

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No: AC-2023-LON-003728

B E T W E E N:-

THE KING on the application of

(1) McDougall

(2) Churchill

Claimants

- and -

(1) The Secretary of State for Health and Social Care

**(2) The Secretary of State for Levelling Up, Housing and
Communities**

Defendants

- and -

The Secretary of State for Science, Innovation and Technology

**Interested
Party**

**REQUEST FOR INFORMATION AND CLARIFICATION MADE PURSUANT TO PART 18 OF THE
CIVIL PROCEDURE RULES 1999 (AS AMENDED) MADE BY THE FIRST DEFENDANT, THE
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE 11 JANUARY 2024**

This is a written request for clarification and the provision of information made pursuant to Part 18 of the Civil Procedure Rules 1999 (as amended) (the “CPR) and the Practice Direction to Part 18 CPR. A copy of Part 18 CPR and PD 18 CPR are attached to this request.

This request is made so as to enable the Secretary of State for Health and Social Care to understand the case that it has to meet and to enable the proceedings to be dealt with in accordance with the overriding objective.

Please respond to this request by 4pm on 19 January 2024

Request	Response
Request 1 In respect of section 3 of the Claim Form N461 issued on 20 December 2023, of: <i>“in the absence of the enactment of public health/environmental protections being a necessary ‘instrument/or a provision of such an</i>	

instrument' operating under the necessary jurisdictions of local planning authorities/local authorities..."

Please set out with full particularity:

(a) the entity that the Claimant considers to be responsible for the enactment of these protections;

1.(a)1 The '*entity*' is the UK Government which enacted the EECC through the '*spheres of competency*' of national regulatory authorities as '*organs*' of the UK as a EU Member State prior to 31/12/2020, and subsequently is required to apply all relevant competencies as an EECC participating nation state.

(b) the basis for that suggestion;

1.(b)1 How those competencies should have been applied pre-31/12/2020 and post-31/12/2020, are a matter for the UK Government to determine.

1.(b)2 We present in section 5 of the Schedule 8 paragraph 39(5) submission ('the submission'),

'Remedies required within the scope of the DLUHC and the DoH&S' (Bundle, pages 83 to 89 issued with our letter before claim on the 13/9/2023),

our assumptions on how the competencies of those national regulatory authorities and the partial competency of the DDCMS prior to the potential involvement of the DIST in the operation of the EECC, should be applied to remedy the flawed transposition of public health protection measures/provisions.

and,

(c) which public health/environmental protections are said to have been required

1.(c)1 The protections are outlined in the N461 **Section 5** '*Statement of Facts*' at paragraphs 5.1, 5.2, and 5.3 (Bundle, page 21).

1.(c)2 **Section 5** of the submission '*Remedies required within the scope of the DLUHC and the DoH under Schedule 8 paragraph 39(5) EUWA powers*' (Bundle, page 83-91) outlines

public health protections remedies to accord with EECC Recital 110 requirement to make '*public health imperative*' in the following sub-sections:

5.2 *the importance of government policy reflecting international agreements* (Bundle, pages 83 to 87),

5.3 *the assignment of competent authority status to LPAs/LAs being made effective regarding public health protection* (Bundle, pages 87 to 88),

please review particularly, paragraph **5.3.1** of this sub-section reporting that,

'LPAs/LAs as EECC competent authorities must be resourced in accordance with EECC Article 6.2, with appropriate expertise and guidance to contribute sufficiently to the efficient and effective management of the radio spectrum by applying European Council Recommendations 1999/519/EC as required under EECC public health protection provisions'.

5.4 *the requirement to end ambiguity regarding the status of LPAs/LAs as EECC competent authorities* (Bundle, pages 88 to 89),

5.5 *the importance of government policy being subsidiary to relevant domestic law* (Bundle, page 89),

and,

5.6 *the requirement that the sub-delegation of powers and authority to LPAs/LAs must be managed carefully, overtly, and through sustained monitoring* (Bundle, pages 89 to 91).

1.(c)3 The legal significance of EECC public health provisions are the subject-matter of Section 1 of the submission specifically, with section **1.8** focussing on:

