IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0196
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50462812, dated 3 September 2012

Appellant: PETER H SAND

First Respondent: INFORMATION COMMISSIONER

Second Respondent: FOREIGN AND COMMONWEALTH OFFICE

Heard at Victoria House, London WC1

Date of hearing: 1 May 2014

Date of decision: 28 July 2014

Before

Andrew Bartlett QC (Judge)
Andrew Whetnall
David Wilkinson

Attendances:

For the Appellant: Paul Harris SC

For the 1st Respondent: Robin Hopkins

For the 2nd Respondent: Martin Chamberlain QC, Julian Blake

Subject matter:
Environmental Information Regulations 2004 – 'public authority' not in United Kingdom – whether Information Commissioner had power to issue decision notice

Cases:
Quan Yick v Hinds (1905) 2 CLR 345
Attorney General for Alberta v Huggard Assets Ltd [1953] AC 420
Nyali Ltd v Attorney General [1957] QB 1
Christian v The Queen [2006] UKPC 47
Chagos Refugees Group v IC and FCO EA/2011/0300, 4 September 2012
Dunne v IC and FCO EA/2012/0257, 26 September 2013
Fish Legal v IC C-279-12, ECJ, 19 December 2013

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the application by the Foreign and Commonwealth Office (FCO) to strike out the appeal.

The Tribunal declares that the Information Commissioner's decision notice was not in accordance with law because the alleged public authority, DG21 LLC, was present in and operated in the British Indian Ocean Territory and not in the United Kingdom, so that the Information Commissioner lacked jurisdiction to deal with Dr Sand's complaint against DG21 LLC.

The Tribunal dismisses the appeal by Dr Sand.

REASONS FOR DECISION

Introduction

1. This is the third case in the Tribunal concerning environmental information relating to the British Indian Ocean Territory (BIOT):

    a. In *Chagos Refugees Group v IC and FCO* EA/2011/0300, 4 September 2012, we considered the general background and required the disclosure of certain information held by the FCO, but held that certain material retained by consultants relating to the feasibility of resettlement was not held by the FCO for the purposes of the Environmental Information Regulations (EIR).

b. In *Dunne v IC and FCO* EA/2012/0257, 26 September 2013, we held that information about the activities of the BIOT fishery protection and patrol vessel held by a private contractor based in London and engaged by the BIOT Government was not held on behalf of the FCO for the purposes of the EIR, because on the evidence it was held solely on behalf of the BIOT Government.

c. The present appeal arises from a request for information held by a different contractor operating under contract to the US military authorities. It raises issues about the application of the EIR in BIOT, the jurisdiction of the Information Commissioner and the Tribunal, and whether the contractor was a public authority for EIR purposes.

The request and the complaint to the Information Commissioner

2. BIOT is one of the UK's Overseas Territories. It was constituted as a separate colony in 1965. By an Exchange of Notes in 1967 the UK and USA Governments agreed upon the setting up of a US military base on Diego Garcia. Subsequent exchanges have added to this agreement.

3. Dr Sand, having read in a scientific paper about environmental monitoring data from Diego Garcia, wrote to the BIOT Administrator at the FCO on 9 March 2012, requesting four categories of environmental information. After some delays, being directed from one place to another, and being told that the data was held by the 'Environment Section' in Diego Garcia, he eventually refined and redirected his inquiry on 25 July 2012 to DG21 LLC ('DG21'), a company contracted to the US Navy. He asked for a list of the pollutants (heavy metals and organic substances) that were monitored on land or in the lagoon, and over which time periods.

4. Major Peter Carr, a former Royal Marines officer, replied in his capacity as environmental manager for DG21: 'As a Contractor to the US Navy, I am not at liberty to pass the information you have requested.'

5. Dr Sand complained to the Information Commissioner, who decided in Decision Notice No: FS50462812, dated 3 September 2012, that DG21 was not a 'public authority' under the EIR and was therefore not subject to the obligation to disclose environmental information pursuant to the EIR.

The appeal to the Tribunal

6. Dr Sand appeals to the Tribunal against the Information Commissioner's decision. DG21 was given the opportunity to be joined but did not respond. The FCO was joined to the appeal, and makes submissions which amount in effect to a cross-appeal. The timetable for the appeal was extended so

that the parties could take into account the decision of the Grand Chamber of the ECJ in *Fish Legal* C-279-12, delivered on 19 December 2013 (clarifying the law on what constitutes a public authority).

