**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 | Respondent |
| --- | --- |
| Ben Jaffey | Kassie Smith QC |
| (Instructed by ClientEarth) | (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.