Easter Term
[2015] UKSC 28
On appeal from: [2012] EWCA Civ 897

JUDGMENT

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

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

29 April 2015

Heard on 16 April 2015

Appellant
Ben Jaffey
(Instructed by ClientEarth)

Respondent
Kassie Smith QC
(Instructed by Government Legal Department)

LORD CARNWATH: (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agree)

Introduction

1. These proceedings arise out of the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law, under Directive 2008/50/EC. The legal and factual background is set out in the judgment of this court dated 1 May 2013 [2013] UKSC 25, and need not be repeated. For the reasons given in that judgment, the court referred certain questions to the Court of Justice of the European Union (CJEU). That court has now answered those questions in a judgment dated 14 November 2014 (Case C-404/13). It remains to consider what further orders if any should be made in the light of those answers.

2. Central to the referred questions were the interpretation of, and relationship between, three provisions of the Directive: articles 13, 22 and 23. Article 13 laid down limit values "for the protection of human health", and provided that in respect of nitrogen dioxide, the limit values specified in annex XI "may not be exceeded from the dates specified therein", the relevant date being 1 January 2010. Article 22 provided a procedure for the postponement of 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 limit values were not met. By the second paragraph of article 23(1), in cases where "the attainment deadline (was) already expired", the air quality plans were required to set out appropriate measures, so that the exceedance period can be kept "as short as possible".

3. The required contents of air quality plans prepared under article 23 were laid down by annex XV section A. In addition, where an application for an extension of the deadline was made under article 22, the plan was to be supplemented by the information listed in annex XV section B. The additional requirements were, first, information concerning the status of implementation of 14 listed Directives, not all directly relevant to nitrogen dioxide emissions (para 2), and, secondly, information on –

> "all air pollution abatement measures that have been considered at appropriate local, regional or national level for implementation in connection with the attainment of air quality objectives",

including five specified categories of measures, such as for example:

> "(d) measures to limit transport emissions through traffic planning and management (including congestion pricing, differentiated parking fees or other economic incentives; establishing low emission zones);" (para 3)

4. When making the reference, this court determined to make a declaration of the breach of article 13, notwithstanding its admission by the Government. Differing in this respect from the Court of Appeal, this court thought it appropriate to do so, both as a formal statement of the legal position, and also to make clear that, regardless of arguments about articles 22 and 23 of the Directive, "the way is open to immediate enforcement action at national or European level".

The referred questions and the CJEU's response

5. The questions referred by this court were as follows:

> "(1) Where, under the Air Quality Directive (2008/50/EC) ('the Directive'), in a given zone or agglomeration conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of 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?
>
> (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 (in particular its second paragraph)?
>
> (4) In the event of non-compliance with articles 13 or 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?"

6. The CJEU, for reasons it did not clearly explain, decided to reformulate the first two questions:

> "By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, (i) whether article 22 of Directive 2008/50 must be interpreted as meaning that, where conformity with the limit values for nitrogen dioxide laid down in annex XI to that Directive cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in annex XI, that State is, *in order to be able to postpone that deadline for a maximum of five years*, obliged to make an application for postponement in accordance with article 22(1) of Directive 2008/50 and (ii) whether, if that is the case, the State may nevertheless be relieved of that obligation in certain circumstances." (para 24, emphasis added)

As will be seen, the reformulation of the first two questions, in particular by the inclusion of the emphasised words, has introduced a degree of ambiguity which it had been hoped to avoid in the original formulation. This has had the unfortunate effect of enabling each party to claim success on the issue. Fortunately, for reasons I will explain, it is unnecessary to making a final ruling on this difference, or to make a further reference for that purpose.

7. The court's answers to the three questions as so reformulated were:

> "1. Article 22(1) of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in annex XI thereto, a member state is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1).

> 2. Where it is apparent that conformity with the limit values for nitrogen dioxide established in annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of article 23(1) of the Directive has been drawn up, does not, in itself, permit the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive.
>
> 3. Where a member state has failed to comply with the requirements of the second subparagraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter."

8. The parties have made written and oral submissions on the appropriate response to the CJEU decision. In summary, Mr Jaffey for ClientEarth invites the court:

> i) to confirm, in accordance with their interpretation of the CJEU judgment, that the article 22 time extension procedure was mandatory, and to quash the existing air quality plan which was prepared under an error of law in that respect;
>
> ii) to direct the production within three months of a new air quality plan under article 23(1) demonstrating how the exceedance period will be kept "as short as possible", and complying with the additional and stricter requirements of annex XV section B.