7. Dr Sand's notice of appeal and accompanying letter were widely drafted, but his Reply to the Information Commissioner's Response, dated 23 November 2012, stated: 'The Respondent correctly summarises the ground of appeal as: The Commissioner erred in concluding that DG21 is not a public authority (or a body exercising functions of a public authority) as defined in the EIR.'

8. The parties' positions in summary are-

   a. Dr Sand contends that the EIR apply in BIOT by virtue of s3 of the BIOT Courts Ordinance 1983, and that DG21 is a public authority within the EIR by virtue of regulation 2(2)(d).[1]

   b. The Commissioner contends that the EIR apply in BIOT, but DG21 is not a public authority.

   c. The FCO contends that the EIR do not apply in BIOT, that DG21 is not a public authority, and that in any event the Commissioner and the Tribunal lack territorial jurisdiction to consider these questions, which are a matter for decision by the BIOT Courts.

9. By a supplementary skeleton argument dated 22 April 2014 Dr Sand also contends, if his submission that DG21 is a public authority is rejected, that DG21 holds the requested environmental information on behalf of the BIOT Government.

10. The question of territorial jurisdiction is logically prior to the other questions, but is closely linked with the question whether the EIR apply in BIOT. In oral argument at the hearing the FCO contended that the proper disposal of the appeal was that the Tribunal should strike it out on the ground of absence of territorial jurisdiction[2]. This contention was developed from a brief 'preliminary observation' in the FCO's skeleton argument for the hearing. The FCO also asserted that the Aarhus

[1] Without being formally abandoned, reliance on reg 2(2)(c) was not pursued at the hearing of the appeal. We also record that Dr Sand did not pursue a contention that the FCO and the Commissioner were wrong to regard the United Kingdom and BIOT as constitutionally distinct. We have therefore proceeded on the assumption of constitutional separation. Our willingness to proceed on this basis reflects the parties' lack of dispute on this aspect and should not be taken to imply any independent view of ours on whether it is correct, on the legal conclusions properly to be drawn from *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, HL, or on subsequent analyses of that decision, such as by Twomey in her November 2008 paper "Responsible Government and the Divisibility of the Crown".

[2] This point did not arise in the *Chagos Refugees* case or the *Dunne* case because the relevant public authority in those cases was the FCO.

Convention did not apply to BIOT, but did not provide objective justification for this submission. The Tribunal therefore gave the FCO an opportunity to justify its position on the Aarhus Convention and gave the other parties an opportunity to consider the FCO's arguments and to respond in writing to the application to strike out. The materials provided subsequent to the hearing were as follows:

a. On 9 May 2014 the FCO provided a note explaining why it said that the Aarhus Convention did not apply to BIOT.

b. On 16 May 2014 Dr Sand provided his comments on the FCO's note on the Aarhus Convention.

c. On 20 May 2014 the IC stated that he agreed that the Aarhus Convention did not apply to BIOT, but that this did not affect his contention concerning the application of the EIR in BIOT.

d. On 29 May 2014 Dr Sand provided his written submission responding to the FCO's application to strike out for want of jurisdiction.

e. On 30 May 2014 the IC provided his written submission responding to the FCO's application to strike out for want of jurisdiction, and also clarifying his argument on the application of the EIR in BIOT.

Evidence and findings

11. In addition to documentary evidence we received witness statements from two civil servants, Dr Martin Longden and Mr Thomas Moody. At the time of making his statement, Dr Longden was Head of the Falklands and Southern Oceans Department at the FCO, and also BIOT Deputy Commissioner. Mr Moody is Head of the BIOT Section and BIOT Administrator. Mr Moody was called to answer questions on both statements. Since he had only been in post since July 2013, his knowledge of the matters he was asked about was less than full.

12. Because the FCO was a party to the proceedings and the BIOT Government was not, the evidence given by Dr Longden and Mr Moody was stated to be given in their FCO capacities and not in their BIOT capacities. Nevertheless, as regards the substance of their evidence, Mr Moody explained that the actions which he described his predecessors in post as having taken in relation to influencing environmental outcomes were actions taken in their capacity as BIOT governing officials (albeit they also held positions in the FCO).

