29 April 2015

PRESS SUMMARY

R (on the application of ClientEarth) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent) [2015] UKSC 28
On appeal from [2012] EWCA Civ 897

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEAL

The proceedings arose out of the admitted and continuing failure of the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European Union law, under Directive 2008/50/EC. In a judgment of 1 May 2013, the Supreme Court referred certain questions to the Court of Justice of the European Union (CJEU) concerning the interpretation of articles 13, 22 and 23 of the Directive.

Article 13 laid down limit values "for the protection of human health"; in respect of nitrogen dioxide, certain limits "may not be exceeded" from the relevant date, i.e. 1 January 2010. Article 22 provided a procedure for a member state to apply to the European Commission to postpone the compliance date for not more than five years in certain circumstances and subject to specified conditions. Article 23 imposed a general duty on member states to prepare "air quality plans" for areas where the limits were exceeded. By the second paragraph of article 23(1), in cases where "the attainment deadline (was) already expired", the air quality plans must set out appropriate measures, so that the period for which the member state would be in exceedance of the limits can be kept "as short as possible". Where an application was made under article 22, the air quality plan had to include the information listed in Annex XV, section B of the Directive. This included information on "all air pollution abatement measures" considered, including five specified categories of measures, such as for example "(d) measures to limit transport emissions". The required contents of air quality plans prepared under article 23 were in Annex XV section A.

ClientEarth argued that the UK was required by article 22 to apply for postponement in respect of all zones where compliance with the air quality limits could not be met by the original deadline. The Secretary of State had not applied to postpone the deadline for some of the UK's non-compliant zones, but instead in 2011 had produced air quality plans under article 23, predicting compliance would not be achieved until 2025. The Secretary of State argued that it was not required to apply for postponement under article 22. The Supreme Court in its judgment of 1 May 2013 declared the UK to be in breach of article 13, and referred the following questions to the CJEU: (1) Where in any zone of the UK the state has not achieved conformity with the nitrogen dioxide limit values by the 2010 deadline, is a member state obliged to seek postponement of the deadline in accordance with article 22? (2) If so, in what circumstances (if any) may a member state be relieved of that obligation? (3) To what extent (if at all) are the obligations of a member state which

has failed to comply with article 13 affected by article 23? (4) In the event of non-compliance with articles 13 or 22, what remedies must a national court provide?

The CJEU answered these questions in a judgment dated 14 November 2014 (C-404/13). The present proceedings considered what further orders, if any, should be made by the Supreme Court.

JUDGMENT

The Supreme Court unanimously orders that the government must submit new air quality plans to the European Commission no later than 31 December 2015. Lord Carnwath gives a judgment with which all members of the Court agree.

REASONS FOR THE JUDGMENT

- The CJEU decided to reformulate the first two questions referred. This introduced ambiguity enabling each party to claim success on the issue of whether the Secretary of State had breached article 22 by not applying to extend the deadline. However, it is unnecessary to make a final ruling on the meaning of the CJEU's judgment on these questions. **[5]** The CJEU's answer to the third question was that the fact that an air quality plan complying with article 23(1) has been drawn up does not in itself mean the member state has met is obligations under article 13. Its answer to the fourth question was that where a member state has failed to comply with article 13 and not applied to postpone the deadline under article 22, it is for the national court to take "any necessary measure" so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter. **[6]**

- The time taken by these proceedings has meant that the article 22 issue has no practical significance, except in relation to the requirements of Annex XV section B, which apply to a plan produced under article 22 but not, in terms, to a plan under article 23. However, as the Commission explained in its observations to the CJEU, the requirements of article 23(1) are no less onerous than those under article 22. The court is able where necessary to impose requirements which are appropriate to secure effective compliance at the earliest possible opportunity. The "checklist" of measures under paragraph 3 of section B have to be considered in order to demonstrate compliance with either article 22 or 23. **[23-24]**

- It is unnecessary to reach a concluded view on whether the article 22 procedure was obligatory. Lord Carnwath saw force in the Commission's reasoning, which treats article 22 as an optional derogation, but makes clear that failure to apply for a postponement, far from strengthening the position of the state, rather reinforces its essential obligation to act urgently under article 23(1) in order to remedy the danger to public health as soon as possible. **[25-26]**

- The Secretary of State's argument that there was no basis for an order quashing the 2011 plans, nor a mandatory order to replace them, was rejected. The critical breach is of article 13, not of articles 22 or 23. The CJEU judgment leaves no doubt as the seriousness of the breach, which has been continuing for more than five years, nor as to the responsibility on the national court to secure compliance. Further, during those five years the prospects of early compliance have become worse (2014 projections predicting non-compliance in some zones after 2030). The Secretary of State accepted that a new plan has to be prepared. The new government should be left in no doubt as to the need for immediate action, which is achieved by an order that new plans must be delivered to the Commission not later than 31 December 2015. **[19, 28-29, 33]**

References in square brackets are to paragraphs in the judgment