Public Bodies' Duty to Consult on Internal Advice: the Limits of the *Bushell* Doctrine

July 2006

On 27 June 2006, the Court of Appeal handed down judgment in *Edwards and Pallikaropulos v Environment Agency and others*[1].

The judgment contained much of interest to environmental lawyers, particularly the Court's rejection of the Appellants' argument that the UK had failed properly to implement the EIA Directive[2] by requiring an environmental impact assessment to be carried out as part of an application for planning permission but not also in respect of the discrete process for consideration of applications for PPC Permits.

This note, however, will focus on the general public law issues considered by the Court of Appeal: when is a public body required to disclose and consult on its internal advice, and in what circumstances may a court exercise its discretion not to grant relief even where there has been a breach of the common law duty of fairness.

Facts

The case concerned a challenge by local residents to a decision by the Environment Agency ("the Agency") to grant a PPC Permit to Rugby Ltd for the continued operation of its cement plant in Rugby, including, as a new proposal, the use of waste tyres as a partial substitute for conventional fuel in the kiln at the plant.

The Agency carried out a full public consultation under the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973) ("the PPC Regulations"). The focus of public concern during that consultation was the likely impact on the environment and public health of the use of tyres as fuel.

Rugby Ltd's application for the PPC Permit (including further information required by the Agency) was made available to consultees and the public. Extensive submissions were received from the public and considered by the Agency.

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[1] *David Edwards and Lilian Pallikaropoulos v (1) the Environment Agency, (2) the First Secretary of State, and (3) Secretary of State for the Environment, Food and Rural Affairs* [2006] EWCA Civ 877.

[2] (Directive 85/337/EEC, as amended by Directive 97/11/EC)

As part of its decision-making process, the Agency also asked its internal Air Quality Monitoring and Assessment Unit ("AQMAU") to review the environmental projections that had been provided by Rugby Ltd as part of its application. AQMAU undertook a review of predicted emissions from the main stack at the cement works and of emissions (particularly of dust) from low level point sources ("LLPS"). As part of its review, AQMAU indicated that it needed further information, including data as to the LLPS, from Rugby Ltd. The Agency obtained this information from Rugby Ltd. This information – unlike that which had been earlier requested and received from Rugby Ltd – was not made available to the public.

AQMAU carried out predictive modelling and produced two reports on the environmental impact of the proposed continued operation of the Rugby cement works. The reports predicted that "within model uncertainty" the emissions from the main stack, including those from the use of tyres as a fuel, were not likely to exceed the relevant air quality objectives, but that, because of "the high background concentrations" of dust from the LLPS, the air quality objectives for dust "were likely to be exceeded". The AQMAU reports were not disclosed to the public.

On 12 August 2003, the Agency issued the PPC Permit to Rugby Ltd and produced a Decision Document setting out the reasons for its decision. The PPC Permit contained conditions including a requirement that the introduction of tyre burning should be subject to a successful trial, the imposition of limits for, among other emissions, those of dust from LLPS, and requirements to take certain precautions and to employ various technologies for minimising emissions, all with a view to securing "best available techniques" for minimising pollution from the plant. These conditions imposed stricter environmental controls than the IPC authorisation that the PPC Permit replaced.

In its Decision Document, the Agency concluded that the use of tyres as a partial substitute for conventional fuel in the kiln would have no significant impact on the environment and would involve no significant risk to human health. The Agency explained that if, and only if, a trial established that the use of tyres would cause no net environmental detriment compared with the "baseline" for conventional fuels already in use, Rugby Ltd could proceed to permanent use without further application. The Agency also expressed the view that the new controls it was imposing would, if anything, constitute an environmental improvement, a conclusion which the courts, on the evidence before them, accepted.

The Agency also set out in the Decision Document some of the predictions derived from AQMAU's work on emissions of dust from the LLPS and their environmental impact. The Agency explained that its (i.e. AQMAU's) predictions were on the assumption that all sources would be emitting dust at the same time, all emissions would be at the maximum permitted levels and all dust was of the PM10 size (the smallest and potentially most harmful). The Agency cautioned that the cumulative effect of those emissions warranted further investigation (provision for which was made in the PPC Permit), but expressed the view that its assumptions had been conservative, and the emissions were unlikely in practice to exceed the relevant air control limits.

Common law duty of fairness

Auld LJ (who gave the judgment of the court) restated the well-known general principle of administrative law that a public body undertaking consultation must do so fairly, as required by the circumstances of the case. He cited the judgment of Lord Woolf MR, as he then was, in *R v North Devon HA, ex p Coughlan* [2001] QB 213, at paragraph 112, which articulated and stated the limitations of this principle in the following terms:

> "... consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The important question in the circumstances of this case, however, was whether fairness in decision-making subject to public consultation required internal workings of a decision-maker, i.e. the AQMAU reports, also to be disclosed as part of the consultation.