13. The following facts seem to us to be either uncontroversial or for practical purposes incontestable:

a. To facilitate military use of Diego Garcia, the inhabitants (the Chagossians) were required to leave the islands which constitute BIOT. Since about 1973 the population of Diego Garcia has consisted of about 2,500 military and civilians stationed on the base, who are overwhelmingly American, but also include a small British contingent, including the BRITREP (British Representative), who is normally a serving military officer. The other islands are now uninhabited. The governor is the BIOT Commissioner, a Foreign and Commonwealth Office official, based in London, at the Overseas Territories Directorate.

b. Many BIOT governmental records and documents are held in London, but some are held locally on Diego Garcia.

c. By the BIOT Environment Charter 2001 the UK and BIOT Governments committed themselves to a number of principles concerned with appropriate treatment of the environment, including the principle of appropriate access to environmental information held by public authorities.

d. The Diego Garcia Integrated Natural Resources Management Plan (September 2005) states: 'the full governmental and civilian judicial authority, including that relating to natural resources conservation and environmental protection, rest with the ... BRITREP, a Senior Royal Navy Commander. The U.K., through the BRITREP, generally monitors environmental matters.' We infer that the BRITREP, like the relevant FCO officials, is 'double-hatted', having responsibilities both to the UK Government and to the BIOT Government.[3]

e. The US Navy is required to provide plans and programs to ensure proper protection of natural resources. This is part of the obligations owed by the US to the UK under the agreements relating to the US base on Diego Garcia. Mr Moody told us, 'We would ask our US guests to respect our requirements for sound environmental management of the parts of the territory they are allowed to use'. The US collects environmental monitoring data, and this is sent to the BRITREP whenever he asks to see it.

f. The required regular environmental monitoring was carried out by DG21 pursuant to a contract made with the US Navy. DG21 was at

[3] It is not clear to us how this all fits in with the BRITREP's accountability to his commanding officer within the Armed Forces (if any).

the date of the information request a joint UK/US private limited company registered under the law of Delaware, USA, which had been set up for the purpose of bidding for procurement contracts to service the US military base on Diego Garcia. Two US corporations were involved in DG21, together with a UK corporation, WS Atkins PLC. (Atkins held a 24.5% share.) DG21's business address was in Dallas, Texas. DG21 held a contract for providing services for the US Navy from 2006 to 2013. On 1 April 2013 the role of DG21 was taken over by G4S Parsons.

14. We formed the clear impression from Mr Moody's evidence that, while the terms of communications between the BRITREP and the US authorities would generally conform to the diplomatic conventions for communications between sovereign States, the US authorities, conscious of their status and obligations as guests, considered themselves under obligation to comply with requests relating to environmental matters. As an example of environmental obligations owed to the UK Government, including consultation with the BRITREP, we were referred to the Further Supplementary Arrangements on Diego Garcia, December 1982, where the US undertook definite obligations relating to environmental matters in paragraphs 1, 3, 4 and 5. Moreover, it was clear that where the US authorities wanted to carry out works, such as a vegetation clearing programme, these could not proceed without permission from the BIOT authorities. There was no example given in evidence of an unsuccessful attempt by the BIOT authorities to exert control over any environmental matter, or of a refusal by the US to comply with any request on an environmental matter, whether on the ground that the request came from the BIOT Government and not the UK Government, or for any other reason.

Territorial jurisdiction

15. Mr Chamberlain QC for the FCO contends that we should strike out this appeal under rule 8(2) of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009, for lack of jurisdiction. He submits, in summary-

a. The Tribunals, Courts and Enforcement Act 2007 ('TCEA') s3(1) establishes the present Tribunal 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. Thus the Tribunal is the creature of statute and has only those functions conferred on it by statute and no others: it is not possible to confer functions on the Tribunal other than by Act of Parliament.

b. Section 3(1) is in Part 1 of the TCEA. By TCEA s147(1) Part 1 extends to England and Wales, Scotland and Northern Ireland.

c. In the case of BIOT the power to make laws for the territory is not statutory but is a prerogative power. The BIOT Courts Ordinance 1983 is made pursuant to the prerogative power. Not being made under statute, it cannot confer jurisdiction on the Tribunal.

d. Subject to certain exceptions, s3 of the BIOT Courts Ordinance 1983 applies English law in the Territory, subject to the proviso that it 'shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary'. But s3 is concerned with substantive law, not procedural law. The applicable procedural law is separately provided for in the Ordinance.

e. The Ordinance by s6 allocates civil proceedings to the BIOT Supreme Court, and envisages that the question of suitability under the proviso will be answered by that Court. Thus the question whether the EIR apply in BIOT should be dealt with by the BIOT Court.

f. The present case is analogous with *Christian v The Queen* [2006] UKPC 47, where the Sexual Offences Act 1956, in force in England, was applied by the local court for Pitcairn Island, and no one suggested that enforcement arrangements applicable in England should be adopted into Pitcairn law.

