**FEBRUARY 5th JUDICIAL REVIEW Case Update**

**Case Number** AC-2023-LON-003728

IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION ADMINISTRATIVE COURT
(1) NEIL MCDOUGALL (2) KAREN CHURCHILL Claimants
and
(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES Defendants and
SECRETARY OF STATE FOR SCIENCE, INNOVATION AND TECHNOLOGY Interested Party

Initial challenge submission filed as Letter Before Action
JR application (redacted)
21 remedies being requested

The European Electronic Communications Code (EECC) is intended to create a Europe-wide framework to ensure freedom for Telecoms companies to provide communication networks and services subject to regulatory conditions, and particularly to,

'*measures regarding public policy, public security and public health* (Recital 5)'.

Since the 25th January filing of defence statements by the Department of Health and Social Care (DoH), and by the Department of Levelling Up, Housing and Communities (DLUHC), we are able to re-evaluate our **central legal argument** against the defence arguments afresh (reference numbers below, link to quotes in italics drawn from the DoH defence).

It is sensible to take nothing for granted at this stage.

Our challenge is founded on attempts to exhaust all non-legal approaches to protecting our rights and the rights of others through alternative dispute resolution (ADR) procedures, leaving judicial review as a remedy of last resort.

Brexit legislation has phased-out gradually our rights under European law; and permanently so, unless a challenge was made by 31st December 2023. We issued the challenge on the 20th December, which we argue was,

*'timely, and in time',*

because of our prolonged efforts to gain clarity.

Nonetheless, the Departments argue that our challenge is *'out of time'* (DoH defence paragraphs 33-38).

The DoH view the challenge as,

*'convoluted'* … and … *'wholly without credit'*(1), and *'flawed'* and *'out of time', 'precluded'* under the legislation we rely upon (ie: the European Union Withdrawal Act 2018), *'pursued against the wrong party'* (ie: itself), and *'without a legal basis'* (DoH defence paragraph 3).

Our **'central legal argument'** is that the EECC Recitals 105 and 106 required local authorities (LAs for small cell deployment), and local planning authorities (LPAs when making mast siting decisions), to reconcile environmental and public health considerations before granting or refusing the authorisation of spectrum access and use (granting or refusing planning permission) in a proposed location. Which is how involuntary public exposure to RFR is regulated.

Public Health England (PHE) state consistently that,

*'control of exposures occurs through product safety legislation, health and safety and planning policy. These regulatory areas all consider the international guidelines'* (paragraph 4 *'Mobile phone base stations: radio waves and health'*, 27th August 2021).

https://www.gov.uk/government/publications/mobile-phone-base-stations-radio-waves-and-health/mobile-phone-base-stations-radio-waves-and-health

LA/LPA authorisation is linked to a decade old initiative to,

*'reduce the cost of deploying high-speed electronic communication networks'.*

Issued in 2014, this directive was designed to facilitate mandatory sharing of masts and small cell infrastructure by Telecoms companies to reduce costs, and to regulate the proliferation of masts and other RFR emitting equipment. EECC Recitals 105, 106, and 110 introduced public health imperatives to LA/LPA authorisation systems.

The DoH argue that the,

*'UK Government had adopted ICNIRP guidelines long before the EECC directive and no further intervention was required'* (DoH defence paragraph 4),

quoting J Stacey's judgment in *R(Angell) v Secretary of State for Health and Social Care (2023) EWHC 495 (Admin)*, that,

*'the UK Government agrees with, accepts and follows ICNIRP guidelines',*

and that,

*'the 2020 ICNIRP report concluded that there was no evidence that additional precautionary measures will result in a benefit to the health of the population'*(DoH defence paragraph 5).

From our perspective how the UK transposed the EECC unto UK law is not an issue.

Matt Warman, the then Under Secretary of State at Department of Digital, Culture, Media, and Sport (DDCMS) in June 2021 stated that,

*'LPAs were not made competent authorities through EU Directive 2014/61/EC (the 2014 cost reduction directive), as the government was already content that the functions in question relating to planned civil works (ie masts) were already in place. The transposition of the EECC would have no effect on the status of LPAs **where** they are considered competent authorities under EU Directive 2014/61/EC',*

implying that LPAs are EECC competent authorities *'where'* they are considered to be so. Therefore, it is likely that on the transposition of the EECC the process that Matt Warman describes as bringing into effect the 2014 directive was repeated (see links below).

Further, EECC Recital 22 pre-empted the UK and EU Member States,

*'flexibility to assign certain functions to competent authority',*

as the Recital affirms that,

*'the tasks assigned to competent authorities by this Directive contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning'.*

The DoH say that our challenge is that,

'*EECC Regulations are said to be unlawful, and are liable to be quashed*' (DoH defence paragraph 2),

when our argument is simply that 'the Regulations' have not been brought into effect ***'where'*** LPAs should have been properly equipped to act as competent authorities.

