	Heathrow Airport Limited
ICO	The Information Commissioner

Preliminary Issues – Jurisdiction & the UK's departure from the EU

2. The core issue before the tribunal is whether HAL is a public authority for the purpose of the EIR; a subsidiary issue raised by HAL is whether that question is one that can be decided by the First-tier Tribunal or whether it has to be the subject of a judicial review. We must, logically, consider that issue first as a preliminary issue, as did the Upper Tribunal in Fish Legal [2015] UKUT 52(AAC) ("Fish Legal (UT)").

3. The appellant's argument is that if HAL is not a public body, then Arora was not entitled to a make a request for information under the EIR and HAL was not under a

duty to answer the request; and, the respondent had no jurisdiction to entertain a complaint from Arora or make a decision under reg. 18 EIR or section 50 FOIA with the consequence that the Decision Notice is not what it calls itself.

4. We accept that, as a statutory tribunal, the FtT only has the jurisdiction conferred on it, but equally it has the power to consider whether it does have jurisdiction – see Sugar v BBC [2009] UKHL 9. We note also that in Fish Legal (UT), which is binding on us, the Upper Tribunal held at [55]:

> 55. In summary, the Commissioner has jurisdiction both to investigate and decide whether a body is a public authority. That decision is one made on the application under section 50 of FOIA and so the document giving notice of that decision is a decision notice served under section 50(3)(b). Sections 50 and 51 are predicated upon the existence of the three key concepts of request, information and public authority on which the legislation is based. But that does not deprive the First-tier Tribunal of jurisdiction to deal with those issues. As Mr Barrett put it at the hearing, section 50(1) merely describes the matters that may be the subject of an application under that section and so a complaint about the way the specific request has been dealt with; it does not prescribe conditions that must be met before an application can be made and determined by the Commissioner. When that section and section 51 refer to an application, they refer to a complaint to the Commissioner that any requirement of the legislation has not been met and the Commissioner can address all the reasons advanced as to why this has not occurred, including the assertion that FOIA does not apply because the request was not made to a public authority.

5. In the light of that, we consider that we do have jurisdiction to consider the issue of whether HAL is a public authority. We do not accept the appellant's submission that HAL is in some way "permitting" the FtT to receive evidence to consider the issue.

6. We accepted that, following R (Evans) v Attorney General [2015] UKSC 21 at [72], that the application of the EIR is to be determined by reference to the date on which the appellant responded to the request for information. That is well before the UK's withdrawal from the EU.

7. Despite some disagreement between counsel as to the legislative means by which it has been achieved, it was not in dispute between the parties that the EIR and relevant case law has been preserved, including the case law relating to the approach to be taken in interpreting legislation introduced to give effect to obligations derived from EU legislation.

Proceedings and History

8. On 21 December 2018 Arora's Solicitors wrote to HAL requesting information pursuant to Section 1(1) of the FOIA and Regulation 5(1) of the EIR. HAL responded on 23 January 2019 pointing out that it was not an "public authority" for the purposes of either and thus was not obliged to respond to the request.

9. On 30 March 2019 Arora's Solicitors wrote to HAL again asking for a review pursuant to Regulation 11(1) of the EIR, accepting, it would appear, that FOIA did not apply.

10. On 8 May 2019 HAL responded maintaining their position that HAL was not a public authority for the purposes of the EIR.

11. On 22 May 2019 Arora made a formal complaint to the ICO submitting that HAL was a public authority as it operates under a highly regulated legal framework delivering what was once a publicly owned service. It submitted that by operation of this legal regime, both prior to and following privatisation HAL (or its predecessors) had been vested with special powers and put in a position of influence going beyond that enjoyed by other private landowners.

12. Arora also submitted that pursuant to the policy of privatisation articulated in the Airports Act 1986 ("the Airports Act"), all property, rights and liabilities of the British Airports Authority including Heathrow were transferred to BAA plc, subsequently BAA Limited which then divested itself of airports and sold Heathrow to HAL.

13. Although Arora submitted, in support of their application, that the finding in the Heathrow Hub case [2019] EWHC 1069 (Admin) contained a finding that HAL was a privileged undertaking for the purpose of Article 106(1) of Treaty on the Functioning of the European Union, that decision was reversed on appeal[1].

14. On 20 September 2019 the ICO wrote to Arora explaining that the focus of the investigation would be to determine whether HAL was a public authority for the purposes of EIR and on the same date wrote to HAL setting out the nature of the complaint and advising HAL that it could be deemed a public authority under either Regulation 2(2)(c) or 2(2)(d). In the event, it was concluded that Regulation 2(2)(d) did not apply.

