Neutral Citation Number: [2019] EWCA Civ 2241

Case No: C3/2018/2012

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL,
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Wikeley
IGIA/2764/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2019

Before:
LORD JUSTICE McCOMBE
SIR ERNEST RYDER
(SENIOR PRESIDENT OF TRIBUNALS)
and
LORD JUSTICE DINGEMANS

- -

Between:

THE DEPARTMENT FOR TRANSPORT	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	
CHRISTOPHER HASTINGS	**Respondents**

Rory Dunlop QC (instructed by the Government Legal Department) for the Appellant
Laura Elizabeth John (instructed by Richard Bailey of the Information Commissioner's Office) for the First Respondent
The Second Respondent in person

Hearing date: 26 November 2019

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APPROVED (OPEN) JUDGMENT

Lord Justice McCombe:

Introduction

1. This is the appeal of the Department for Transport ("DfT") from the decision of the Upper Tribunal (Administrative Appeals Chamber) (Upper Tribunal Judge Wikeley) ("UT") of 31 May 2018. By its decision the UT allowed the appeal of the Information Commissioner ("the IC") from the decision of the First-tier Tribunal (General Regulatory Chamber) (Judge Peter Lane, Mr D Sivers and Ms A Lowton) which had allowed the DfT's appeal from the decision of 20 October 2015 of the IC requiring the disclosure of certain information relating to a meeting between HRH The Prince of Wales and Mr John Hayes MP, a Minister at the DfT, held on 10 September 2014. The disclosure was directed by the IC after considering a complaint made to the IC by the Second Respondent, Mr Christopher Hastings, a journalist, following the rejection of his request for disclosure made to the DfT.

2. At the initial stages the DfT declined Mr Hastings' request, principally in reliance upon s.37(1)(aa) of the Freedom of Information Act 2000 ("FOIA"). That provision states as follows:

> "(1) Information is exempt information if it relates to— …
>
> (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne."

The exemption works to exclude this type of information from the general right of access to information held by public authorities under FOIA. The DfT also relied upon exemptions from the obligation to disclose relating to "personal information" and "information provided in confidence" (ss.40(2) and 41).

3. Mr Hastings complained to the IC that the DfT should have considered his request under the Environmental Information Regulations 2004 ("EIR") rather than under FOIA. Information which is properly within the ambit of the EIR is exempt from disclosure under FOIA but is subject to the different disclosure and exemption regime under those regulations: see FOIA s.39. There is no such absolute exemption for communications with the heir to the Throne as is found in s.37(1) (aa) of FOIA. The primary disclosure obligation under the EIR is to be found in regulation 5, requiring a public authority which holds "environmental information" (subject to exceptions) to disclose such information on request.

4. The EIR implements the United Kingdom's obligations arising under the EU Directive 2003/4/EC on public access to environmental information. That Directive gave effect to the EU's international obligations arising under the Aarhus Convention 1998 on the same subject.

5. The question that arises in this case is as to the application of the definition of environmental information in the EIR to the information in issue. Do the EIR apply or is the information not "environmental" and, therefore, subject to FOIA and to the absolute exemption from disclosure in s.37(1)(aa)? The relevant definition in the EIR is in these terms:

> "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—
>
> > (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> >
> > (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
> >
> > (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
> >
> > (d) reports on the implementation of environmental legislation;
> >
> > (e) cost-benefit and other economic analyses and assumptions used within the frame work of the measures and activities referred to in (c); and
> >
> > (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

The material part of that definition for present purposes is category (c).

