Easter Term
[2013] UKSC 25
On appeal from: [2012] EWCA Civ 897

JUDGMENT

R (on the application of ClientEarth) (Appellant) *v* The Secretary of State for the Environment, Food and Rural Affairs (Respondent)

before

Lord Hope, Deputy President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

1 May 2013

Heard on 7 March 2013

Appellant	*Respondent*
Dinah Rose QC Emma Dixon Ben Jaffey (Instructed by Client Earth)	Kassie Smith (Instructed by Treasury Solicitors)

LORD CARNWATH, DELIVERING THE JUDGMENT OF THE COURT

1. This is the judgment of the court, giving reasons for making a reference to the Court of Justice of the European Union (CJEU). The court has also decided that, on the basis of concessions made on behalf of the respondent, the appellant is entitled to a declaration that the United Kingdom is in breach of its obligations to comply with the nitrogen dioxide limits provided for in Article 13 of Directive 2008/50/EC ("the Air Quality Directive"). Decisions on the extent of other relief (if any) will have to await the determination of the CJEU on the questions referred. In these circumstances the judgment does no more than set out the factual and legal context of the dispute, and the issues of European law which now arise (as a basis in due course for a reference in compliance with the recommendations of the CJEU: 6 November 2012 C 338/1).

Background

2. Nitrogen dioxide is a gas formed by combustion at high temperatures. Road traffic and domestic heating are the main sources of nitrogen dioxide in most urban areas in the UK. The Air Quality Directive imposes limit values for levels of nitrogen dioxide in outdoor air throughout the UK. These limits are based on scientific assessments of the risks to human health associated with exposure to nitrogen dioxide. These risks are described in the agreed statement of facts and issues:

> "At concentrations exceeding the hourly limit value, nitrogen dioxide is associated with human health effects. Short term heightened concentrations of nitrogen dioxide are associated with increased numbers of hospital admissions and deaths. At elevated concentrations, nitrogen dioxide can irritate the eyes, nose, throat and lungs and lead to coughing, shortness of breath, tiredness and nausea. Long-term exposure may affect lung function and cause respiratory symptoms. Nitrogen dioxide, along with ammonia, also contributes to the formation of microscopic airborne particles, one of the many components of particulate matter (PM_{10} and $PM_{2.5}$) which have been calculated to have an effect equivalent to 29,000 premature deaths each year in the UK. It is currently unclear which components or characteristics of particulate matter lead to these health impacts."

European Air Quality Legislation

3. The current EU legislative framework governing air quality has its origins in the Air Quality Framework Directive of September 1996 (96/62/EC) (the Framework Directive). The general aim of the directive, as stated in article 1, was

> "to define the basic principles of a common strategy to:
>
> - define and establish objectives for ambient air quality in the Community designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,
>
> - assess the ambient air quality in Member States on the basis of common methods and criteria,
>
> - obtain adequate information on ambient air quality and ensure that it is made available to the public, inter alia by means of alert thresholds,
>
> - maintain ambient air quality where it is good and improve it in other cases."

4. Article 2 contained the key definitions which have been carried into the later directives, including:

> "'limit value` shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;
>
> 'target value` shall mean a level fixed with the aim of avoiding more long-term harmful effects on human health and/or the environment as a whole, to be attained where possible over a given period;
>
> 'margin of tolerance` shall mean the percentage of the limit value by which this value may be exceeded subject to the conditions laid down in this Directive;

5. A "zone" was defined as a "part of their territory delimited by the Member States", and an "agglomeration" was defined as;

> "a zone with a population concentration in excess of 250 000 inhabitants or, where the population concentration is 250 000 inhabitants or less, a population density per km² which for the Member States justifies the need for ambient air quality to be assessed and managed."

6. By article 4(1) the Commission was required to submit proposals on the setting of limit values for various atmospheric pollutants, one being nitrogen dioxide. They were required to take account of the factors listed in Annex II, which included "economic and technical feasibility". Article 7(1) required member states to take the "necessary measures to ensure compliance with the limit values". By article 7(3) they were required to draw up –

> "action plans indicating the measures to be taken in the short term where there is a risk of the limit values … being exceeded. Such plans may, depending on the individual case provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded".