9. In response Miss Smith for the Secretary of State submits that the correct interpretation of the CJEU decision is that the article 22 procedure was not mandatory, and that, given the stated intention of the Secretary of State to prepare updated plans by the end of the year, no further relief is necessary or appropriate.

The Commission's submissions to the CJEU

10. There was no Advocate General's opinion in this case to provide background to the court's characteristically sparse reasoning. However, the European Commission had presented detailed Observations, which help to fill the gap. Their submission contains a valuable discussion of the legal and factual background to the relevant provisions of the Directive and their objectives, before giving the Commission's proposed responses to the referred questions. They give a much clearer answer to the first two questions than the court - ostensibly in favour of the Government, but in terms which may be regarded as making it a somewhat Pyrrhic victory in its practical consequences. Their answers to the third and fourth questions are in substance the same as those given by the court, in essence for the same reasons albeit more fully stated.

11. The Commission explained that the limit values for nitrogen dioxide were previously defined in Directive 99/30/EC in April 1999, which also fixed the date for compliance at 1 January 2010. In that respect the 2008 Directive made no change. However, a review in 2005 had shown that compliance would be problematic for a significant number of states. In recognition of this, the 2008 Directive introduced, in article 22, the possibility of an application for an extension of up to five years, subject to "a number of substantive requirements and procedural safeguards" (para 22), and subject to approval and supervision by the Commission. Although the choice of measures was left to member states, annex XV section B lays down a new requirement for "a very detailed scientific examination and consideration of all available measures", and entailing "a degree of effort by a member state to demonstrate that it will introduce and implement the most appropriate measures to tackle the anticipated delay in compliance …" (para 25).

12. Article 22 was thus conceived as "derogation, albeit one subject to significant procedural and substantive requirements and safeguards" (para 27). Where a member had not applied for derogation for particular zones, but the limits were exceeded, then article 13 was breached and article 23 applied. The Commission pointed out that in such cases, the state would have been already bound to take all necessary measures to secure compliance by January 2010, and would have had 11 years (from 1999) to do so:

> "In the Commission's view, therefore, the second subparagraph of article 23(1) must be seen as an emergency mechanism that applies where there is already a serious breach of Union law that results in grave dangers to human health. In that regard, it must also be seen as a specific implementation of article 4(3) TEU, where a member state is already in breach of Union law and is already bound to remedy that breach." (para 34)

13. In the Commission's view, article 22 was "the only lawful solution offered by the legislator to member states facing a problem of compliance" (para 37). They stressed the "key point" that air quality plans produced under article 22 have to meet the stricter conditions laid down by annex XV section B:

> "If a member state could circumvent such conditions by using article 23 instead of article 22 in situations where exceedances were predictable, this would result in a kind of self-service derogation (*derogation à la carte*) and in an erosion in oversight, enforcement and in the standard of legal protection of public health that would be contrary to both the structure and the spirit of the Directive." (para 39)

14. Commenting on the compliance situation in the United Kingdom, the Commission observed that there appeared to have been a choice of "less expensive and intrusive measures" than those that would be required to put an end "to a string of continuous breaches of the limit values". The plans submitted showed that for the relevant zones "the UK only expects compliance to be achieved for each zone between 2015 and 2020 or even between 2020 and 2025 (London)" (para 43).

15. In answer to the first two questions, the Commission expressed the view that the article 22 procedure was not mandatory, but was foreseen as "an optional derogation" for member states to obligations that already existed (para 48). The consequence was that the United Kingdom was not obliged, in terms of TEU article 4(3), to apply for a derogation; but rather it was obliged to adopt all necessary measures to put an end to the infringement of article 13 as soon as possible. The infringement for article 13 resulted, not from its decision not to apply for a derogation, but from its failure to adopt adequate measures to achieve compliance by January 2010 (para 53).