Background

6. Mr Hastings is a journalist working for a Sunday newspaper and had an interest in the meeting in September 2014 between the Prince of Wales and ministers at the DfT and the Department of Communities and Local Government ("DCLG") respectively. Mr Hastings made a disclosure request to each Department, relying expressly upon the EIR, in essentially similar terms. That made to the DfT was as follows:

> "My request concerns a meeting which took place between John Hayes MP and His Royal Highness the Prince of Wales on 10 September 2014.
>
> > 1. In the case of this meeting can you please provide copies of all correspondence and communications (including emails) between Mr Hayes and His Royal Highness the Prince of Wales which in any way relates to the meeting and the topics

> under discussion. Please note that reference to His Royal Highness the Prince of Wales should also include his Private Secretary and his private office. Please note that the reference to the Minister should include his Private Secretary and or his private office. This correspondence and communication could have been generated prior to the meeting taking place or it could have been generated afterwards.
>
> 2. In the case of this meeting can you please identify any other representative and or employees from the department who accompanied Mr Hayes? Can you please identify all other individuals at the meeting irrespective of whether they are connected to the department.
>
> 3. In the case of this meeting can the department please provide copies of all documentation, correspondence and communications (including emails) held by the organisation which in any way relates to the meeting and the topics under discussion at the meeting.
>
> 4. In the case of this meeting can the department please provide a list of all environmental topics covered at the meeting.
>
> 5. Can the department please provide copies of any briefing notes or similar which were issued to Mr Hayes and or any other departmental staff member or representative prior to the meeting taking place.
>
> 6. Can the department please provide copies of any correspondence and communications (including emails) between Mr Hayes and any other departmental employee which in any way relate to the meeting and the specific topics under discussion at those meeting. These communications could have predated the meeting or it could have been generated afterwards."

7. In the response to that request, the DfT informed Mr Hastings that it did not hold information within categories 1 or 6. It disclosed the name of the minister attending the meeting (Mr Hayes), but declined to identify any of the others present. Disclosure of the remainder of the material requested was refused on the basis that it was not considered to be environmental information. The decision was maintained after a further internal DfT review requested by Mr Hastings.

8. Following the blanket refusal of DfT to disclose further information relating to the meeting, the IC upheld Mr Hastings' complaint, taking the view that most of the disputed information held by DfT (with some exceptions) was indeed "environmental". A Decision Notice to that effect was given on 20 October 2015, with reasons stated in part in the Notice itself and in part in a confidential annex, the bulk of which dealt with the question of whether the information sought fell to be dealt with under the EIR or under FOIA. The DfT appealed to the FTT.

Proceedings in the FTT and UT

9. By the time the matter reached the FTT, however, matters had taken on a rather different complexion. DCLG had relented to some degree in its opposition to Mr Hastings' request and had disclosed certain information. Shortly before the hearing before the FTT on 13 April 2016, the DfT also indicated its willingness to disclose substantial parts of the information held, conceding that those parts were environmental in nature within the EIR definition. As a result, the IC's position before the FTT was that the remainder of the information (which was within a relatively small compass) also fell to be treated as environmental information. The parties and the FTT agreed that the practical way forward was for the categorisation of the remaining disputed information to be decided as a preliminary issue. To the extent that the FOIA regime was then found to apply, the DfT's appeal would have to be allowed as the relevant information would be absolutely exempt under s.37(1)(aa). If the EIR applied, the FTT would proceed to hear evidence and submissions on the questions of public interest in disclosure/non-disclosure arising under the EIR.

10. The argument before the FTT then developed by reference to the 2008 decision of the former Information Tribunal in *Department of Business, Enterprise and Regulatory Reform v Information Commissioner & anor.* EA/2007/0072 ("*DBERR*"). In that case, the Information Tribunal had considered the approach to be adopted when the information in issue is "mixed" in nature, i.e. containing both environmental and other information potentially outside that definition. As the UT noted in the present case the Information Tribunal's approach in *DBERR* had "stood the test of time" in the absence of other authority. The FTT sought to follow that decision. However, as I will note later, the law has moved on somewhat since *DBERR* (in particular, in the decision of this court in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney* [2017] EWCA Civ 844 ("*Henney*")) and it is necessary, therefore, to take those later developments into account.