7. Article 8 headed "Measures applicable in zones where levels are higher than the limit value" provided:

> 1. Member States shall draw up a list of zones and agglomerations in which the levels of one or more pollutants are higher than the limit value plus the margin of tolerance…
>
> 3. In the zones and agglomerations referred to in paragraph 1, Member States shall take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit.
>
> The said plan or programme, which must be made available to the public, shall incorporate at least the information listed in Annex IV."

8. Article 11 contained detailed provisions for information to be given to the Commission about areas of non-compliance and progress in dealing with it. In particular, member states were required to "send to the Commission the plans or programmes referred to in Article 8(3) no later than two years after the end of the year during which the levels were observed" (art 11(1)(a)(iii)).

9. A further Directive 1999/30/EC ("the First Daughter Directive") contained the detail of the limit values, margins of tolerance, and deadlines for compliance for the various pollutants. Annex II set two types of limit values for nitrogen dioxide, an hourly limit value (a maximum of 18 hours in a calendar year in which hourly mean concentrations can exceed 200 micrograms μg/m3) and an annual mean limit value (mean concentrations must not exceed 40 μg/m3 averaged over a year). The deadline for achieving both limit values was 1 January 2010. It is to be noted that for some other pollutants (sulphur dioxide and particulates) an earlier date was set (1 January 2005).

10. The 2008 Air Quality Directive was a consolidating and amending measure. As paragraph (3) of the preamble explained, the earlier directives -

> "…need to be substantially revised in order to incorporate the latest health and scientific developments and the experience of the Member States. In the interests of clarity, simplification and administrative efficiency it is therefore appropriate that those five acts be replaced by a single Directive and, where appropriate, by implementing measures."

The Framework Directive and the First Daughter Directive were repealed (Article 31), but the same limit values, margin of tolerances, and deadlines were reproduced in annex XI of the new directive.

11. Article 13 provides:

> *Limit values and alert thresholds for the protection of human health*
>
> "1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.
>
> In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.
>
> …

> The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1)…"

The difference between the first and second paragraphs of article 13 appears to reflect the fact that the former relates to limits which, unlike those for nitrogen dioxide, had already come into effect at the time of the directive. The absolute terms of the obligation under article 13 may be contrasted, for example, with article 16 which requires "all necessary measures not entailing disproportionate costs" to achieve the "target value" set for concentrations of $PM_{2.5}$.

12. Of direct relevance to the present appeal are articles 22 and 23. They come in different chapters: the former in chapter III ("Ambient and Air Quality Management", the latter in chapter IV ("Plans"). The relevant parts are as follows:

> "*Article 22 Postponement of attainment deadlines and exemption from the obligation to apply certain limit values*
>
> 1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline.
>
> …
>
> 3. Where a Member State applies paragraphs 1 or 2, it shall ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned.
>
> 4. Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the

Commission shall take into account estimated effects on ambient air quality in the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current Community measures and planned Community measures to be proposed by the Commission.

Where the Commission has raised no objections within nine months of receipt of that notification, the relevant conditions for the application of paragraphs 1 or 2 shall be deemed to be satisfied.

If objections are raised, the Commission may require Member States to adjust or provide new air quality plans.

Article 23 Air quality plans

1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.

Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed…"

13. Annex XV section A lists categories of information to be included in air quality plans generally (generally reproducing the categories in Annex IV of the Framework Directive); section B sets out additional information to be provided under article 22(1), including "information on all air pollution abatement measures that have been considered … for implementation in connection with the attainment

of air quality objectives", under specified headings. The headings include, for example

> "(a) reduction of emissions from stationary sources by ensuring that polluting small and medium sized stationary combustion sources (including for biomass) are fitted with emission control equipment or replaced;
>
> (b) reduction of emissions from vehicles through retrofitting with emission control equipment. The use of economic incentives to accelerate take-up should be considered;
>
> …
>
> (h) where appropriate, measures to protect the health of children or other sensitive groups."

14. The term "air quality plan" was new to this directive, but not the content of article 23. The "correlation table" (annex XVII) indicates that article 23 and annex XV section A were designed to reproduce with amendments the effect of article 8(1)-(4), and annex IV of the Framework Directive, where the corresponding term was "measures". The time-limit of two years, in the third paragraph, corresponds to that set by article 11(1)(a)(iii) for submission of plans under article 9(3).