	<p><i>'LPAs/LAs are primary regulators of involuntary public exposure to radio frequency radiation'</i> (Bundle, pages 60 to 62);</p> <p>the subject-matter of Section 2 being,</p> <p><i>'How telecoms directives were transposed into UK law'</i> (Bundle, pages 62 to 71);</p> <p>with section 2.1 focussing on,</p> <p><i>'LPAs/LAs regulatory public health responsibilities'</i> (Bundle, pages 62 to 63);</p> <p>with section 2.5 focussing on how,</p> <p><i>'LPAs/LAs act under the sub-delegation of powers held by the SoSfH&SC'</i> (Bundle, pages 66 to 68).</p> <p>1.(c)4 The particularities are as fully described in the submission within the breadth of our knowledge.</p>
<p>Request 2 In respect of section 3 of the Claim Form N461 issued on 20 December 2023, of: <i>"The DLUHC and the DoH&C declined the opportunity to quash conduct that led to these deficiencies..."</i></p> <p>(a) Please particularise what "conduct" is being alleged and referred to.</p>	<p>2.(a)1 On our receipt of the DLUHC 3 November 2023 response to our letter before claim (Bundle, page 44), we explained in our response of 4 December 2023 (Bundle, at pages 45 to 48), at paragraph 12(i) that,</p> <p><i>'any conduct'</i> (as noted in footnote (2)) ... <i>'concerning the flawed enactment of a directive that may be' ... 'incompatible with any principle of EU law'</i> (as noted in footnote (3)),</p> <p>can be made subject to a Schedule 8 paragraph 39(5) challenge.</p>

<p>(b) Please set out how and when the Secretary of State for Health and Social Care is said to have declined to quash “conduct” in question.</p>	<p>2.(a)3 The meaning of the word <i>'conduct'</i> is a matter of interpretation of the relevant clauses of the EUWA 2018, aided by the explanatory notes, which we reference in footnotes (1), (2) and (3) to paragraph 12(i).</p> <p>2.(a)4 It is for the challenged public authority/authorities or a court to determine whether the transposition of directives in question (in this case the interconnected directives 2014/61EC and 2018/1972EC) suffered a flawed enactment that is proven incompatible with any principle of EU law in respect to the direct rights that we assert have been nullified by the conduct of relevant authorities where,</p> <p><i>'under the principle of cooperation in good faith laid down in Article 4(3) of the Treaty on European Union (TEU), Member States are required to give full effect to the provisions of the EU law. This means they have to interpret the national law in line with EU law, to refuse to apply any conflicting provision of national law and also to nullify the unlawful consequences of a breach of EU law. Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned. ('Statement of facts', paragraph 5.14, Bundle, page 23).</i></p> <p>2.(a)5 The conduct being alleged and referred to, is particularised in relation to the rights asserted (paragraph 5.16 of the <i>'Statement of facts'</i>, Bundle, page 24), and is conduct that we claim resulted in the flawed transposition of the EECC (summarised in paragraphs 5.17 to 5.25, Bundle, pages 24 to 27).</p> <p>2.(b)1 Our interpretation of the DoH&SC and the DLUHC 3 November 2023 responses to our 13 September 2023 letter before claim, leads us to conclude that the authorities have the discretion to compromise the claim,</p>
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	<p>could actively contest or concede the case, or take a '<i>neutral stance</i>' after seeking an extended deadline of 3 November 2023 to respond to the letter before claim.</p> <p>2.(b)2 Our position on how and when the Departments declined to quash 'conduct' in question is as stated in paragraphs 21 to 25 of our 4 December 2023 letter of response to Mr Dall'Antonia (Bundle, page 48), who whilst acting for the DLUHC had, we assumed, the GLD status as 'case handler'.</p> <p>2.(b)3 The absence of a response to this letter concluded our efforts to seek further clarity on the outcome of the letter before claim on the 6 December 2023.</p>
<p>Request 3 The N461 issued on 20 December 2023 refers to the date of the decision under challenge being 3 November 2023 but also refers to the enactment of regulation on 21 December 2020.</p> <p>(a) Please confirm which decision is being challenged and why the date of 3 November 2023 has been given.</p>	<p>3.(a)1 The EECC transposition decision of the 21 December 2020 and the decisions represented by the DoH&SC and the DLUHC responses to the letter before claim made on 3 November 2023, are inextricably linked (as explained in the N461 Grounds 3 '<i>Application in time</i>', paragraphs 6.3.1 to 6.3.7, Bundle, pages 31 and 32), given the exceptional rights, powers and obligations granted to potential claimants, national regulatory authorities and the court under Schedule 8 paragraph 39(5) EUWA 2018.</p> <p>3.(a)2 Further, paragraph 4 of the judicial review pre-action protocol does not limit challenges to decisions. It states that,</p>

'judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review the lawfulness of -

- an enactment, or*
- a decision, action or failure to act in relation to the exercise of a public function'.*

3.(a)3 Clearly, actions and failure to act in relation to the exercise of public functions involve a sequence of decisions.

3.(a)4 In the exceptional circumstances protected by Schedule 8 paragraph 39(5) EUWA 2018, judicial review would not be a remedy of last resort if potential claimants were not able to first seek a remedy/remedies from a relevant regulatory authority or authorities

'to dis-apply legislation or quash conduct in the event of a successful challenge' ,

under the procedure described in note 211 of the EUWA Explanatory notes.