11. The crux of the FTT decision appears in paragraphs 20 and 21. The FTT noted the submission made by Ms John for the IC that it was problematic for the IC and for the FTT to undertake their own exercises in "hypothetical redaction" or "blue pencil" work in a case of this type. The FTT decision continued as follows:

> "20. …As Mr Dunlop in effect acknowledged in oral argument, the solution to that potential problem lies in requiring the public authority to make good its case, by undertaking the relevant work and presenting the result to the Commissioner or Tribunal. The Tribunal finds that the correct approach is, accordingly as follows.
>
> > (1) If a public authority contends that information associated with environmental information is exempt from disclosure by reason of FOIA, the authority has to identify what the allegedly exempt information is.
> >
> > (2) Where the authority does so, the Commissioner/Tribunal will decide if the environmental information is coherent/comprehensible without the other information. As Miss John submits, that would be a question of fact, to be determined in each particular case.

> (3) If the Commissioner/Tribunal concludes that the environmental information is not coherent/comprehensible, then both sets of information must be disclosed as environmental information subject to the EIR regime unless the predominant purpose of the entire information is not environmental.
>
> (4) The application of the "predominant purpose" test serves, amongst other things, to avoid the "tail wagging the dog", in that the presence of a small amount of environmental information within an overall set of information that is non-environmental will not cause the entire set to be disclosed in the face of a FOIA exemption, which is not present in the EIR.
>
> 21. We have earlier recorded that the DfT accepted, in the course of the hearing, that certain words within otherwise now disclosed passages should, in fact, be disclosed. The words in question are, in each case, "lines to take". We are fully satisfied that the remaining disputed material (marked in green in the closed bundle) is not environmental information and that its severance from the disclosed environmental information does not render the latter incoherent or unintelligible. Whilst we accept that the disclosure of both sets of information might render the whole more interesting from a journalistic perspective, the disclosed information makes perfect. sense on its own. As is plain, it is briefing material in connection with the meeting between Ministers and the Prince of Wales. We are entirely satisfied that the withheld material is not, in its own terms, environmental information within the meaning of regulation 2 of the EIR. The disclosed material, by contrast, is about the government's activities in the environmental field, as well as the Prince's project in Poundbury, Dorset. Further details about the withheld information are contained in the Closed Annex to this decision."

12. Thus, the FTT determined the preliminary issue in favour of the DfT and allowed the appeal. The IC appealed to the UT, with permission granted by UT Judge Wikeley. In his substantive decision, the Judge Wikeley found that the FTT, as a matter of law, had applied the wrong test.

13. The UT accepted the submission for the IC which it recited at paragraph 56 of the decision as follows:

> "…the Tribunal had started with the disaggregated information in isolation in 'silos' and had then worked backwards from there to the issue of classification. Accordingly, Ms Morrison argued, the Tribunal had failed to apply the contextualised and holistic approach to the definition of "environmental information" mandated by *Henney*, by which information had to be viewed in the wider context of what it was 'on'."

The UT gave three reasons for that view. They were these:

"58. First, in paragraph [20] of its decision, the Tribunal set out, in four steps, what it described as "the correct approach" for dealing with cases where a document contains what the public authority asserts is both environmental and non-environmental information (see paragraph 22 above). Although in part the Tribunal appears to be following the line taken in *DBERR v IC and FoE* (see paragraphs 35 and 36 above), the difficulty with its approach is that the test as set out here by the Tribunal turns on the coherence or comprehensibility of the component parts of the composite information as the public authority has identified them. It does not in terms consider what the information is 'on'. A public authority may well be able to disaggregate information which it acknowledges as being environmental information in such a way that the material disclosed under the EIR is coherent and comprehensible. Yet this may result in other information which is in reality likewise 'on' the matters identified in the regulation 2(1) definition as being severed, to be dealt with separately under FOIA. It is necessary to consider the subject matter of both parts of the disputed information, and the link between them, as well as taking a holistic approach to the information, in order to decide whether the supposed non-environmental information can indeed be properly regarded as being 'on' something other than one of the matters enumerated in the regulation 2(1) definition."