15. By contrast, article 22 and annex XV section B were new. The purpose was explained by paragraph (16) of the preamble:

> "(16) For zones and agglomerations where conditions are particularly difficult, it should be possible to postpone the deadline for compliance with the air quality limit values in cases where, notwithstanding the implementation of appropriate pollution abatement measures, acute compliance problems exist in specific zones and agglomerations. Any postponement for a given zone or agglomeration should be accompanied by a comprehensive plan to be assessed by the Commission to ensure compliance by the revised deadline. The availability of necessary Community measures reflecting the chosen ambition level in the Thematic Strategy on air pollution to reduce emissions at source will be important for an effective emission reduction by the timeframe established in this Directive for compliance with the limit values and should be taken

into account when assessing requests to postpone deadlines for compliance."

16. A Commission communication relating to notifications under article 22 was issued on 26 June 2008. It noted that a majority of member states had not attained the limit values for PM_{10} even though they had become mandatory on 1 January 2005. Current assessments indicated that a similar situation might arise in 2010 when limit values for nitrogen dioxide would become mandatory (para 3). The notification procedure was described as follows:

> "The initial notifications are expected principally to concern PM10, for which the potential extensions will end three years after the entry into force of the Directive, i.e. on 11 June 2011. In view of the existing levels of non-compliance with the limit values for PM10, it is important to submit notifications as soon as possible after the Directive enters into force for zones and agglomerations where Member States consider that the conditions are met. When preparing the notifications, care must, however, be taken to ensure that the data necessary to demonstrate compliance with the conditions are complete.
>
> 9. As regards nitrogen dioxide and benzene, the limit values may not be exceeded from 1 January 2010 at the latest. Where the conditions are met, the deadline for achieving compliance may be postponed until such time as is necessary for achieving compliance with the limit values, but at maximum until 2015. The aim must be to keep the postponement period as short as possible. If an exceedance of the limit values for nitrogen dioxide or benzene occurs for the first time only in 2011 or later, postponing the deadline is no longer possible. In those cases, the second subparagraph of Article 23(1) of the new Directive will apply."

Air Quality Plans in the United Kingdom

17. For the purposes of assessing and managing air quality, the UK is divided into 43 'zones and agglomerations'. 40 of these zones and agglomerations were in breach of one or more of the limit values for nitrogen dioxide in 2010.

18. On 20 December 2010, in response to a letter before action from ClientEarth, the Secretary of State indicated that air quality plans were being drawn up for Greater London and all other non-compliant zones and

agglomerations as part of the time extension notification process under article 22. It was said that these plans would demonstrate how compliance would be achieved in these areas by 2015. However, when draft air quality plans were published on 9 June 2011 for the purposes of public consultation, the proposals indicated that in 17 zones and agglomerations, including Greater London, compliance was expected to be achieved after 2015.

19. The UK Overview Document stated (referring to projections shown in Table 1):

> "The table shows that of the 40 zones with exceedances in 2010, compliance may be achieved by 2015 in 23 zones, 16 zones are expected to achieve compliance between 2015 and 2020 and that compliance in the London zone is currently expected to be achieved before 2025" (para 1.3).

20. On 19 September 2011, the Secretary of State published an analysis of responses to the consultation. It stated, in response to comments that the plans did not meet the requirements for a time extension under Article 22:

> "The Introduction to the UK Overview document makes clear that the European Commission advised Member States to also submit air quality plans for zones where full compliance is projected after 2015. As set out in paragraph 1.1 of the UK Overview document, the UK will be submitting plans with a view to postponement of the compliance date to 2015 where attainment by this date is projected. Plans for zones where full compliance is currently expected after that date will also be submitted to the Commission under Article 23 on the basis that they set out actions to keep the exceedances period as short as possible."

21. Final plans were submitted to the Commission on 22 September 2011, including applications for time extensions under Article 22 in 24 cases supported by plans showing how the limit values would be met by 1 January 2015 at the latest. In the remaining 16 cases, no application has been made under Article 22 for a time extension, but air quality plans were prepared projecting compliance between 2015 and 2025.

22. In a decision dated 25 June 2012, the European Commission raised objections to 12 of the 24 applications for time extensions, unconditionally approved nine applications, and approved three subject to certain conditions being

fulfilled. It made no comment on the zones for which compliance by 2015 had not been shown.