16. With regard to the third question (the relationship between articles 13 and 23), the Commission emphasised that, if the state chose not to apply for derogation under article 22, it remained under a mandatory obligation under article 23 to prepare air quality plans showing measures appropriate to keep the exceedance period "as short as possible". Noting "the emergency character" of plans drawn up under the second subparagraph, it commented on the relevance of annex XV section B:

> "The obligation in the second subparagraph of article 23(1), in the case of exceedances for which a derogation has not been granted, requires member states to achieve a very precise result - compliance with the limit values for nitrogen dioxide in the

> shortest possible period of time. In other words, the Directive requires the member state to bring the infringement of article 13 to as swift an end as possible by adopting measures that would be appropriate for the specific zone or agglomeration and that would most swiftly and concretely tackle the specific problems in that area. These measures, as opposed to the ones referred to in annex XV section B, will have to tackle any problems *in concreto*, for each zone …" (para 62)

In other words, the obligation under article 23(1) was not less onerous than annex XV section B, but more specific. As the Commission observed:

> "It would be perverse if article 23(1) were treated as requiring a lesser effort from member states than article 22." (paras 64)

17. The Commission also noted ClientEarth's concerns that the plans submitted by the United Kingdom "were simply not ambitious enough" to address the problem in as short a time as possible (para 65). This view seemed to be confirmed by Mitting J's observation in the High Court that a mandatory order would "impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made". The Commission noted the European court's rejection of similar arguments of "impossibility" in a line of cases under the air quality Directives, beginning with (Case C-68/11) *Commission v Italy* (19 December 2012); and, by analogy, in an earlier series of cases relating to the bathing water Directive, beginning with (Case C-56/90) *Commission v United Kingdom* [1993] ECR I-4109. The Commission observed:

> "In each of these cases, the court found no obstacle to rely on annual bathing water reports to declare failures, finding unfounded any arguments as to difficulties faced by member states." (para 79)

18. In line with these observations, the Commission's answer to the third question was that, where a member state finds itself in breach of article 13, it may either request and obtain a derogation under article 22, or comply with article 23(1) by preparing plans to bring the breach to an end as soon as possible:

> "That is to say that the air quality plan must foresee effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly as possible, subject to judicial review by the domestic courts.

> A failure by a member state to do so would result in the infringement also [of] article 23(1) of the Directive, alongside article 4(3) TEU." (para 84)

19. With regard to the fourth question (the duty of the national court), the Commission noted that the United Kingdom's claim that it was not possible to achieve earlier compliance had not yet been tested in the national court. It regarded this as "a particularly serious question" where there was an established breach of article 13 "resulting in a clear and grave hazard to human health" (para 87). It reviewed the authorities on the right of individuals to invoke Directives before national courts, and the duty of the latter to provide appropriate remedies for their breach. It was the duty of national courts to ensure that those directly concerned by a violation of article 13 were in a position to require the competent authorities either to seek and obtain a derogation under article 22, or, if they chose not to do so, to adopt and communicate to the Commission air quality plans, compliant with article 23(1), so as to deal with the specific problems in the relevant zones as swiftly as possible (para 113).

Non-compliance - the present position

20. Before discussing the proposed responses to the CJEU decision, it is appropriate to record the present position in respect of compliance with the Directive, as summarised in the frank and helpful evidence of Jane Barton on behalf of the Secretary of State. The latest information, published in July 2014, shows a significant deterioration since the case was last before the court (and as compared to the information considered in the Commission's submission):

> "In July 2014, the UK Government published updated projections for concentrations and expected dates for compliance with the annual mean limit values in the Air Quality Directive. … These projections showed that compliance would be achieved later than previously projected. The previous projections for NO_2 published in September 2011 … show 27 zones compliant by 2015, 42 zones compliant by 2020 and all 43 zones compliant by 2025. The updated projections up to 2030 show five out of 43 zones compliant by 2015, 15 zones by 2020, 38 by 2025 and 40 by 2030. The remaining three zones would not be compliant by 2030 (Greater London Urban Area, West Midlands Urban Area and West Yorkshire Urban Area)."

21. It is fair to add that the failures of compliance are not confined to the United Kingdom. Analysis of 2013 air quality compliance data reported by member states indicated that 17 member states reported exceedances of the hourly mean limit value. One of the reasons for the worsening position is said to be failure of the European vehicle emission standards for diesel vehicles to deliver the expected emission reductions of oxides of nitrogen. Ms Barton explains:

> "The main reason for this is that the real world emission performance of a vehicle has turned out to be quite different to how the vehicle performs on the regulatory test cycle. Vehicles are emitting more NOx than predicted during real world operation. This disparity has meant the expected reductions from the introduction of stricter euro emission standards have not materialised. In fact, as is recognised in the new Clean Air Programme for Europe, average real world NOx emissions from Euro 5 diesel cars type-approved since 2009 now exceed those of Euro I cars type-approved in 1992."

She adds that this is a problem which cannot easily be addressed by individual member states, since they cannot unilaterally set stricter vehicle emission standards than those set at EU level. The European Commission, with the support of the UK Government, has made a proposal to introduce a new test procedure from 2017 to assess NOx emissions of light-duty diesel vehicles under real world driving conditions.