59. Secondly, it is plain from paragraph [21] of the Tribunal's decision that it applied the four-step test identified in the previous paragraph. The remaining disputed material (marked in green in the closed bundle and running to about two pages of A4, albeit the information in question was generously laid out) was found to be not environmental information because "its severance from the disclosed environmental information does not render the latter incoherent or unintelligible". There is really no way of hiding from the reality here – the Tribunal was assessing the status of the still disputed information by reference to its impact on the already disclosed environmental information rather than in its own right. Similarly, the (very short) closed annex to the Tribunal's decision, as with paragraphs [20]-[21] of its open decision, focuses on what is essentially a coherence test for the already disclosed information.

60. Thirdly, the Tribunal went on in paragraph [21] of its decision to confirm that it was "entirely satisfied that the withheld material is not, in its own terms, environmental information within the meaning of regulation 2 of the EIR" (emphasis added). This was in contrast to the disclosed information which was about government's activities in the environmental arena (and the Prince's project at Poundbury). Information on the latter subjects on any analysis obviously falls within the definition of environmental information. But, as the Court of Appeal made clear in *Henney*, "the statutory definition

> in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental" (at paragraph 45)."

14. The UT proceeded to give "Guidance on documents that include both environmental and other information". It suggested the following methodology:

> "69. First, the starting point for a tribunal's analysis is that "environmental information" in regulation 2(1) of the EIR must be construed broadly (see e.g. recitals (1), (2), (10) and (16) and Article 1 of Directive 2003/4/EC and the case law discussed above).
>
> 70. Second, the document containing the requested information must be considered as a whole. Tribunals should ask themselves whether the requested information as a whole is information 'on' one or more of the matters identified in the regulation 2(1) EIR definition.
>
> 71. Third, where the public authority has disaggregated the information in the document into information which it accepts is environmental information (and so governed by the EIR) and information which it considers is other information (and so subject to FOIA), the tribunal must ask itself whether those component parts are separately information 'on' one or more of the matters set out in regulation 2(1) of the EIR. To that extent the approach set out by the information tribunal in *DBERR v IC and FoE* (at paragraph [29]) is helpful."

15. Having found that there was an error of law in the FTT decision, the UT proceeded to remake the decision on the preliminary issue of whether the still disputed information was "environmental" or not. It concluded that it was "environmental" for reasons given principally in paragraphs 84 to 86 of the decision, as follows:

> "84. So what then is the "measure or activity that the disputed information is 'on'"? Mr Dunlop would have me decide that it was simply "administrative information relating to the Prince of Wales' attendance" at the meeting in question. I do not accept that submission for two inter-related reasons.
>
> 85. First, Mr Dunlop's characterisation or description of the information is an unduly narrow reading. In any event, as already noted, the question is not whether or not the information in dispute is in some way intrinsically environmental information. Rather, a broad and purposive approach must be taken, and in my assessment the information in question provides the context to better understand the already released information. The released environmental information is essentially a series of bullet points about housing policy which, taken by itself, would not look out of place in a party political manifesto. The disputed information sets the context for that information – in much the same way as do the three words "lines to take", which appear at the start of paragraphs 6 to 9 inclusive of the document and which were released at the 11th hour at the Tribunal's

> instigation. It is not simply stand alone "administrative information" but rather part of a briefing note 'on' the environmental subject in hand.
>
> 86. Second, the measure or activity that the released information was 'on' was, for the most part, government policy on housing issues, and government policy on housing is self-evidently something that will affect or is "likely to affect the elements and factors referred to in (a) and (b)" of the relevant EIR definition. The disputed information was produced for the express purpose of providing the framework for the discussion of those policies. While it was certainly not crucial to a full understanding of the released information, that is not the proper test to be applied. The disputed information was more than merely connected to, or incidental to, that other plainly environmental information."

The judge also added, as an additional reason (by reference to the recitals to the Aarhus Convention) that "Greater public access to environmental information is thus an end in itself." (With respect, I think Mr Dunlop was correct in his submission before us that this last reason involves some circularity of reasoning.)