16. On behalf of Dr Sand, Mr Harris SC submits:

a. The present case differs from *Christian*. The jurisdiction of the Tribunal arises from a specific statutory regime which in England and Wales is exercised by the Tribunal and not by the ordinary courts of law.

b. The question of the Tribunal's jurisdiction depends upon whether FOIA and EIR have been extended to BIOT. This should be decided first.

c. If FOIA and EIR apply in BIOT, the normal expectation, absent any modification pursuant to s3 of the Courts Ordinance, would be that cases arising from freedom of information requests would be dealt with by the enforcement machinery in FOIA and EIR, and not by the ordinary BIOT courts.

d. TCEA s3(1) does not provide an obstacle to jurisdiction. The Information Commissioner has made a decision. The Tribunal's

function is conferred on it by FOIA s57 (the appellant's right to appeal to the Tribunal against the Commissioner's decision, irrespective of whether the information request relates to a UK public authority or a BIOT public authority) and s58 (the Tribunal's powers on the appeal). These statutory provisions are extended to BIOT by the Courts Ordinance.

e. The jurisdiction to hear the present case therefore arises because of the functions conferred on the Tribunal by 'any other Act', as provided for by TCEA s3(1).

17. Through Mr Hopkins, the Commissioner submits:

a. FCO is correct to state that the BIOT Courts Ordinance 1983 is not an Act of Parliament. But the source of the Tribunal's jurisdiction is the EIR, which constitute an 'Act' for the purposes of TCEA s3(1), on the basis that regulation 18 incorporates, with modifications, the enforcement provisions found in Parts IV and V of FOIA.

b. TCEA s3 simply reflects that the Tribunal, as a creature of statute, must be able to point to some basis in UK legislation for doing what it is asked to do, ie, to hear and determine the appeal.

c. Because the Information Commissioner made a decision under FOIA s50 (as applied by the EIR), the Tribunal has jurisdiction under FOIA ss57-58 as applied by regulation 18.

d. If the Tribunal decides, contrary to the Commissioner's view, that the EIR do not apply in BIOT, that would be a reason for deciding that the Commissioner's decision was not in accordance with the law: it would not be a reason for declining jurisdiction to consider the appeal against the decision notice.

e. If the Tribunal were to decide that it lacked jurisdiction, it could transfer the proceedings to the BIOT Court.[4]

18. Having considered the parties' arguments, we accept, with modifications, the submissions put forward by the Information Commissioner. Our analysis is as follows:

[4] We understand that the BIOT Supreme Court and BIOT Court of Appeal do exist, but as at 1999 the BIOT Supreme Court had only sat on three occasions, and has not sat since. If it did sit, it would probably sit in London unless there were special reason to sit locally.

a. Under TCEA s3(1) the Tribunal can only exercise functions conferred on it under or by virtue of the TCEA or any other Act.

b. The BIOT Courts Ordinance 1983 was made pursuant to the prerogative power. Irrespective of the debate over whether section 3 of the Ordinance extends as far as applying in BIOT English procedural law on matters outside the ordinary business of the Courts, the Ordinance cannot itself confer jurisdiction on the Tribunal, because it was not made under statute.

c. The relevant 'other Act' for our purposes is the European Communities Act 1972, s2(2). The EIR explicitly state that they were made in exercise of the powers conferred by that section. The functions conferred on us under the EIR are therefore conferred 'by virtue of' the 1972 Act.

d. Regulation 18 of the EIR applies the enforcement and appeals provisions of FOIA, with modifications, for the purposes of the Regulations.