15. On 18 October 2019 HAL responded to the ICO through its solicitors, Bryan Cave Leighton Paisner, submitting that HAL, although subject to regulatory requirements, is a private company answerable to its shareholders. In particular, although acknowledging that the operation of the airport could be seen as a service carried out "in the public interest" and could be seen as having a number of statutory powers and responsibilities, these are not functions in the environmental field for the purpose of Article 2(2) of the Directive. HAL further submitted, relying on Cross [2016] UKUT 153 (AAC) ("Cross"), that in order to satisfy the "functional test" referred to in Fish Legal, the relevant entity must be under national law performing specific duties etc. relating to the environment which were not applicable here. Although accepting it is an airport operator and statutory undertaker under the Civil Aviation Act 2012 which gave it power under various statutes including the power to make byelaws, these did not relate to the environment and therefore are not dispositive of the purposes for determining HAL's role.

16. On 12 December 2019 the ICO wrote to HAL stating it was satisfied that it was not under the control of any other public authority and therefore was not a public authority by virtue of Regulation 2(2)(e) of EIR but that there were grounds for

[1] See R (ota) Heathrow Hub (&or) v SSHD [2020] EWCA Civ 213

considering that it is a public authority under Regulation 2(2)(c) in that it is carrying out functions of public administration. The letter states that the ICO's understanding of the history of Heathrow is it was originally under the control of the Ministry of Aviation until the British Airports Authority ("BAA") was established under the British Airports Act 1965 this being privatised under the Airports Act but ultimately HAL became the airport's owner operator and that it was therefore possible that HAL derive responsibilities of functions that originate from the Airports Act as well as the licence granted by the Civil Aviation Authority ("CAA").

17. HAL responded, repeating that Heathrow Airport's operation could not be seen as carrying out functions in the environmental field. It also sets out relevant terms of the Airport Operator Licence granted by the CAA which is described as an economic licence that regulates economically those airport operators under the CAA that determine a market power test. It also goes on to explain that BAA was established in 1986 to own airports and that HAL was incorporated in 1986 as part of the process and became the company responsible for the operation of Heathrow Airport solely. In 2006 BAA plc was purchased by an international investment consortium. It was then re-registered as a private company changing its name to "BAA Airports" and then to "LHAR Airports". Between 2009 and 2014 BAA/LHAR divested Gatwick, Stansted, Edinburgh, Glasgow, Southampton and Aberdeen Airports retaining HAL, the largest airport in the group. It is stated that in terms of responsibility the Airports Act 1986 appears to apply only to one responsibility on HAL, that is to provide certain assistance to the Secretary of State on request.

18. On 3 February 2020 the ICO gave its decision stating that it considers HAL to be a public authority for the purposes of the EIR for the reasons set out at paragraphs 14 to 38 concluding that HAL is a body which carries out the functions of public administration.

19. In doing so it interpreted the case law as meaning that the body in question must be empowered with the relevant function under statute [21] and that there appeared to be a direct transfer of functions, powers and responsibilities from the BAA in 1981 to HAL in 1986 [23]. The ICO concluded that HAL's main function was to operate Heathrow as it was entrusted to it under the Airports Act 1986 and that this is a service of public interest. It considered also 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.

20. The ICO also relied on what the FtT had decided in Poplar Housing v ICO [2012] 2 WLUK 498 ("Poplar (FtT)")that so long as the special powers relate to any of its services of public interest the point will be deemed to be a public authority subject to a cross-check, special powers being powers beyond those which result from normal rules applicable to relations between individuals under private law. An example given by the ICO were powers of HAL to acquire/ enter land.

21. On 28 February 2020 HAL lodged a notice of appeal submitting that it was not a public authority for the purposes of the EIR because, inter alia, it had not been entrusted by

government when performing services of public interest; its predominant activity was the operation of Heathrow Airport as a business as required by company law which it carried out for the benefit of its shareholders and that insofar as it was required to comply with the law, including laws relating to the environment these were legally incidental to those activities and did not transform it into a body carrying out functions of public administration.

22. On 1 April 2020 the ICO filed a response to the notice of appeal. The HAL considered that the ICO misrepresented its position asserting that it accepted it had been entrusted with the performing of services of public interest.

23. On 9 June 2020 further to directions from the First-tier Tribunal HAL filed and served a reply and on 20 November 2020 HAL filed and served its evidence.

Background to the creation of HAL

24. We consider it necessary to set out the background to the creation of Heathrow Airport and HAL. This is derived from the statement of Daniel Freiman which is not disputed by the ICO.