16. Accordingly, the UT allowed the IC's appeal and remitted the case back to a differently constituted FTT to determine the applicability of any of the exceptions to disclosure of environmental information under the EIR. The UT refused permission to appeal to this court, saying (principally) that the grant of permission should be a question for the Court of Appeal itself. The DfT now appeals with permission granted by Asplin LJ by her order of 6 February 2019.

Grounds of Appeal

17. There are three grounds of appeal, as follows:

> "a. Ground 1: The Upper Tribunal erred in law in setting aside the decision of the First-tier Tribunal ("FTT") when the FTT had made no error of law.
>
> b. Ground 2: The Upper Tribunal erred in law in its approach to whether and how information should be separated in order to facilitate consideration of whether it is environmental.
>
> c. Ground 3: The Upper Tribunal erred in law in applying an incorrect test when considering whether the information was environmental."

Open/Closed Sessions

18. At the start of the hearing of the appeal, Mr Dunlop QC for the DfT applied for a direction that we should hear the appeal by way of open and closed sessions. Ms John did not object to a closed session but she queried whether it was necessary or whether all could be dealt with on the open materials; she submitted that the arguments advanced by the DfT in its closed submissions were essentially the same as appeared in the open skeleton arguments for the parties. Mr Hastings adopted Ms John's submissions on this point.

19. We granted Mr Dunlop's application. My reasons were these.

20. At all stages below, part of the proceedings had been conducted on closed materials and in closed session. The decision-makers at each level had clearly gained benefit from consideration of the closed arguments. It seemed important that we should be able to consider the (relatively slender) disputed materials fully with counsel for the DfT and the IC, without the constraints in considering potentially non-disclosable materials imposed by an open hearing. Indeed, as will appear below, for my part, it struck me that a vital part of the decision in the present matter was to consider the materials themselves, free from excessive theorising about principles that might be applied to cases of this type generally. Further, given the stance of the IC on the appeal, it seemed to me that the interests of the public in disclosure of disputed material would be adequately protected by the submissions of Ms John for the IC.

The Appeal and my Conclusions

21. Before turning specifically to the grounds of appeal, I wish to make some general observations about the practicalities of resolving the dispute in this case, which may well apply in other cases too.

22. The present case concerns information of potentially "mixed" character: some undoubtedly (and now undisputedly) environmental material within the EIR and some which the DfT contends is not environmental and which, in this case, should fall within the FOIA regime and accordingly within the absolute exemption concerning information relating to communications with the heir to the Throne. The disputed information is not large in volume.

23. With assistance of counsels' submissions on the relevant law – now principally the decision of this court in *Henney* – it was not difficult in the end to apply that law to the materials and to reach a decision on the specific materials in issue. I found that that relatively easy decision was clouded by having to analyse proposed theoretical tests for resolving issues of this kind which had emerged from the discussions in the decisions below. This is not a criticism in any way of the very careful and rigorous decisions of both Tribunals nor it is a criticism of counsels' submissions before us. It is simply an observation that, without resorting to general principles that might be applied in *all* cases of potentially "mixed" information, it was an easier task simply to look at the relatively small amount of disputed material in the present case and then reach a decision one way or the other. In short, with the assistance described, when one went to the closed material, without too much theorising, all fell into place.

24. The IC and the FTT, however, had to determine the rather different ranges of disputed material in issue respectively before them, before the decision in *Henney* was delivered. The *DBERR* case had, however, highlighted the potentially daunting task for the IC and the Tribunal in conducting their own exercises in dividing one category of information from another and had produced a test of "predominant purpose" of documents in issue. The FTT here, drawing on that decision, placed the initial segregation task upon the relevant public authority and focussed on the question of whether the information that was accepted to be environmental in nature was "coherent/comprehensible" without other information. This opened the way for the IC's successful submission before the UT that the FTT had failed to apply a contextual and holistic approach as, it was submitted, was mandated by *Henney*. The IC also submitted that the FTT approach also

tended to put constituent parts of the released information and the disputed information into isolated "silos".