3.(a)5 While the relevant regulatory authorities have discretion not to regard the challenge as successful within the 31 December 2023 deadline, the decisions made on such a challenge appear to be both pre-requisite to judicial review, and a necessary condition for judicial review becoming as a remedy of last resort within the 31 December 2023 EUWA 2018 deadline for the commencing proceedings.

3(a)6 For those reasons and because the substantive remedies sought, rest within the spheres of the competencies of the DoH&SC and the DLUHC as organs of the UK as an EECC participating state, the Departmental responses of 3 November 2023 to our letter before claim are, we believe of a challengeable status.

<p>(b) Please confirm whether the response to the Pre-Action Protocol Response dated 3 November 2023 is said to be the “decision” being challenged.</p> <p>(c) If any other “decisions” is being challenged, please explain which ones, and the dates on which they are said to have been made.</p>	<p>3(a)7 As stated in paragraph 3.12 of the submission, EU withdrawal was designed to protect the prospect that, <i>'domestic legislation may follow from a judgment which establishes that a provision of a directive has direct effect'</i> (Bundle, page 71).</p> <p>3.(b)1 As stated in (a) above, the 21 December 2020 decision and the decisions made by DoH&SC and the DLUHC through their 3 November 2023 responses to our letter before claim are linked inextricably. Hence, the decisions of the Departments to maintain what we consider to be a <i>'neutral stance'</i> to our letter before claim are made subject to this challenge.</p> <p>3.(c)1 As stated in (a) above, paragraph 4 of the judicial review pre-action protocol does not limit challenges to decisions, as:</p> <p><i>'judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review the lawfulness of -</i></p> <ul style="list-style-type: none"> • <i>an enactment, or</i> • <i>a decision, action or failure to act in relation to the exercise of a public function',</i> <p>and our challenge is multi-factorial in its scope. Hence, it includes aspects of all four subject-matter categories listed above.</p> <p>3.(c)2 After exhausting all alternatives to judicial review, our interest is limited to decisions concerning our asserted rights that if taken wrongly can be reversed through the enactment of remedies that bring those rights properly into effect.</p> <p>3.(c)3 Multiple decisions will have been made by UK national regulatory</p>
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	<p>authorities to implement the EECC after it was agreed on 11 December 2018, but the decision to transpose the directive on the 21 December 2020, and the decisions taken by the DoH&SC and the DLUHC on the 3 November 2023 not to enact powers under Schedule 8 paragraph 39(5) EUWA 2018, are the only reversible decisions (relevant to the paragraph 3.(c)2, above) that are safeguarded by remedies made available through the now activated judicial review proceedings.</p>
<p>Request 4 Section 5 entitled “Statement of Facts” of: <i>“5.12 LPAs/LAs are undoubtedly administrative authorities acting under the policy direction of the DLUHC and on behalf of the Secretary of State for Health...”</i></p> <p>(a) Please state with full particularity the legislative basis upon which the Claimant’s assertion is based.</p>	<p>4.(a)1 The legislative basis for this factual assertion is presented in the submission in section 1.7</p> <p><i>‘Can LPAs/LAs immunise themselves from taking into account contrary and contradictory evidence on what constitutes an established adverse health effect of radio-magnetic radiation (RFR)’ (Bundle, pages 58 to 60);</i></p> <p>and section 1.8,</p> <p><i>‘LPAs/LAs are primary regulators of involuntary public exposure to radio frequency radiation (RFR)’ (Bundle, pages 60 to 62);</i></p> <p>and section 2.1,</p> <p><i>‘LPAs/LAs regulatory public health responsibilities, (Bundle, pages 62 to 63);</i></p> <p>and section 2.5,</p> <p><i>‘LPA/LAs act under the sub-delegation of powers held by the Secretary of State for Health (SoSfH)’ (Bundle, pages 66 to 68).</i></p>

	<p>4.(a)2 It is considered imprudent and unnecessary to offer a summary explanation of this analysis beyond the general explanation in the N461 'Statement of facts' (paragraphs 5.1 and 5.25, Bundle, pages 21 to 27), and the 'Introduction' to the submission (Bundle, pages 50 to 52).</p>
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Constitutional and Social Care Public Law Litigation Team, Litigation Group, Government Legal Department 11 January 2024

Statement of truth by the claimants (Claim No: AC-2023-LON-003728) re: the statements we make in the right hand column response as above.

We understand that proceeding for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth

We believe that the facts stated in this form are true.

Neil McDougall and Karen Churchill

(confirming as joint claimants in the absence of digital signatures).

Dated 16 January 2024