25. In 1929 Farey Aviation Company Limited, a military aircraft manufacturer established towards the end of the First World War, bought 71 acres of land southeast of the hamlet "Heathrow" to establish an airfield for flight testing. It gradually acquired further land eventually owning 240 acres and until 1944 it remained a grass airfield owned and operated by Farey for the assembly and flight testing of its aircraft. In May 1944 the site was requisitioned by the Air Ministry and Farey was evicted. In 1945 it was announced that the area would be used for a new international airport for London rather than military purposes and on 1 January 1946 ownership of the site was transferred from the Air Ministry to the Ministry of Civil Aviation. In 1965 with the enactment of the Airports Authority Act 1965, the British Airports Authority was established, transferring the aerodromes at Heathrow, Gatwick, Stansted and Prestwick to be transferred from the Ministry of Civil Aviation to BAA.

26. On 12 November 1975 the Airports Authority Act 1975 came into force, repealing the 1965 Act but continuing the existence of BAA. Subsequent to that, on 8 July 1986 the Airports Act 1986 came into effect.

27. The preamble to that Act provides as follows:

> "An Act to provide for the dissolution of the British Airports Authority and the vesting of its property, rights and liabilities in a company nominated by the Secretary of State; to provide for the reorganisation of other airport undertakings in the public sector; to provide for the regulation of the use of airports and for the imposition of economic controls at certain airports; to make use of other amendments of the law relating to airports; to make provision with respect to the control of capital expenditure by local authority airport undertakings; and for connected purposes".

28. We note that Section 1 of the Airports Act which was superseded on 21 July 2004 gave the Secretary of State the power to be direct reorganisations of BAA's undertaking. Section 2 of the Act dissolved BAA; that section has now been repealed.

29. Under the Airports Act, BAA was floated on the stock market. BAA and BAA plc were different entities in several ways. The board of the old authority was appointed by the Secretary of State and they were civil servants. A board member could be removed by the Secretary of State. There was no such role in the constitution and operation of BAA plc. Further, BAA was under the Airports Authority Act 1975 under a statutory duty to provide at its aerodromes such services and facilities as are in its opinion necessary or desirable for their opinion and in doing so to have regard to the development of air transport and to efficiency, economy and safety of operation (see Section 2 of the 1975 Act). These duties did not apply under the 1986 Act.

30. As Mr Freiman states at [25], towards the end of the 1990s, concerns began to mount over BAA's perceived monopoly position resulting in it and in March 2009 the Competition Commission concluded a market investigation which found that there was no competition between BAA's seven airports and as a result BAA had to divest itself of three airports, Gatwick, Edinburgh and Stansted.

31. HAL is an indirect subsidiary of Heathrow (SP) Limited which with other companies forms part of the Heathrow (SP) Group which is an indirect subsidiary of Heathrow Airport Holdings Limited, part of the wider Heathrow Airport Holdings Limited Group which is in turn the indirect subsidiary of FGP Topco Limited the ultimate parent company of the Heathrow (SP) Group. FGP Topco is owned indirectly by investment vehicles controlled and managed by a number of large shareholders.

32. As regards Heathrow's facilities and operation it is the busiest airport in the United Kingdom being the UK's only hub airport serving until recently around 80,000,000 passengers per annum and, as HAL accepts, is a crucial part of the UK's national infrastructure and an economic driver for the local and regional economy, in 2019 employing approximately 76,000 people in a range of jobs directly related to the operation of the airport and supporting approximately 38,000 further jobs in the surrounding area in the airport's supply chain.

Regulation of HAL & its relationship with the CAA

33. HAL is subject to economic regulation by the CAA and under the Civil Aviation Act 2012 which is designed to allow the UK's regulated airports to generate revenues which are sufficient to finance their operating and capital expenditure requirements and provide a regulated rate of return on their regulatory asset base. This economic regulation applies only to Gatwick and Heathrow.

34. We consider it also necessary to look at how civil aviation is regulated and administered. Mr Freiman says at [76] (which is not in dispute), civil aviation is heavily regulated at an international, EU and domestic level. The regulatory framework is primarily focused on ensuring the safety and security of civil aviation and there is also economic regulation of airports directed towards fostering

competition and protecting the interests of users of their services. Other matters covered by applicable regulations include immigration and customs, consumer protection, the use of land and development of airport facilities and environmental issues associated with aviation such as noise and other emissions.

35. Much of the UK legislation in civil aviation gives effect to international agreements such as the Chicago Convention. EU legislation also plays a significant role in the regulation of UK aviation generally and airports in particular (e.g. the Single European Sky regime, EU Regulations on safety and EU Regulations on the rights of disabled travellers). Essentially, there is an interlocking system of regulations with at the top the International Civil Aviation Organisation established by the Chicago Convention followed by administration at the European level under the European Civil Aviation Conference (not part of the EU), Eurocontrol and EASA being the European Union Aviation Safety Agency). In addition, there is oversight and regulation from the Secretary of State of Transport through the Department of Transport and the CAA. Many of these powers relate to safety and security and there are also powers in relation to land as described in Mr Freiman's statement at paragraph [108].