e. The Information Commissioner has made a decision in response to Dr Sand's complaint, and the matter is now before us on appeal, pursuant to ss 57-58 of FOIA as applied by regulation 18, with a view to our reviewing the facts and determining whether his decision is in accordance with the law.[5]

f. The territorial extent of TCEA Part 1 does not affect the position. The Information Commissioner is based within 'England and Wales, Scotland and Northern Ireland', and he issued his decision in England. It is against this decision that the appeal is brought. The case of *Christian* does not impact on the question of our jurisdiction.

g. The question whether the EIR apply in BIOT is relevant to our determination of whether the Commissioner's decision was in accordance with the law, but does not affect our jurisdiction to entertain the appeal. In considering the possible application of the EIR in BIOT, and whether the Commissioner's decision was in accordance with the law, it seems to us that we must consider also whether the Commissioner had legal authority to issue a valid decision notice concerning a request for information held by an authority situated outside the United Kingdom. But again, this

[5] We record that none of the three parties advances the view that the case of *Information Commissioner v Gordon Bell* [2014] UKUT 106 (AAC) has any bearing on the present jurisdictional arguments. (Some of the problematic issues arising from the reasoning in that case were explored in Clucas v IC EA/2014/0006, 2 June 2014.) We do not consider that there is anything in the *Bell* decision that deprives us of jurisdiction to entertain the present appeal.

question goes to whether his decision was in accordance with the law, not to whether we have jurisdiction to entertain the appeal.

h. It could be argued that the BIOT Court would be a more appropriate forum than the Tribunal for deciding whether the EIR apply in BIOT, but no party has requested that we transfer the appeal to the BIOT Court, and we have not received detailed argument on the Commissioner's view that we would have power to do so.

19. In the circumstances and for the reasons stated above we consider that we have jurisdiction to entertain the appeal, and we dismiss the FCO's application to strike out the appeal.

Do the EIR apply in BIOT?

20. It seems to us that this question has at least two aspects to it, which are not always sufficiently acknowledged in some of the arguments addressed to us. One aspect is whether the EIR apply in BIOT at all. Another aspect is, if they do apply, what is the enforcement mechanism as regards public authorities situated in BIOT? In particular, does the Information Commissioner have legal authority to issue and enforce a decision notice concerning a request for information held by a body situated in BIOT, or is that a matter for a BIOT official or the BIOT Courts? However, it is right to say that these two aspects of the question cannot be considered in separate compartments but are inextricably linked, because the argument whether the EIR apply necessarily involves consideration of the availability of a suitable enforcement mechanism.

21. Dr Sand contends that BIOT is subject to the EIR by virtue of s3 of the BIOT Courts Ordinance 1983. The EIR are part of the law of England, and there is nothing that makes them inapplicable or unsuitable to local circumstances. The reasons of principle which make it desirable for environmental information held by public authorities to be available on request (informing debate, identifying problems, restraining abuse of power, promoting better decision-making, and so on) are not country specific. There is no barrier of cultural differences, given the UK and US commitments to freedom of information, and the absence of the formerly indigenous population. Neither geographical remoteness nor the lack of permanent inhabitants is a reason against the application of the EIR[6]. If the BIOT Commissioner can deal with issues arising in BIOT electronically, from London, so can the Information Commissioner and the Tribunal. The freedom of information regime is separate from the ordinary courts except

[6] Dr Sand made comparisons with Rockall (part of the UK) and with St Helena (where he said FOIA has been disapplied, but not the EIR; however, it is not clear to us whether the express exclusion of FOIA by the Freedom of Information Act 2000 (Dis-application) Order 2005 does or does not by necessary implication exclude the EIR, given that the EIR operate by incorporation of the enforcement provisions of FOIA).

at the enforcement stage. FOIA s54(4) could be modified so as to be understood as referring to the BIOT Court.

22. The Information Commissioner supports these contentions of Dr Sand.

23. Dr Sand relies additionally on the terms of the Aarhus Convention and of the BIOT Environment Charter 2001:

    a. By ratifying the Aarhus Convention in 2005 the UK committed itself to disclosure of environmental information. Dr Sand argues that at ratification on the UK did not except its overseas territories from the application of the Convention, and accordingly would be in breach of its international obligations if the EIR did not apply in BIOT.

    b. The BIOT Environment Charter was signed on behalf of the UK and BIOT Governments. In the Charter both Governments committed themselves to the principles set out in the Rio Declaration on Environment and Development. Principle 10 is concerned with appropriate access to environmental information held by public authorities.