23. A letter from the Commission (EU Pilot) dated 19 June 2012 referred to "multiple complaints" concerning the UK's compliance with PM_{10} and NO_2 limit values in the Air Quality Directive, including its failure to request time extensions for 17 zones, in which the NO_2 limits were exceeded. The letter commented:

> "The Commission has noted your confirmation that these zones have indeed not applied under Article 22 of the Directive and is considering how to address this issue under its wider enforcement strategy for the Directive. At this point, the Commission would like to draw your attention to the obligation of setting out 'appropriate measures, so that the exceedance period can be kept as short as possible', as provided by Article 23 for all zones and agglomerations where an exceedance is taking place and no time extension has been requested under Article 22…."

24. Another letter from the Commission (Directorate-General Environment) to ClientEarth dated 29 June 2012 commented on their own complaint of non-compliance:

> "We will await the outcome of your appeal to the United Kingdom's Supreme Court in *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* and your further update on the situation to decide how best to proceed with this matter given that it now appears clear that numerous Air Quality Plans, including the plan for London, were not communicated to the Commission under Article 22 of Directive 2008/50/EC as was originally thought… The Commission would have some considerable concerns if Article 23 of the Directive were seen to be a way of allowing Member States to circumvent the requirements of Article 22 of the Directive. Article 22 of the Directive was introduced in order to afford Member States additional time for compliance for up to a maximum of 5 years, on condition that an air quality plan is established in accordance with Article 23 and communicated to the Commission for assessment. It is only under these conditions that Member States can be afforded additional time for compliance and Article 23 itself cannot be relied upon to further extend this clearly prescribed and limited time extension clause.

> As explained, our normal policy is to stay or close complainant files where the issue in question is before the national courts so as to allow national proceedings to run their course before deciding whether or not to instigate our own infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU): The national courts are the key authority in Member States tasked with the interpretation and implementation of EU law. The fact that the Commission has powers to bring its own infringement proceedings against Member States under Article 258 TFEU should not mean that individuals cannot plead these obligations before a national court as has been recognised by the Court of Justice as long ago as 1963 (*Van Gend en Loos* judgment [1963] ECR 1). As the Court already recognised in that case, a restriction of the guarantees against an infringement by Member States to the procedures under Article 258 TFEU would remove all direct legal protection of the individual rights of their nationals. The Court concluded that the vigilance of individuals concerned to protect their rights amounted to an effective supervision in addition to the supervision entrusted by Article 258 TFEU to the Commission."

The proceedings

25. The present proceedings for judicial review had been commenced on 28 July 2011. The claimants sought –

> "(i) a declaration that the draft nitrogen dioxide air quality plans do not comply with the requirements of EU law; and (ii) a mandatory order requiring the Secretary of State to (a) revise the draft air quality plans to ensure that they all demonstrate how conformity with the nitrogen dioxide limit values will be achieved as soon as possible and by 1 January 2015 at the latest, and (b) publish the revised draft air quality plans as public consultation documents, giving a reasonable timeframe for response".

By amendment, the Appellant also sought a declaration that the United Kingdom is in breach of its obligations to comply with the nitrogen dioxide limits provided for in Article 13 of Directive 2008/50/EC.

The proceedings

26. The claim was heard by Mitting J on 13 December 2011. He dismissed the claim (*R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 3623 (Admin)). He held that article 22 was discretionary. He declined in any event to grant a mandatory order:

> "… such a mandatory order, like the imposition of an obligation on the Government to submit a plan under Article 22 to bring the United Kingdom within limit values by 1 January 2015, would raise serious political and economic questions which are not for this court. It is clear from all I have seen that any practical requirement on the United Kingdom to achieve limit values in its major agglomerations, in particular in London, would impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made. It would be likely to have a significant economic impact. The courts have traditionally been wary of entering this area of political debate for good reason." (para 15)

He also declined to make a declaration:

> "… A declaration will serve no purpose other than to make clear that which is already conceded. The means of enforcing Article 13 lie elsewhere in the hands of the Commission under article 258 of the Treaty on the Functioning of the European Union, and if referred to it, the Court of Justice of the European Union under Article 260. Those remedies are sufficient to deal with the mischief at which the 2008 Directive is aimed." (para 16)

27. The appeal was dismissed by the Court of Appeal on 30 May 2012 ([2012] EWCA Civ 897). Laws LJ, giving the only substantive judgment, agreed with Mitting J that article 22 was discretionary. In those circumstances, he declined to consider the issue of a mandatory order which he regarded as "moot". Of the judge's reasons for refusing a declaration he said:

> "… it seems to me that he was, with respect, plainly right and the contrary is not contended. His judgment speaks as a declaration. No substantive issue of effective judicial protection arises from his refusal to grant a formal declaration." (paras 22-23)

28. Permission to appeal to the Supreme Court was granted by the court on 19 December 2012.

The submissions of the parties (in summary)

ClientEarth

29. ClientEarth does not accept that the UK has considered or put in place all practical measures to ensure compliance by 2015.