36. We note that under the Civil Aviation Act 1982 ("CA Act"), it is the Secretary of State who has powers in relation to the provision and development of airports and this includes under Sections 41 to 47 the powers to acquire land, claim rights over land, restrict the use of land for the purpose of securing safety at aerodromes (section 45) and so on. We do, however, note that s 42A permits the Secretary of State to authorise a licence holder to acquire land compulsorily.

37. The Secretary of State also has powers under Section 78 of the Civil Aviation Act 1982 to regulate noise and vibration from aircraft at designated aerodromes including Heathrow Airport. This is done by imposing duties on aircraft operators, prohibiting or restricting the number of aircraft to take off during certain times and the Secretary of State may also give the manager of designated aerodromes directions as he considers appropriate for the purpose of avoiding, limiting or mitigating effects of noise and vibration. It is of note that aircraft movement restrictions are imposed by the government. The Secretary of State also has powers to impose schemes requiring an operator to make grants towards the cost of insulating buildings and noise and vibration, these arising under restrictions applicable under EU Regulation 598/2014. The Secretary of State can also make Regulations requiring certain persons including HAL to furnish it with information relating to civil aviation and to make reports available regarding the monitoring of aircraft noise.

38. We note that the CAA is the UK's specialist regulator of civil aviation including the economic regulation of Heathrow. Its powers are wide ranging, and it is funded by the aviation industry. It also exercises a number of functions under the EU Regulations on civil aviation and the CAA has a general duty under Section 1 of the CAA Act 2012 to exercise its economic regulatory functions in the manner which it considers will further the interests of users of air transport services and promote competition in the provision of airport operation and services.

39. The CAA also has statutory air navigation functions and is required to take account of guidance on environmental objectives given to it when doing so. The CAA is also under duty to publish certain information.

40. It is noted also that HAL has competitors both in terms of other international hub airports, other airports in the United Kingdom and other providers who have made rival proposals for the expansion of air traffic capacity.

Legal Framework

41. Article 1 of the Convention provides:

> " In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

42. In furthering that aim, the Convention places duties in respect to environmental information on "public authorities" as defined in article 2:

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

43. In addressing the meaning of "public authority", the Aarhus Convention Implementation Guide (second edition, 2014, p.46)[2] provides:

> "The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken into three parts to provide as broad coverage as possible. Recent developments in privatized solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice."

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

> "'Public authority' also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental

[2] Although not authoritative, the guide is considered by the CJEU as relevant to interpreting the convention – see Fish Legal (CJEU) [2013] EUECJ C-279/12, [2014] 2 WLR 568 at [38].

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

45. Turning next to the Directive, we note that the recitals provide:

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

(11) To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.

46. Public authority is defined in Article 2.2 of the Directive as follows:

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

47. Under regulation 2 (2) of EIR, so far as is relevant, a public authority means:

(a) government departments;

(b) any other public authority as defined in section 3(1) of the Freedom of Information Act 2000 , disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding-

(i) anybody 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."

48. As was noted in ICO v Poplar [2020] PTSR 2081 (" Poplar (UT)") 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; that is clear also from British Gas Trading Ltd v Lock and Anor [2016] 1 CMLR 25 at [37] ff. Further, and in any event, we conclude that it cannot be argued in respect of the EIR be said that they were intended to go further than the Directive; that much is evident from the EIR's explanatory note.

Evidence and Submissions

49. As noted above we had a written statement from Mr Daniel Freiman. That was not disputed and after he formally adopted his statement, there was no cross-examination. We then heard submissions from HAL and the Information Commissioner which we have taken account where relevant. We do not repeat all the points here.

Submissions from HAL

50. In order for a body to be a public authority:-

(1) the body must be a natural or a legal person;

(2) the body must be a body performing public administrative functions;

(3) those public administrative functions must be under national law; and

(4) those public administrative functions must be "in relation to the environment".

51. HAL does not dispute that the test is as set out by the ICO in her skeleton argument, that the test is that HAL would be a public authority if:-

(a) it had been "entrusted" under national legislation;

(b) was performing services that are in the public interest;

(c) those public interest services relate to the environment;

(d) it has been vested with "special powers for the purposes of performing those public interest services"; and

(e) standing back in all the circumstances of the case the combination of factors identified in (a) to (d) above results in the appellant being a functional authority ("cross-check").

52. The difference, HAL submits is in the application of the factors. HAL submits that it is not an administrative authority entrusted with the performance of services. Although it has certain powers which may relate to the environment, these are simply to facilitate it like any other airport operator as a consequence of its business. These, it is said, result from third parties using the airport and the powers and duties are needed to facilitate an operator dealing with the consequences of bringing together airlines and their passengers at Heathrow.