22. Even if some aspects of the problem may be affected by matters beyond the control of individual states, this has not led to any loosening of the limit values set by the Directive, which remain legally binding. In February 2014, the Commission launched a formal infringement proceeding against the UK for failure to meet the nitrogen dioxide limit values. It is not clear why for the moment only the UK has been selected for such action. It may have been triggered by the declaration made by this court in 2013, which was referred to in the Commission's press release, and the detailed consideration given by the Commission in connection with the CJEU case. Without sight of the correspondence with the Commission (which is said to be confidential), it is not possible to comment on the scope of that action or its likely timing and outcome. However, as is clear from the answer to the fourth question, any enforcement action taken by the Commission does not detract from the responsibility of the domestic courts for enforcement of the Directive within this country.

23. It is in any event accepted by the Secretary of State that the air quality plans which were before the court in 2011 will need to be revised to take account of the new information, and of new measures to address the problems. It is intended that

these should be submitted to the European Commission, following consultation, by the end of this year. It is estimated that on average around 80% of nitrogen dioxide emissions at sites exceeding the EU limit values come from transport, so that developing effective transport measures is regarded as a key priority for work and investment. According to Ms Barton, the Government has since 2011 committed over £2 billion in measures to reduce transport emissions. Other initiatives are being developed at local level. One example is what she describes as a "game-changing" proposal by the Mayor of London, published on 27 October 2014, for an "Ultra-Low Emission Zone" (ULEZ) in central London from 2020. One of the issues for consideration in the appeal is whether these proposals should be taken on trust, or should be subject to some measure of court enforcement.

Discussion

24. These proceedings were commenced in July 2011, shortly following the publication in June of air quality plans for consultation under article 23, which included an indication of the zones for which the Secretary of State did not intend to apply under article 22 because compliance within the extended time-limit was considered impossible. At that time the possibility of an effective application under article 22 for a postponement to January 2015 remained a live issue, at least in theory. It is understandable therefore that the focus of the claim was on that article. Unfortunately, the time taken by the proceedings, including the reference to the CJEU, has meant that article 22, with one possible exception, is of no practical significance. An extension to January 2015, the maximum allowed under that article, is of no use to the Secretary of State. Indeed, it may have been in anticipation of this position that the CJEU felt able to avoid a direct answer.

25. The possible exception relates to the requirements of annex XV section B, which would apply to a plan produced under article 22, but not, in terms, under article 23. However, the difference is more apparent than real. The purpose of the listed requirements under article 22 appears closely related to the procedure envisaged by the article, which involves approval and supervision by the Commission. As the Commission explained, the requirements of article 23(1) are no less onerous, but may be more specific than those under article 22. They are also subject to judicial review by the national court, which is able where necessary to impose such detailed requirements as are appropriate to secure effective compliance at the earliest opportunity. A formulaic recitation of steps taken under the long list of Directives in paragraph 2 of section B may be of little practical value. Mr Jaffey realistically limited his claim to paragraph 3 of section B, which he described as a "checklist" of measures which had to be considered in order to demonstrate compliance with either article. I agree with that approach, but do not regard it as necessary to spell it out in an order of the court.

26. In those circumstances I need comment only briefly on the court's answer to the first two questions. As already noted, the problem with the court's reformulation was that it introduced ambiguity in both question and answer. The court did not say whether the state was or was not obliged to make the application; but simply that it was obliged to so "in order to be able to postpone … the deadline specified by the Directive …". This formulation appeared to start from the assumption that the state was seeking to extend the deadline, and to leave open the question whether it was obliged to do so. On the other hand, the concluding statement that "Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1)" might be thought to imply an unqualified obligation in all circumstances.

27. Before this court, both counsel have bravely attempted their own linguistic analysis of the reasoning to persuade us that the answer is clearer than it seems at first sight. I am unpersuaded by either. Understandably neither party wanted us to make a new reference, although that might be difficult to avoid if it were really necessary for us to reach a determination of the issues before us. If I were required to decide the issue for myself, I would see considerable force in the reasoning of the Commission, which treats article 22 as an optional derogation, but makes clear that failure to apply, far from strengthening the position of the state, rather reinforces its essential obligation to act urgently under article 23(1), in order to remedy a real and continuing danger to public health as soon as possible. For the reasons I have given I find it unnecessary to reach a concluded view.