25. The decision in *Henney* was available to the UT when it reached its decision and that Tribunal, therefore, had to consider whether the decision of the FTT was consistent with the law as explained in *Henney*. Thus, the UT was bound to consider the theoretical approach to "mixed" information enunciated by the FTT and to "correct" that approach in so far as it thought necessary.

26. In *Henney*, the dispute between the parties concerned the government's Smart Meter Programme ("SMP") introduced pursuant to the EU Electricity Directive (Directive 2009/72/EC) and in particular, whether a project assessment review ("PAR") of the communications and data component of the programme was a "measure" (reg. 2(1)(c)) likely to affect the environmental "elements and factors" (in reg. 2(1)(a)). The UT had concluded first that,

> "Taking a broad view of the regulation, and bearing in mind the "bigger picture" it is accurate to say that the PAR is information on the SMP as a whole, which …is plainly a relevant measure for the purpose of the regulation …
>
> …[W]ithout the communications and data system there is no SMP".

The UT had also found,

> "… the contents of this PAR, with its focus on the communications and data component, is sufficiently closely connected to the success of the SMP overall. Furthermore, the SMP's objectives include relevant environmental impacts. The disputed information accordingly falls within regulation 2(1)(c)."

27. Ultimately, the court in *Henney* dismissed the appeal against the UT's finding that the PAR was environmental information. However, the court qualified some of the UT's approach to the decision. I return to these qualifications below. In his judgment (with which David Richards and Irwin LJJ agreed), Beatson LJ set out certain overriding principles (in paragraphs 11-17).

28. First, Beatson LJ noted that the EIR must be interpreted, as far as possible in the light of the wording and purpose of the Directive, giving effect to international obligations under the Aarhus Convention. This emphasises the importance of the obligation to provide access to environmental information (paragraphs 14 and 15). Secondly, it is well-established that the term "environmental information" is to be given a wide meaning to avoid "… the effect of excluding from the scope of the directive any of the activities engaged in by the public authorities"; *Glawischnig v Bundesminister für Sicherheit und Generationen* (C-316/01) EU:C2003:343; *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539. However, thirdly, it is to be noted from *Glawischnig* that the "broad meaning" approach does not mean that it is right,

> "to give a general and unlimited right of access to all information held by public authorities which has a connection, however

> minimal, with one of the environmental factors mentioned …. To be covered by the right of access it establishes, such information must fall within one or more of the … categories set out in that provision."

29. Fourthly, the qualifications to the UT decision in *Henney*, imported by Beatson LJ (to which I have referred above), appear at paragraphs 35 and 36 of his judgment, where he said:

> "… in my judgment consideration of the issue in this case is not assisted by using the phrase the "bigger picture". Its use can appear to go beyond the familiar principle of construction that determines meaning in the light of the relevant context. It can also deflect attention from the statutory definition in regulation 2(1)(c) and lead to an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal. That was precisely what the CJEU in *Glawischnig's* case (see [17] above) stated is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.
>
> 36. Mr Choudhury is thus correct to submit that an approach which is not focussed on the statutory definition is liable to introduce uncertainty and error."

Beatson LJ continued in paragraph 37, as follows:

> "37. There is an important difference between the definition of "information" in section 1(1) of FOIA and the definition of "environmental information" in section 2(1)(c) of the EIR. The former focuses on the information itself: see *Independent Parliamentary Standards Authority v Information Commissioner* [2015] EWCA Civ 388, [2015] 1 WLR 2879 at [35] – [36]. The latter also focuses on the relevant measure rather than solely on the nature of the information itself. It refers to "any information" "on … (c) measures … affecting or likely to affect the elements and factors referred to" in regulation 2(1)(a) and (b)" (emphasis added). It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on"."