53. It is further submitted that the ICO has erred in believing that there are certain things which belong to the public sector and if not owned by them are outsourced. It is submitted that the privatisation which occurred here was not an "entrusting" and that ICO has wrongly assumed that the operation of an airport naturally and always belongs to the state and that therefore, it follows that if it is not the state carrying that out that it is somebody else who has been entrusted to do so.

54. HAL submits that the 1986 Act did not entrust HAL and that rather the Act was an expression by parliament that the state was no longer wanted to be in the business of running airports. Mr Coppel drew attention that the numerous businesses had been sold to the public in the 1980s and whilst some of these are subject to lots of Regulations such as airlines (BOAC being sold off to become British Airways) which are given powers to deal with, for example, unruly passengers, these are powers given to are facilitate and deal with the consequences of the business.

55. It is submitted further that the notion that an operating airport is in the public interest is simply an assumption as the same could be said for large supermarkets or businesses such as Tesco. The logic of ICO's conclusions is that, as even the smallest of airport would be affected, size should not be relevant.

56. It is further submitted that Heathrow had not been vested with special powers and that the submissions of the ICO to that effect did not withstand analysis. It is submitted that insofar as that HAL has the power to make byelaws under Section 3 in Schedule 3 of the Airport Act 1986, that was a power given to other operators, and those who own pasture land and operate markets. It is submitted also that other bodies have compulsory land acquisition powers and that they are nothing unusual, nor are the powers to carry out certain works without obtaining planning permission.

57. That, it is said, is because the presumption that no development can proceed without planning permission, it is often granted generally by permitted development orders; and, the lack of need to obtain permission is not unique to airport operators. Insofar

as HAL has the power to manage noise levels, this was given to facilitate them dealing with the environmental consequences of running their business and that insofar as it had been vested with any special powers, there was no real substantive advantage over the rights of private law.

58. In summary, HAL operates as a business and it is under a duty to its shareholders; it is under a statutory duty to carry passengers and unlike, for example, water authorities it is not under a duty to provide sewerage and water services or to improve them.

59. Turning to the test and the case law, it is submitted that there were significant differences between how HAL had come into being and the Regulation which applied to the water industries under Ofwat (see Fish Legal (UT) at [71] to [73] and [74] to [78]). It was emphasised in Poplar (UT) at [58] to [78] that this is binding, although the special powers given in that case were not enough. As Farbey J had said in Fish Legal (UT) at [52] there are two distinct and necessary criteria for an entity being a public authority, entrustment of public services and in the vesting of special powers. In the case of the water companies there had been no dispute about entrustment but in Poplar there had, as here, been no entrustment. The ICO had simply assumed what had to be proved. There was no duty here to operate an airport.

60. In Poplar, the housing association's functions were considerably greater than those of the HAL in any event and as was set out in Daniel Freiman's evidence what was going on here was requiring things to be done and for third parties to do things, that this was not an entrustment of power but it was necessary to address the consequence of HAL's business some of which was environmental.

61. In summary, HAL competes in an open market with competitors to attract airlines and passengers to run a business at a profit as any company is required but in doing so has to comply with a complex legislative regulatory framework. It is a large business with lots of activities but applying the cross-check, it simply was not a public authority.

ICO's Submissions

62. It is submitted that Wisniewski v Central Manchester Health Authority [1998] PIQR P324was not applicable here as regards the evidence adduced. No inferences adverse to the ICO could be taken from it not adducing evidence. It could be distinguished given the facts of Wisniewski this was not a tactical choice to withhold evidence and the ICO had no independent knowledge or nothing in her control that she could be holding back. The ICO had no idea of what knowledge was available to Arora but that they were not a party and the ICO could not compel them to do so.

63. The ICO's position was that for there to be entrustment there was no need for an entity to be appointed by name (see Fish Legal v ICO [2013] EUECJ C-279/12 "Fish Legal (CJEU)" at [43], [44] and [48]).

64. She accepted that Fish Legal (CJEU) did not deal with whether the water utilities had been entrusted, that not being in dispute and that the correct test is that set out in

paragraphs [48] of Fish Legal (CJEU) and [50] of Cross as endorsed by Farbey J in Poplar (UT) that it is the vesting of the powers that is the entrustment.

65. Ms John submitted further that and with regard to the Airport Act 1986 the date of entrustment was not necessarily relevant having had regard to the preamble to the Act and that the means of the nominating companies to be approved by the Secretary of State and assets being transferred was not materially different from Section 6 of the Water Industries Act, the act of entrustment being materially similar. Although it required a certificate of appointment to be granted by the CAA (see Sections 57A and 58) there were things which were given to HAL which were not present in Poplar and that here the effect was to give powers directly to HAL unlike the housing association.