24. The FCO first points out that it is a general principle of statutory construction that unless otherwise stated a modern Act of Parliament applies to the United Kingdom only and not to overseas territories: *Attorney General for Alberta v Huggard Assets Ltd* [1953] AC 420, 441. Subordinate legislation is presumed to have the same extent as the primary legislation under which it was made. There is nothing in the EIR to indicate their application outside the United Kingdom. The only possible basis for such application is therefore the BIOT Courts Ordinance 1983. The FCO relies on the proviso to s3 of the Ordinance regarding suitability to local circumstances. The FCO does not suggest that the reasons of principle which make it desirable for environmental information held by public authorities to be available on request are inapplicable in BIOT. Nor does it suggest that there are any cultural or other differences which render the EIR inherently unsuitable for BIOT, except that it refers to and relies upon the lack of procedural provision for enforcement of the EIR in BIOT. The FCO draws a parallel with the Australian case of *Quan Yick v Hinds* (1905) 2 CLR 345, as summarised by Lord Hoffmann in *Christian* at [15]:

> ‘The Australian case of Quan Yick ... concerned a special kind of English offence (being deemed to be a “rogue and vagabond”) in which an appeal to Quarter Sessions was an essential part of the machinery for enforcing that law. The High Court decided that it could not apply in New South Wales, where there was no court of Quarter Sessions.’

25. The FCO submits that in *Quan Yick*, as interpreted in *Christian*, the enforcement mechanism was integral to the substantive law, and that the present case is *a fortiori*. The EIR regime does not make sense in the absence of the office of Information Commissioner in BIOT, and a right of appeal to a specialist tribunal. The Commissioner and the Tribunal are not provided for in BIOT. There is no one appointed or remunerated to carry out their tasks. So, for example, the powers of entry and inspection under FOIA Schedule 3 cannot be implemented or exercised.

26. The FCO also submits that the Aarhus Convention does not apply to BIOT, and that, from a legal point of view, the BIOT Environment Charter is (as Mr Chamberlain accepted in oral argument) 'just empty words'. Moreover, the FCO does not accept that the absence of the EIR regime in BIOT would or does represent a breach of any commitment given in the Charter.

27. We deal first with the arguments concerning the Aarhus Convention.[7]

28. The FCO's contention that the Aarhus Convention does not apply to BIOT rests on the proposition that for several decades United Kingdom practice has been (a) to declare in writing to which, if any, of its territories a treaty will extend and (b) where the instrument expressing consent to be bound refers only to the United Kingdom of Great Britain and Northern Ireland, the treaty applies only to the metropolitan territory. In the case of the Aarhus Convention the instrument expressing consent was in this latter form.

29. Dr Sand argues that the FCO's contention is incompatible with the letter and the spirit of article 29 of the Vienna Convention on the Law of Treaties, which states: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.

30. We acknowledge that UK practice, as described by the FCO, appears out of step with the practice of other states, but it seems to us that the UK intention is sufficiently clear. The UK practice is recognised on page 82 of the UN Handbook on Final Clauses of Multilateral Treaties (2003). While the Handbook is for information purposes, having no formal legal status, it appears to us to be sufficient evidence of UK practice having been established in the form contended for by the FCO. We therefore hold that the Aarhus Convention does not apply to BIOT. This removes one plank of Dr Sand's argument, but does not determine whether the EIR apply in BIOT.

[7] We observe, for completeness, that the Convention was ratified not only by the UK but also by the European Community (as it was called in 2005). The Convention covers a shared field of European Community and individual EU Member State competence. The relevant part of the Convention is implemented in the EU by Council Directive 2003/4/EC on public access to environmental information. In turn, the EIR implement this Directive.

31. The relevance of the BIOT Environment Charter seems to us to be that it shows that the declared policy of the UK and BIOT Governments is in favour of the principle of appropriate access to environmental information, and that the policy considerations underlying this principle apply in BIOT. However, the Charter does not mention any particular regime for the implementation of that commitment, so it provides only indirect support for the application of the EIR in BIOT.

32. Remembering that the EIR were made in order to implement Council Directive 2003/4/EC, it seems reasonable to be cautious about their effective extension to a territory that is outside the United Kingdom and not part of the European Union. But it has to be remembered that the general effect and intention of s3 of the Courts Ordinance is to apply English law in BIOT; the EIR are part of English law; accordingly the EIR apply in BIOT unless there is something about them which means they fall outside the operative words of s3 or unless excluded by the operation of the proviso.