30. Fifthly, in paragraphs 39 of the judgment, Beatson LJ rejected the idea that the language of the directive required that the relevant measure be that which disputed information is "primarily" "on" for the purposes of the regulation. Equally, in paragraph 41, the learned Lord Justice rejected any requirement that the information in issue should be "directly or immediately concerned" with a relevant measure. This, it was said, would preclude consideration of the context which would be contrary to the principles of construction summarised in the earlier passages of the judgment.

31. Sixthly and finally, Beatson LJ said this in paragraph 43 (a paragraph upon which much attention was focussed in the arguments before us):

> "43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."

32. In seeking to provide "guidance" for the general run of cases where "mixed" information is in issue, it seems to me that one will rarely need to do more than apply these principles to the information as a whole, in order to see whether (in the context of the whole and applying a broad and holistic view) the disputed elements of the information are "on" the "measure" in question. I would not wish to expand on those principles in the present case.

33. A Tribunal or court is perhaps also wise to exercise caution when dealing with information which may lie on the borderline of information generally disclosable under the EIR and information which may attract an absolute exemption from disclosure under FOIA.

34. It will be recalled that DfT's first ground is that there was no error of law in the FTT decision and that, therefore, the UT had no jurisdiction to interfere with the FTT decision: see s.12(1) of the Tribunals, Courts and Enforcement Act 2007. In my judgment, quite understandably, the FTT decision did involve the making of an error on a point of law. The error was occasioned, at least in part, by not having the advantage of seeing the decision in *Henney*. It seems to me that this led to an over rigid segregation approach, based upon the question of the coherence and comprehensibility of the undisputed environmental information *after* separation of that information from the disputed material. That was contrary to the broader approach counselled in *Henney*. I would, therefore, reject Ground 1 of the DfT's Grounds of Appeal.

35. Nor do I think, with respect, that the decision of the UT reflects fully the principles stated in *Henney*. In the present case, it is common ground that the "measure" in question, for the purposes of regulation 2(1)(c), is government housing policy. As Beatson LJ said in paragraph 37 of his judgment, the first step is to is to identify the relevant "measure". On this issue, I accept Mr Dunlop's argument that the released information contains the material elements on that measure. The information, provided

by the additional material (including the names of those attending), does not help one better to understand the measure in question (i.e. the policy itself) (c.f. UT judgment, paragraph 85). In my view, the UT did not clearly identify the "measure" in question and therefore failed to focus sufficiently on whether the remaining information was information "on" that measure. Reference to "context" adds nothing in this case.

36. In *Henney*, without the communications and data system there was no SMP (as counsel put it before the UT in that case). Here it is not the case that without the withheld information there is no government housing policy. In short, in my judgment, "the framework for the discussions of [the] policies" at the meeting (UT judgment, paragraph 86) was not information "on" the policies. The withheld information, therefore, said nothing about the policies themselves; i.e. it gave no information ***"on"*** the policies. (I will give more reasons for this view in the closed judgment to be delivered at the same time as this open judgment.)

37. I consider that the outcome of the present appeal can, therefore, be resolved simply by reference to Ground 3 and by deciding whether the still disputed information is environmental in nature, applying the law as stated in *Henney*.

38. Ms John's argument on this point can, I think, be summarised by reference to paragraph 50 of her skeleton argument where she said this:

> "… the UT correctly asked itself what the Disputed Information was 'on' (UT Judgment §84 [CB/6/83]) and concluded that is "not simply stand alone '*administrative information' but rather a briefing note 'on' the environmental subject in hand*" (UT Judgment §85 [CB/6/83]). It also held that it was "*produced for the express purpose of providing the framework for the discussion of [government housing] policies*." (UT Judgment §86 [CB/6/83]). Those conclusions reflect a correct application of the approach outlined in *Henney* para 43 to the determination of what the Disputed Information is 'on'. The UT considered the Disputed Information in its wider context, including the purpose for which it was produced and its context within the rest of the information requested. The Appellant's argument that the UT effectively asked itself whether the Disputed Information was 'on' the Disclosed Information is without foundation."