66. It is submitted that, as HAL accepted, Heathrow Airport is a crucial part of the national infrastructure and so it was performing a service in the public interest and that there was no need to show any ongoing statement from it for it to be in the public interest. And, in any event, Heathrow had been handed this duty under the 1986 Act and continues to perform it. It is submitted that the powers were not just vested for an environmental purpose nor was that necessary

67. The ICO accepted that HAL is private but it was formerly part of the state and has a sufficient connection to what the state does. It is a crucial part of the infrastructure, it is what the state does. As with privatised utilities which used to be performed by the state it is an activity which is heavily regulated in terms of accessibility and in terms of price. It was submitted that when applying the cross-check it was still covered.

Response by HAL

68. It was submitted that whether or not there was entrustment was not a new point which had been put by the ICO before and that regard has to be had to Poplar (UT) at paragraphs [80] to [83] as well as [79].

69. It was submitted that the Airport Act 1986 was historic in that Section 1 had been repealed over fifteen years ago and little of the powers set out in Section 58 and 63 of that Act still applied. Insofar as there is the power to seize aircraft, most aircraft are subject to a bill of sale or a mortgage, under which a lender may seize and HAL's power to seize aircraft is a similar power to make sure it is not put behind the lender in recovering debt.

Analysis of the Law

70. We turn to the questions posed at [50-51]. There is no doubt that HAL is a legal person.

71. We consider also that, despite the minor differences between the relevant wordings of Directive and the EIR, that there is no difference in how they are to be applied.

72. The first area of dispute between the parties is as to the means by which HAL has, arguably, come to be performing public administrative functions.

73. This issue was considered by the CJEU in Fish Legal CJEU although the issue was not in dispute. At [52], the CJEU held this:

> 52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, *which are entrusted*, under the legal regime which is applicable to them, *with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law*.[our emphasis]

74. The issue was considered by the Upper Tribunal in Cross, which held at [93] to [95]:

> *93. Linkage between organic and functional public authorities.* The opening reference in paragraph 52 of *Fish Legal EU* to "*administrative authorities defined in functional terms"* provides a clear link between a public authority at the second tier of the hierarchy and the entities which, organically, are *administrative authorities* at the first tier of the hierarchy. This is because it states that this category again concerns *administrative authorities* but defined in functional terms rather than by an organic approach.
>
> 94. In our view, this means that 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.
>
> 95. In our view, by paragraph 52 of *Fish Legal EU* the CJEU captures the need for this link by referring to entities (a) being entrusted with the performance of services of public interest, and (b) being vested with special powers. That combination is important because it is what makes a service of public interest one that counts or qualifies in determining whether the entity is an administrative authority and so a public authority under the functional definition (see paragraphs 39 and 40 above).

75. In Poplar Housing (UT) Farbey J considered in detail the issue of "entrustment" at [58] to [78]. Her conclusion at [77] to [78] is as follows:-

> 77. In her 2019 report to Parliament ("Outsourcing Oversight? The case for reforming access to information law"), the Information Commissioner commented at p.3:
>
> > "In the modem age, public services are delivered in many ways by many organisations. Yet not all of these organisations are subject to access to information laws. Maintaining accountable and transparent services is a challenge because the current regime does not always extend beyond public authorities and, when it does, it is complicated. The laws are no longer fit for purpose."
>
> This Tribunal's task, however, is to interpret the applicable legal instruments in light of the relevant case law. The policy underlying outsourcing is not a matter for the Tribunal.
>
> 78. For these reasons, I have concluded that the CJEU in *Fish Legal EU* lays down a dual test in so far as entrustment is different from the vesting of special powers. The dual test is

expressed in *Cross* which faithfully and correctly applies *Fish Legal EU*. Irrespective of whether it is binding on me, I take the view that *Cross* was correctly decided in so far as it laid down a dual test of(a) entrustment and (b) being vested with special powers. Ground I is therefore dismissed.

76. That is binding on us. It thus follows that there has to be both entrustment *and* a vesting of special powers.

77. In summary, in this case the ICO is seeking to persuade us as it sought to persuade Farbey J [at 58] that entrustment is not conceptually different from the vesting of special powers. We reject that submission for same reasons as did Farbey J in Poplar at [68] to [73] in particular:

> 68. In my view, the critical part of *Fish Legal EU* is para 52 which defines what constitutes a public authority under article 2(2)(b) of the Directive. The test is functional. Public authorities are: "administrative authorities" which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers."
>
> 69. The Court's reference to public authorities as being "administrative authorities" reflects the judgment in C-204/09 *Flachglas Torgan GmbH v Federal Republic of Germany EU:C:2012:71* . In that case, the Court stated (at para 40) that, in referring to "public authorities", the authors of the Directive "intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions." It is not obvious that Poplar may reasonably be regarded as an administrative authority. Neither its obtaining local authority housing stock nor its contractual relations with a London borough nor its status as a registered provider of social housing would seem apt to convert it from a company that supplies housing to an administrative authority.
>
> …
>
> 73. The view that an entity's power to performs its functions must be set down in national law is consistent with other passages of the Court's judgment. The words "by virtue of a legal basis specifically defined in the national legislation which is applicable to them" (at para 48; see above) relate to the empowering of an entity to perform functions, as does the reference to "an entity empowered by the state to act on its behalf' (at para 67; see above). The Court's reference (at para 49) to *Flachglas Torgan* demonstrates that article 2(2(b) refers to entities which are administrative authorities as established in national law and not to entities which may carry out some of the same functions as are performed by the State but which cannot be regarded as bound by legislation to do so.

78. Unlike in Poplar, there is no argument here about contractual obligations giving rise to statutory duties. We are concerned with national legislation itself. We note that the appellant has always maintained, contrary to what was submitted by ICO, that there has been no national legislation which amounts to an act of entrustment. We note also that it is not a privileged undertaker as the High Court's decision was overturned by the Court of Appeal[3]. We accept following Fish Legal (UT) and Cross and Poplar

[3] See R (ota) Heathrow Hub (&or) v SSHD [2020] EWCA Civ 213

Housing (UT) that there must be a discrete legislative or executive measure by which a legal person is empowered by the state to act on its behalf.

79. The ICO points to the Airport Act and in particular, sections 57A and 58, as evidence that there has been an act of entrustment, and that as a "statutory undertaker" HAL is in a position akin to the water companies.

80. Much of the Airport Act 1986 has been repealed over time. Part V of that Act which applies to "relevant airport operators"; we were not given a list of those. Essentially, what is left of Part V and Schedule 2 applies to a group of airports including Heathrow and allows the Secretary of State to authorise a relevant operator to acquire land compulsorily (section 59) but viewed overall, these powers and those set out in the CAA Act (see Airport Act at 59 (6)) are powers primarily dependent on the prior grant of authority to the relevant operator. The powers are of a limited nature and are expressed in terms of facilitating the operation of the airport.

Special powers

81. The ICO submitted that HAL had been vested with special powers, relying on Fish Legal (CJEU) at [56] and, in more detail, Fish Legal (UT) at [106] to [110].

82. The CJEU said this:

> 56. In the light of the foregoing, the answer to the first two requestions referred is that in order to determine whether entities such as the water companies concerned can be classified as legal persons which perform "public administrative functions" under national law, within the meaning of Article 2 (20(b) of Directive 2003/4, it should be examined whether those entitled are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

83. In its decision in Fish Legal, the UT accepted [106] that the issue is a practical one "Do the powers give the body an ability that confers on it a practical advantage to the rules of private law?

84. The UT then discussed the powers given to the water companies to compulsorily acquire land, and to make byelaws which could give rise criminal offences, concluding [107] and [110] that they did, adding [110]:

> 110. The power need not be unique to a particular body, sector or industry. Mr de la Mare repeatedly referred to other bodies or industries that had the same or similar powers. That does not show that the power cannot satisfy the special powers test. The extent to which the CJEU's judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide. As Judge Jacobs noted in his reference, the reasoning in these cases is potentially relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecoms. It will have to be applied to those and other bodies as and when cases arise. The outcome cannot be assumed for the purposes of deciding the cases before us.

85. We turn then to applying these principles to the facts of this appeal. In doing so, we accept the evidence of Mr Freiman. It was not challenged, and in the event, there was no need for HAL to rely on Wisniewski which we consider is not applicable to the facts of this case in any event.

86. We consider that there is not in the legislation applicable to HAL, an equivalent of Section 6 of the Water Industry Act 1991 under which a company is appointed to be an undertaker for an area, an act which then under section 6(2) has a large range of duties, obligations and so on of a statutory nature in the whole of a geographical area. The process of appointment is set out in some detail in sections 8 to 10.

87. Under sections 6 and 36 of the Water Industry Act there are a whole host of provisions which apply to the water industries. There are also by operation of section 3 (d) duties on undertakers to exercises powers having regard to a wide range of factors relating to conservation, protection of flora and fauna, beauty of a local area, and so on. We have not been shown any similar requirements applicable to HAL we find that the nature of the duties, and responsibilities conferred on the water companies, is different from how the legislative scheme applies to HAL.

88. The respondent's secondary argument is more historical in nature, citing the privatisation of airports through the Airport Act and the creation (and then sale of) BAA. We find little merit in that argument.