The Respondents argued that it did not and relied particularly upon the House of Lords' judgments in *Bushell & Anor v Secretary of State for the Environment* [1981] AC 75 and in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

Auld LJ recognised that the judgments in *Bushell* and other subsequent authorities had established the general principle that fairness in decision-making subject to public consultation did *not* require the internal workings of a decision-maker to be disclosed as part of the consultation. However, Auld LJ also noted that, although the House of Lords in *Alconbury* had approved and applied the judgment in *Bushell*, Lord Clyde (at paragraph 141) had expressed an important qualification that parties should be allowed to comment if "some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry".

Moreover, Auld LJ indicated that he did not consider that Lord Diplock's approach to internal decision-making in *Bushell* established "a rule so absolute that it would override in particular circumstances the requirement of fairness, the conceptual setting in which he was considering the disclosability or non-disclosability of internal decision-making". Instead, he considered that "a more pragmatic approach" should be taken:

> "Thus, if in the course of decision-making a decision-maker becomes aware of a new factor, as in *Interbrew SA v Competition Commission* [2001] EWHC Admin 367, or some internal material of potential significance to the decision to be made, as in *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB, 353, CA, at 370-371 (per Taylor LJ) and 376 (per Morland J), fairness may demand that party or parties concerned should be given an opportunity to deal with it".

Applying those principles to the circumstances of the present case, Auld LJ held that

> "... the reasoning of Lord Diplock in *Bushell* is plainly of general application to holders of public office or public bodies such as the Agency, charged with making administrative decisions in which the public have an interest and an entitlement to be consulted. Many or most of such public officer holders or bodies have their own internal expertise and staff to turn to for advice and guidance in reaching their decisions. The decision when made, just like that of a government minister, may be the product of contribution from a number of members of staff working to the decision-maker or the corporate body.
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> In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own thought processes for criticism before reaching its decision".

However, Auld LJ maintained that if, a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. He held that this was the position in the present case: AQMAU had obtained additional information from Rugby Ltd going to the predicted environmental impact of the proposals, which was not put in the public domain until the Agency issued its Decision Document; and the highly technical nature of AQMAU's predictions and the possible significance of their conclusions were such that their non-disclosure in the consultation process could not be dismissed as unimportant.

The Court therefore held that, by failing to disclose the AQMAU reports as part of its public consultation, the Agency had been in breach of the common law duty of fairness.

Discretionary refusal of relief

Despite finding that the Agency had been in breach of the common law duty of fairness, the Court upheld the Judge's decision to refuse to grant relief (thereby refusing to quash the Agency's decision to grant the PPC Permit).

The Court confirmed that a domestic law procedural defect, not contravening EU law or rendering the ensuing decision *ultra vires*, does not necessarily lead to the quashing of a decision. It is for a judge, looking at all the material facts of the case before him, to determine in the exercise of his discretion whether it was "necessary or desirable for him to do so in the interests of justice". The range of factors that may properly bear on such a decision include the prejudice or absence of prejudice to a claimant in being deprived of an opportunity to make informed representations; whether a claimant acted with all reasonable speed in raising the grounds on which he relies; the conduct of the interested party; and whether it would be in the interests of good public administration to quash, leaving the parties to re-start the process. Depending on the relative weight of relevant factors one way or the other in any particular case, no single one of them is necessarily decisive.

In the present case, the Court particularly took account of the fact that the Judge had held, on the evidence before him, that "tyre burning emissions from the main stack, on their own, would have no significant adverse effects on the environment, and that emissions from the plant as a whole would not contribute significantly to pollution in the area. In the circumstances, he clearly regarded as remote or fanciful the possibility that the Agency would or might have made a different decision if it had consulted members of the public on the advice given in the AQMAU Reports, whatever his views about the importance of their non-disclosure as a matter of due process on the issue of fairness". Moreover, the Court stressed that "the continuing and dynamic regulatory role provided by the PPC Regulations, requires and enables the Agency, continuously to monitor post-permit the plant's operations so as to ensure maintenance and improvement of the environmental safeguards secured by "best available practice" and the conditions of the permit".

Finally, the Court stated that "whatever the case as to the Agency's non-disclosure of [the AQMAU reports] in the consultation process, it is now "water under the bridge". Put more prosaically, given the Judge's finding on the evidence before him of no environmental harm from the plant and the continuous and dynamic nature of the PPC regulatory system enabling assessments to be made on what is known rather than predicted by AQMAU over three years ago, it would be pointless to quash the permit simply to enable the public to be consulted on out-of-date data".

Conclusion

In its judgment in *Edwards and Pallikaropulos v Environment Agency and others*, the Court of Appeal has reasserted the importance of ensuring fairness in consultation processes carried out by public bodies. Although it confirmed the general principle set out in *Bushell* that fairness does *not* require the internal workings of a decision-maker to be disclosed as part of a public consultation, it has highlighted the limits to that principle.

However, the Court balanced its finding on fairness by taking a pragmatic approach to the question of how a Judge may exercise his discretion as to whether or not to grant relief. It should be noted, however, that this approach was limited to a situation where the Court had found that there had been a domestic law procedural defect only. The position might have been somewhat different if, for example, the Court had found that there had been a breach of EC law. As indicated at the beginning of this note, the Court rejected the Appellants' arguments that there had been a breach of the EIA Directive and/or the PPC Regulations.

Kassie Smith of Monckton Chambers acted for the Respondents in this case.

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