30. In any event, article 22 is a mandatory procedure which applied to any member state which remained in breach of the relevant limit value at 1 January 2010. That is confirmed by article 22(4): where in the view of a member state paragraph 1 "is applicable", the state "shall" notify the Commission and communicate the required air quality plan. Paragraph 1 is applicable where "in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified…"

31. Article 23 does no more than preserve the system already in place under the previous directive. It is not an alternative procedure for a state which is in breach of the limit value, nor a means by which it can avoid the more stringent controls set out in annex XV(B) or the maximum margins of tolerance set by article 22(3).

32. The lower court erred in disregarding the responsibility of the domestic courts to provide an effective remedy for the admitted breach of article 13 (see eg Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* ([2010] ECR I-0000, paras 72, 75). Neither practical difficulties nor the expense of compliance can be relied on as defences (see eg Case C-390/07 *Commission v UK* [2009] ECR I-00214, para 121; Case C-68/11 *Commission v Italy* paras 41, 59-60).

The Secretary of State

33. The Secretary of State accepts that the UK is in breach of article 13 in relation to certain zones, and that for certain zones it has not produced plans showing conformity by 2015; but asserts that for those zones compliance within that timetable is not realistically possible, due to circumstances out of its control and unforeseen in 2008. These problems are shared with other states. In many cases the Commission has rejected plans submitted under article 22 because the notifications have failed to fulfil the condition of demonstrating compliance by 2015.

34. Article 22 is not mandatory, as indicated by the use of the word "may" in article 22(1). An air quality plan demonstrating compliance by 1 January 2015 is

only required if a member state is applying under Article 22 for postponement of the deadline. Further, postponement can only properly be sought if the state is able to demonstrate how conformity will be achieved by the new deadline.

35. Where postponement is not sought, the state is at immediate risk of infraction proceedings, but remains subject to a continuing duty, under the second paragraph of article 23, to maintain plans setting out "appropriate measures so that the exceedance period can be kept as short as possible". That paragraph (which was not in the earlier Directives) envisages, and provides for, the situation in which a Member State has failed to comply with the relevant limit values by the relevant deadline.

36. The refusal of discretionary relief by the courts below was consistent with EU principles, both of effective judicial protection, which leave to domestic systems the procedural conditions governing actions for the protection of the rights under Community law (Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at §5); and of "sincere co-operation", in cases of "unforeseeable difficulties" which make it "absolutely impossible" to carry out obligations imposed Community law (see Case C-217/88 *Commission v Federal Republic of Germany* [1990] ECR I-2879 at §33).

The court's preliminary conclusion

37. The court is satisfied that it should grant the declaration sought, the relevant breach of article 13 having been clearly established. The fact that the breach has been conceded is not, in the court's view, a sufficient reason for declining to grant a declaration, where there are no other discretionary bars to the grant of relief. Such an order is appropriate both as a formal statement of the legal position, and also to make clear that, regardless of arguments about the effect of articles 22 and 23, the way is open to immediate enforcement action at national or European level.

38. The other issues raise difficult issues of European law, the determination of which in the view of the court, requires the guidance of the CJEU, and on which accordingly as the final national court we are obliged to make a reference.

39. Taking note of the draft questions provided by the appellants, and subject to any further submissions of the parties, the following questions appear appropriate:

i) Where in a given zone or agglomeration conformity with the limit values for nitrogen dioxide cannot be achieved by the deadline of 1 January 2010 specified in annex XI of Directive 2008/50/EC ("the Directive"), is a

Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?

ii) If so, in what circumstances (if any) may a Member State be relieved of that obligation?

iii) If the answer to (i) is no, to what extent (if at all) are the obligations of a Member State which has failed to comply with article 13, and has not made an application under article 22, affected by article 23 (in particular its second paragraph)?

iv) In the event of non-compliance with article 13, and in the absence of an application under article 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU?

40. The parties are accordingly requested to submit to the court (if possible in agreed form) their proposals for any revisions to the questions to be referred to the CJEU, together with brief summaries of their respective submissions as to the answers to those questions. These should be submitted within 4 weeks of this judgment.