89. As noted above, the airport at Heathrow was initially a private interest. It was taken into public ownership but later privatised along with other airports as large corporation. That was well over 30 years ago, and the structure of its ownership has changed radically since then, the legislative intent being to stimulate competition in the air transport, hence it having to compete with other airports inside and outside the United Kingdom. Much of the regulatory framework is designed to do that. But it does not alter the fact that HAL is a commercial enterprise operating in a market, seeking to make a profit for its shareholders in competition with other businesses of a similar nature.

90. The fact that the provision of airport facilities was for a time a function of the state is not a factor that attracts much weight; there is nothing to which we have been taken to show that that is so or that given from Fish Legal (CJEU) that the test in determining that issue is not a national law test, that there is something inherent that running an airport, however large, is the provision of a public service akin to, for example, the provision of water or sewerage. In those cases, there is effectively a monopoly within a specific geographic area; a consumer has no choice of provider. And, we consider, there is an obvious difference between the provision of water, sewerage, gas, and electricity and the provision of an airport; the former are essential to everyday life but the latter is not in the same category.

91. Further, as HAL submits, the role of the state fluctuates over time, as is shown by the legislative history set out at [25] to [30] above shows. We accept the submission that Parliament has, through the legislation over the past 35 years, shown a consistent

intent that the state should not be in the business of operating airports, and has moved away from the state monopoly model. It is notable that the statutory duty under the 1975 Act to operate aerodromes was not maintained in the 1986 Act enabling privatisation.

92. As noted in Cross at [96], "services of public interest" is not a term of art, and account has to be taken of what government ordinarily does. Although not binding on us, the First-tier Tribunal in Poplar (FtT) did consider this issue in some detail, and its reasoning was approved by Farbey J in Poplar Housing (UT)

93. A key detail we find is in Poplar (UT) at [113 i)] where it was noted that the provision of subsidised housing was properly a government function, given that was the antithesis of private commercial activity. Also identified were the continuing involvement of the state in providing social housing, a close relationship with the local housing authority. That is significantly different from how HAL operates.

94. 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.

95. HAL has a licence to operate an airport. It does so on a conventional basis generating profits for its shareholders. Passengers and airlines are free to use other airports with which Heathrow Airport is in competition, albeit that that competition is not straightforward given its relative size, hence Heathrow is subject to economic regulations as is Gatwick.

96. We accept from the evidence that HAL does have a large number of powers conferred by various legal instruments, but we do not find any instrument by which HAL has been made responsible by the state to act on its behalf to perform a service of public interest

97. Accordingly, for these reasons, we are not satisfied that there has been an entrustment, and thus first part of the two-fold test has not been met, and the appeal falls to be allowed on that basis.

98. We have, nonetheless, gone on to consider in the alternative, whether the powers that HAL has are special powers for the purpose of performance of services of public interest.

99. We accept that Heathrow Airport has a number of powers in relation to the compulsory acquisition of land and the making of byelaws which are not normally given to public companies or individuals and which are broadly similar to those identified by the UT in Fish Legal(UT) at [107] and [110].

100. We accept that there are powers granted to make bylaws and to develop land. The latter is, we consider, not unusual in that permitted development is conferred under planning law in many different ways, and developing land is not, we consider, *per se*

a public administrative function. As regards the power to make byelaws, we accept Mr Coppel's submission that the power to make bylaws is relatively common in other areas, such as pasture land and markets.

101. Despite these submissions, we consider that there is not a sufficient basis here to distinguish Fish Legal (UT) as regards the powers of compulsory purchase and the power to make byelaws, both of which were identified by the Upper Tribunal as being special powers. We accept the Upper Tribunal's reasoning on those points, even if it were not binding on us. It is the existence of the powers even if limited and not frequently used that makes the difference.

102. It does not, however, follow that because special powers have been vested that this amounts to entrustment. That would, in effect, render redundant the requirement for there to be a distinct entrustment, contrary to the binding decisions in Fish Legal (UT) and Poplar (UT)

103. We have next to consider, in the alternative if the powers have to be environmental. There is some indication in Farbey J's decision in Poplar (UT) that that is so [89] and indeed in Cross at [83] to [92] albeit that is obiter. We did not hear detailed argument on how article 2 (2)(b) is to be interpreted but we see no reason not to follow the conclusion that the entity in question's public administrative functions (if they exist which in this case we have found they do not) must include specific duties, activities or services relating to the environment. Given the wide powers HAL has in relation to noise and emissions, we would have been persuaded that this test were met.

104. Finally, we turn to the "Cross-check".

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.

107. For all of these reasons, we conclude that HAL is not a public authority within the meaning of the EIR and we allow HAL's appeal.

Signed

Date 16 June 2021
Promulgation date 18 June 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul
Sitting as a Judge of the Upper Tribunal