39. I do not accept that the UT approach, as cited by Ms John in this paragraph, is a correct one. In the present case it does not appear to me that all the contents of a briefing note amounted to information on the relevant "measure" at all. The disputed information may provide something, originally emanating from a third party about the measure, but that is not information "on" the measure itself. The same is true of the identities of those who attended the meeting in September 2014.

40. Mr Hastings, in short submissions, adopted the arguments presented by Ms John. Additionally, he also addressed a point made by Ms John in her skeleton argument in which she offered an example of information in one document that could be said to be "on" distinctly separable subjects, e.g. "on" climate change and "on" the Budget respectively. Ms John had submitted that the present case was not of that type. Mr Hastings pressed the argument further saying that if he made an EIR request about "the Budget" he would expect to get a great deal of information disclosed, not simply on

strictly "green" issues. I see Mr Hastings' point, but I do not think that it takes the argument further on the particular information in issue in this case.

41. In his open reply, Mr Dunlop tried to provide us with further suggestions as to the "guidance" that could be applied in cases of the present type, where the information in issue is of a "mixed" character. He did so in seven paragraphs of a carefully constructed "speaking note", upon which Ms John offered her own comments. I appreciated the efforts made by both counsel in this regard. However, I am reluctant to go down this road or to do more than apply what I take to be the law as explained in this court's judgment in *Henney*. This I have endeavoured to do. In undertaking this task in the present case, involving a very small amount of material, I have found the answer to be relatively straightforward. I would not wish to embark upon giving more "guidance" which might turn out to be less than helpful in a more complex case.

42. In my judgment, that is enough to resolve the present appeal, which I would allow on Ground 3, and would hold that the information still in dispute is not "environmental information" within the definition in regulation 2(1) of the EIR. I do not find it necessary to address Ground 2 separately and specifically. Mr Dunlop's skeleton argument on this ground seemed to me to be an amplification of his submission that the FTT had not erred and amounted largely to an endeavour to uphold the principles that the FTT enunciated in paragraph 20 of its decision which, for the reasons given above, I would not endorse.

43. For completeness, I set out in an annex to this judgment the "gist" of the closed session which we held, as set out in a short document agreed between Mr Dunlop and Ms John.

Conclusion

44. For these reasons, I would allow the appeal.

ANNEX

> "In summary, the parties developed the arguments they had made in open on the Appellant's Ground 3, by reference to the disputed information; the Confidential Annex to the Commissioner's Decision Notice; and the Closed Reasons of both the First Tier Tribunal and Upper Tribunal.
>
> In particular:
>
> Mr Dunlop QC, on behalf of the Appellant, took the Court through the closed material confirming which information remained withheld and which had been disclosed.
>
> Mr Dunlop made further submissions as to the context and purposes of the withheld information. Mr Dunlop argued that this particular information is not "on" the Government's housing policy (that being the relevant "measure" for the purposes of Regulation 2(1)(c) EIR in this case), and that it would not further public debate on the Government's housing policy to disclose it. It is therefore not "environmental information" within regulation 2(1)(c) EIR.

> Mr Dunlop then referred the Court to the conclusion in the Confidential Annex to the Commissioner's Decision Notice, which was upheld by the Upper Tribunal in the Closed Reasons for its judgment, and explained why in the Appellant's view the conclusions were incorrect.
>
> Ms John, on behalf of the Respondent, responded to the arguments set out in the Appellant's closed written submissions. She referred to and relied upon arguments she had made in open in response to Ground 3, as well as the closed reasoning of the UT.
>
> Ms John argued that, applying the Court of Appeal's judgment in *Henney*, in particular the guidance in paragraphs 39, 41, 42 and 43, the withheld information is "on" Government housing policy and falls within the definition of "environmental information" in regulation 2(1)(c) EIR.
>
> In reply, Mr Dunlop QC argued that the Commissioner went too far with her approach."

The Senior President of Tribunals:

45. I agree.

Lord Justice Dingemans:

46. I also agree.