Our challenge seeks to rectify the failure of the DoH/DLUHC to ensure that through appropriate,

*'administrative action'*,

in accordance with EECC Article 1, being the

*'Subject matter, scope and aims',*

paragraph 1, which affirms that the Directive,

*'lays down tasks of national regulatory authorities and, where applicable, of other competent authorities,* ***and establishes a set of procedures*** *to ensure the harmonised application of the regulatory framework throughout the Union'.*

On the EECC Article 124 transposition requirement for,

*'administrative provisions necessary to comply with this Directive* (the EECC)',

where equipping LAs/LPAs to act as EECC competent authorities is required, our challenge is, and had to be brought to rectify,

*'any enactment … made against either administrative action or domestic legislation other than Acts of Parliament or rules of law'* … or *'any conduct concerning the flawed enactment of as directive that may be … incompatible with any principle of EU law'* (quoting here from our judicial review application which referenced relevant sections of the European Union Withdrawal Act 2018, and its explanatory notes).

Challenging *'Regulation'* is unnecessary, and doing so would be out of scope as a challenge to an Act of Parliament or a rule of law. Instead, we are challenging the indifferent and neglectful *'conduct'* of the DoH/DLUHC.

The DDCMS assumed in July 2020 that,

*'only minor changes in relation to spectrum sharing'* (DoH defence paragraph 15),

would be required to implement the crucial EECC Article 45 on spectrum management, including the 45.2(h) harmonisation, required through,

*'pursuing consistency and predictability regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC'*,

which we assert is brought into effect through planning law, planning policy and planning procedures obliging the LAs/LPAs to make evidence-based decisions beyond reliance on ICNIRP guidelines, and by doing so respect objector rights to protect their interests.

The DoH claim that,

*'nothing further was required but to adapt and publish, by 21st December 2020, the laws, regulations and* ***administrative provisions*** *necessary to comply with this Directive* (the EECC)' (DoH defence paragraph 28c).

The DoH asserts that,

*'the time limit for judicial review expired on 21st March 2021, and proceedings were not therefore commenced 'promptly', and the claim/challenge is 'seriously out of time'* (DoH defence paragraphs 36/38).

In anticipation of the 'administrative provisions', not being brought into effect adequately in Bath specifically, Wera Hobhouse (MP for Bath) asked questions of Matt Warman on 10th November 2020 (receiving an answer on 17th November), and through a follow-up question on the 14th June 2021 (receiving a follow-up answer on the 22nd June),

https://questions-statements.parliament.uk/written-questions/detail/2020-11-12/114987/

*https://www.theyworkforyou.com/wrans/?id=2021-06-14.15347.h*

Bath and North Somerset Council (BANES) denied that it was an EECC competent authority.

Challenging a decision made by BANES on the 10th March 2021, on a mast upgrade for 5G activation when it, and the Telecoms applicant had been unaware of a family home built within the likely public exclusion zone, making the use of the home unsafe. The home owner with our support, issued a letter before claim but BANES Council in response declined to:

i) withdraw the permission it granted,

ii) refer the controversy to Ofcom,

and,

iii) accept that it was responsible for reconciling environmental and public health considerations as an EECC competent authority under EECC Recital 106 concerning the upgrade, prior to granting or refusing planning permission.

Rather than pursuing a judicial review, the potential litigant with our support, sought the intervention of Ofcom through ADR procedures to protect the rights of the compromised family on health and safety grounds under the Communications Act 2003 and the Wireless Telegraphy Act 2006.

Ofcom stated on 12 April 2021 that,

*'whilst Government have confirmed Ofcom is* ***the*** *'competent authority' referenced in the EECC, the EECC places no obligations on Ofcom'*.

An urgent request for clarity on Ofcom's role and responsibilities under the EECC was issued to Ofcom's Chief Executive, and to the Directors of Legal, Corporate, and Spectrum Analysis functions reading:

*'the role of LPAs as 'competent authorities' under Recital 106 of the EECC, which requires in specific circumstances which apply in (name withheld) case, competent authorities should reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC.*

*This Recital clearly applies to LPAs in the first instance in determining planning applications for mast/antennas. In a second instance, the EECC may require Ofcom as a national level competent authority with obligations under Article 45 of the EECC, alongside other national level competent authorities to collaborate effectively with LPAs enacting their independent competency under Recitals 5, 106 and 110 of the EECC on public health grounds. LPAs alongside all other involved agencies, and Telecoms companies, need to be properly informed of their individual and mutual obligations under the EECC.*

*If the roles of authorities are not clarified and properly exercised, Ofcom's ability to coordinate the UK enactment of the EECC will be compromised'.*

And that,

*'it appears that the EECC transposition has not brought into effect the safeguards that the public health elements of the Code are designed to protect'.*

These pre-and-post 21st December 2021 actions are evidenced in our submissions to the Court.

They demonstrate that:

i) our longstanding concern has not been the legality of EECC Regulations, rather it is the conduct induced or negated,

*'administrative action/procedures/administrative provisions',*

that make the Regulations work, or fail to work effectively,

and,

ii) we sensibly, persistently, and appropriately pursued ADR procedures to secure our and other's rights regarding those concerns.

The case is likely to be allocated to a Bristol based judge. Once allocated, (estimated February 5th 2023) we will be renewing our claim that Aarhus Convention cost protection should be granted, as the case has UK wide implications for public health and environmental protection that are fundamental to the proper operation of the planning system.

Securing that protection is our priority.

Neil McDougall
Karen Churchill