28. The remaining issue, which follows from the answers to the third and fourth questions, is what if any orders the court should now make in order to compel compliance. In the High Court, Mitting J considered that compliance was a matter for the Commission:

> "If a state would otherwise be in breach of its obligations under article 13 and wishes to postpone the time for compliance with that obligation, then the machinery provided by article 22(1) is available to it, but it is not obliged to use that machinery. It can, as the United Kingdom Government has done, simply admit its breach and leave it to the Commission to take whatever action the Commission thinks right by way of enforcement under article 258 of the Treaty on the Functioning of the European Union." (para 12)

The Court of Appeal adopted the same view. That position is clearly untenable in the light of the CJEU's answer to the fourth question. That makes clear that, regardless of any action taken by the Commission, enforcement is the responsibility of the national courts.

29. Notwithstanding that clear statement, Miss Smith initially submitted that, in the absence of any allegation or finding that the 2011 plans were as such affected by error of law (apart from the interpretation of article 22), there is no basis for an order to quash them, nor in consequence for a mandatory order to replace them. I have no hesitation in rejecting this submission. The critical breach is of article 13, not of article 22 or 23, which are supplementary in nature. The CJEU judgment, supported by the Commission's observations, leaves no doubt as to the seriousness of the breach, which has been continuing for more than five years, nor as to the responsibility of the national court for securing compliance. As the CJEU commented at para 31:

> "Member states must take all the measures necessary to secure compliance with that requirement [in article 13(1)] and cannot consider that the power to postpone the deadline, which they are afforded by article 22(1) of Directive 2008/50, allows them to defer, as they wish, implementation of those measures."

30. Furthermore, during the five years of breach the prospects of early compliance have become worse, not better. It is rightly accepted by the Secretary of State that new measures have to be considered and a new plan prepared. In those circumstances, we clearly have jurisdiction to make an order. Further, without doubting the good faith of the Secretary of State's intentions, we would in my view be failing in our duty if we simply accepted her assurances without any legal underpinning. It may be said that such additional relief was not spelled out in the original application for judicial review. But the delay and the consequent change of circumstances are not the fault of the claimant. That is at most a pleading point which cannot debar the claimant from seeking the appropriate remedy in the circumstances as they now are, nor relieve the court of its own responsibility in the public interest to provide it.

31. In normal circumstances, where a responsible public authority is in admitted breach of a legal obligation, but is willing to take appropriate steps to comply, the court may think it right to accept a suitable undertaking, rather than impose a mandatory order. However, Miss Smith candidly accepts that this course is not open to her, given the restrictions imposed on Government business during the current election period. The court can also take notice of the fact that formation of a new Government following the election may take a little time. The new Government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue. The only realistic way to achieve this is a mandatory order requiring new plans complying with article 23(1) to be prepared within a defined timetable.

32. Although Mr Jaffey initially pressed for a shorter period than that proposed by the Secretary of State, he made clear that his principal objective was to secure a commitment to production of compliant plans within a definite and realistic timetable, supported by a court order. In the circumstances, I regard the timetable proposed by the Secretary of State as realistic. There should in any event be liberty to either party to apply to the Administrative Court for variation if required by changes in circumstances.

33. Finally, I should mention a further important issue which we have not been called upon to determine as part of these proceedings, but which may well arise in connection with the new plans. This concerns the interpretation of the words "as short as possible" in article 23(1). The judgments of the European court noted by the Commission (para 17 above), in particular the Italian case (relating to the precursor of article 13 itself) indicate that the scope for arguing "impossibility" on practical or economic grounds is very limited. Miss Smith sought to distinguish the Italian case, on the grounds that it related to article 13, not article 23. Mr Jaffey objects that this argument takes insufficient account of the direct relationship between the two articles, as underlined by both the Commission and the CJEU. If this remains an issue in relation to the new air quality plans, when they are published for consultation, it may call for resolution by the court at an early stage to avoid further delay in the completion of compliant plans.

34. That is a further factor which makes it desirable that the new plans should be prepared under a timetable approved by the court, with liberty to apply for the determination of such issues as and when they arise in the course of the production of the plan, without the need for the expense and delay of new proceedings.

35. For these reasons, I would allow the appeal. In addition to the declaration already made, I would make a mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015. There should be provision for liberty to apply to the Administrative Court for variation of the timetable, or for determination of any other legal issues which may arise between the present parties in the course of preparation of the plans. The parties should seek to agree the terms of the order, or submit proposed drafts with supporting submissions within two weeks of the handing-down of this judgment.

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

JUDGMENT

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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.