33. We find the operative words of s3 difficult to interpret. They refer to 'the law of England as from time to time in force in England and the rules of equity as from time to time applied in England'. The contrast between 'law' and 'rules of equity' belongs to the period before the Judicature Act of 1873, and refers to the common law developed in the common law courts, as contrasted with the jurisdiction exercised in Chancery. We do not understand why an ordinance passed over 100 years later is expressed in terms which hark back to that distinction. The arguments of all parties before us proceed on the assumption that, despite this historical reference, the term 'law' includes statute law of England, not merely common law. We adopt the same assumption. (We do this with some misgivings, noting that in the corresponding English Law (Application) Ordinance 2005 for St Helena statute law is expressly dealt with separately.)

34. What seems to be clear from the Courts Ordinance 1983 is that BIOT has its own institutions for the enforcement of legal rights and liabilities. We see this particularly in ss2 and 5, and ss6-48. The intent of the Ordinance taken as a whole appears to us to be inconsistent with a proposition that any English court or tribunal is intended by s3 to have territorial jurisdiction over BIOT.

35. Seen in this context, we are unable to read s3 as being intended to extend to BIOT the statutory jurisdiction of English or UK regulatory authorities, from which appeal lies to English or UK courts or tribunals, such as the Charity Commission, the Financial Conduct Authority, or the Information Commissioner. Where the relevant regulatory statute is suitable for application in BIOT, it must in our view be applied with the necessary modifications to enable local enforcement.

36. The FCO contends that the machinery of the Commissioner and the Tribunal could not be replicated in BIOT without specific BIOT legislation

and BIOT public expense. We do not find this objection convincing. The legislation already exists, in the form of s3 of the Courts Ordinance. That the modifications required may be regarded as substantial, because of the absence of an Information Commissioner or Tribunal in BIOT, is not a weighty objection to application; the FCO itself submits that the local circumstances qualification is to be liberally construed, as shown by *Nyali Ltd v Attorney General* [1957] QB 1, 16.

37. The FCO also refers us to the exposition of the local circumstances qualification by Sir Kenneth Roberts-Wray in *Commonwealth and Colonial Law*. He states at p549: 'the rules can be reduced to one principle: that the imported English law is to be applied with the limitations and modifications required by local circumstances; ... the application of any given law is to be entirely rejected if the circumstances which explain its origin in England have no relevance in the country concerned'. In our view, as the 2001 Charter recognises, and as the FCO does not dispute, the policy considerations underlying the EIR are as applicable in BIOT as in England. This exposition therefore leads to a conclusion in favour of the application of the EIR in BIOT.

38. We therefore find ourselves in an intermediate position between the primary arguments addressed to us on each side. We agree with Dr Sand and the Information Commissioner, and disagree with the FCO, on the applicability and suitability of the EIR for local circumstances in BIOT. But we agree with the FCO and disagree with Dr Sand and the Information Commissioner on whether the Information Commissioner and the present Tribunal are appropriate authorities for enforcing the EIR upon a public authority situated in BIOT.

39. We hold, therefore, that the EIR apply in BIOT, but with such modifications as may be required to enable local enforcement.[8]

40. For our part, we see no reason why (for example) a BIOT Magistrate should not fulfil the functions of the Information Commissioner and the BIOT Supreme Court the functions of the Tribunal. But we are not fully informed about BIOT institutions, and it is not for us to define the precise manner in which the functions which in England are exercised by the Commissioner and the Tribunal under the EIR should be allocated to BIOT authorities or Courts. That is a matter for a BIOT Court to decide.

41. It follows that the UK Information Commissioner is not, in our judgment, the appropriate authority for enforcement of the EIR in relation to DG21, which is a company incorporated in Delaware USA and which provided services in BIOT, even if DG21 is a BIOT public authority within the meaning of the EIR. For this reason, we have reached the conclusion that

[8] This holding corresponds with the secondary position indicated by the Information Commissioner in paragraphs 27-28 of his skeleton argument dated 21 March 2014.

the Information Commissioner's decision was not in accordance with the law. In other words, he reached in substance the right conclusion, but for the wrong reason. Instead of deciding that DG21 was not a public authority, in our view he should have decided that DG21, being in BIOT, was outside his territorial jurisdiction, so that he lacked jurisdiction to rule on whether it was a public authority for EIR purposes.

42. We should add that this decision does not involve a conclusion that a BIOT public authority which is present in the United Kingdom would fall outside the jurisdiction of the Information Commissioner and the Tribunal as regards compliance with the EIR. That is a separate question, on which we have not heard argument.

Is DG21 a public authority under reg 2(2)(c) or 2(2)(d) of the EIR?

43. Given the conclusion that we have reached above, and given that DG21 LLC is not present in the United Kingdom and has not taken any part in the proceedings or submitted to the jurisdiction of the Tribunal, it is unnecessary, and probably inappropriate, for us to decide this question. We were also told that the Upper Tribunal is shortly to reconsider the question of what constitutes a public authority for EIR purposes in light of the ECJ decision in *Fish Legal*. We observe only that on the very unusual facts of the case we see force in the arguments on all sides, particularly when one takes into account that privatisation arrangements do not necessarily prevent a body being regarded as a public authority where it is entrusted with public functions.

Did DG21 hold the information on behalf of the BIOT Government?

44. The alternative contention that DG21 held the environmental information on behalf of the BIOT Government was not clearly spelled out in Dr Sand's notice of appeal and as far as we can tell was not understood by any of the three parties to form part of the appeal. It was raised by Dr Sand's supplementary skeleton argument dated 22 April 2014. By that skeleton we are asked to consider it on the footing that, contrary to Dr Sand's primary contention, DG21 was not a public authority within reg 2(2) of the EIR.

45. We did not understand the Information Commissioner or the FCO to make any formal objection to our considering this alternative contention, despite its late arrival. But we have concerns about the extent to which it is appropriate for us to consider it. In our view it is a matter on which the BIOT Government would potentially need to be heard.

46. Of course the contention comes as no surprise to the BIOT Government, because the FCO officials who have been involved with this appeal are the

same officials who wear BIOT hats. So it might be thought at first sight that our concern is more a matter of form than of substance. But in our view there is a real question of substance and of procedural fairness. Because the BIOT Government is not formally represented on this appeal, and because the contention that DG21 held the environmental information on behalf of the BIOT Government was not clearly raised in Dr Sand's notice of appeal, we received limited argument on the contention from the other parties, and the question of whether we have jurisdiction over the BIOT Government on the basis that it sits in London was not addressed at all.

47. It seems to us that we are able to deal with the alternative contention on the basis, and only on the basis, of the assumption invited by Dr Sand for this purpose, namely, that DG21 was not a public authority within reg 2(2) of the EIR. As Mr Hopkins observes on behalf of the Information Commissioner, the question of holding the information on behalf of the BIOT Government is closely connected with the question of whether DG21 was a public authority, since the topic of effective control plays an important role in each question. In our view, for practical purposes the alternative assumption invited by Dr Sand involves accepting that the arguments presented by the FCO and the Information Commissioner are correct, to the effect that DG21 was not a public authority within the meaning of the EIR because it was not under the control of or a creature of the BIOT Government. (This was of course contested by Dr Sand on the facts, and we have not ruled on it.)

48. DG21 was in contractual relationship with the US Navy. By clause H3(a) on page 129 of the contract, information generated and/or collected by DG21 in the performance of the contract was considered to be owned by the US Government and had to be returned to the Government at the completion of the contract. DG21 was not in a direct relationship with the BIOT Government. On the assumption which we are invited to make, it would seem to us to follow that DG21 did not hold information on behalf of the BIOT Government.

49. This conclusion rests on the stated assumption and should not be understood as an independent finding, binding on any basis other than the making of the assumption.

Conclusions and remedy

50. We dismiss the FCO's application to strike out the appeal.

51. We rule that because DG21 was present and operated in BIOT, and not in the United Kingdom, the Information Commissioner lacked jurisdiction to deal with Dr Sand's complaint, and accordingly the Decision Notice dated 3 September 2012 was not in accordance with the law.

52. We have ruled in favour of Dr Sand and the Information Commissioner to the extent of agreeing with them that the EIR apply in BIOT, but for the reasons given above we dismiss Dr Sand's appeal.

53. We thank all parties for their helpful and detailed submissions.

Signed on original:

Andrew Bartlett QC

Judge of the Tribunal

Promulgated 29th July 2014