Case No: C1/2012/0010

Neutral Citation Number: [2012] EWCA Civ 897
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE MITTING)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 30 May 2012

Before:

LORD JUSTICE LAWS
LORD JUSTICE PITCHFORD
and
SIR JOHN CHADWICK

- -

Between:

THE QUEEN on the application of
CLIENTEARTH **Appellant**

- and -

SECRETARY OF STATE FOR ENVIRONMENT,
FOOD & RURAL AFFAIRS **Respondent**

- -

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Mr Ben Jaffey (instructed by ClientEarth) appeared on behalf of the **Appellant**.

Miss Kassie Smith (instructed by Defra Legal Advisers) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Laws:

1. This is an appeal, with permission granted by Sir Richard Buxton on 28 March 2012, against the judgment of Mitting J given in the Administrative Court on 13 December 2011 by which he declined to grant relief in judicial review proceedings brought by the appellants to impugn draft air quality plans published by the Secretary of State for failure to comply with emission values for nitrogen dioxide set by European Union law.The appeal requires the court to construe provisions contained in Directive 2008/50/EC of the European Parliament and Council of 21 May 2008 on ambient air quality and cleaner air for Europe ("the Directive"). There are also issues touching the principle of effective judicial protection.

2. NO_2 is a gas formed by combustion at high temperatures. Traffic exhaust and domestic heating are its principal sources in most urban areas in the United Kingdom. A heightened concentration of NO_2 in the ambient atmosphere has adverse health consequences ranging from irritation of the eyes, nose and throat to respiratory difficulties and enhanced response to allergens. It contributes to the formation of microscopic airborne particles, which are estimated to be associated with 29,000 deaths each year in the United Kingdom.

3. Mitting J said this at paragraph 3 of his judgment:

> "Control of the emission of nitrogen dioxide has been the subject of Community legislation for many years. The first Framework Directive of the Council is 96/62/EC of 27 September 1996. Under Article 4 the Commission was obliged to submit proposals to the Council for the setting of limit values. Under Article 8(1) Member States were required to draw up a list of zones and agglomerations in which the levels of one or more pollutants were higher than the limit value plus the margin of tolerance. Article 8(3) required Member States to take measures in respect of those zones to ensure that a plan or programme was prepared or implemented for attaining the limit value within the specified time limit."

4. There followed Council Directive 1999/30/EC of 22 April 1999. Article 4(1) required Member States to take the measures necessary to ensure that concentrations of NO_2 did not exceed the limit values provided by Annex 2 from 1 January 2010. There followed in 2008 the Directive with which we are concerned in this appeal. Article 13(1) provides in relation to NO_2 that "the limit value specified in Annex XI may not be exceeded from the date specified therein."

5. The limit values are expressed as concentrations of micrograms of NO_2 per cubic metre in the ambient air. There are two relevant limit values: an hourly limit value allowing concentrations in excess of 200 micrograms per cubic

metre for no more than 18 hours in a calendar year; and an annual limit value allowing a mean concentration of no more than 40 micrograms per calendar month over the whole calendar year. The deadline imposed by Annex XI was again for 1 January 2010.

6. It was conceded before Mitting J and in Ms Smith's skeleton argument before us that the United Kingdom is in breach of its obligations under Article 13(1) of the Directive. The issue of interpretation in the appeal, which I will explain after introducing the legislation, turns largely on Articles 22 and 23 of the Directive.

7. Article 22 was a new provision, not pre-figured in the framework Directive or the Directive of April 1999. Article 22(1) provides in part:

> "Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide...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."

Article 22(2) deals with pollutants other than nitrogen dioxide. It states:

> "Where, in a given zone or agglomeration, conformity with the limit values for PM10 as specified in Annex XI cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State shall be exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in paragraph 1 are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to meet the deadlines."

Then (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."

8. Air quality plans are dealt with in Article 23. The first paragraph provides in part:

> "Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit 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 [Annex] XI...
>
> 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 Directive has been transposed into domestic law by the Air Quality Standards Regulations 2010. There is no transposition of Article 22. The argument before us has turned entirely on the terms of the Directive. We have not been required to consider the Regulations separately.

9. The issue on the construction of the Directive may be summarised thus: it is whether, as Mr Jaffey for the appellants asserts, as regards those zones or agglomerations where compliance with NO_2 limit values cannot be achieved by 1 January 2010, the Directive requires the Secretary of State to prepare an air quality plan which demonstrates compliance by 1 January 2015. That date

is of course five years, the maximum extended period specified in Article 22(1) after 1 January 2010.

10. In order to see how this issue arises, I should summarise in brief the factual history. For this I have drawn on the comprehensive witness statement of Helen Ainsworth, who is a policy adviser on EU air quality at Defra.

11. It was clear, at least as long ago as February 2009, that there was a risk that the United Kingdom was unable to achieve the limit values for NO_2 by 2015, especially in Greater London. There were, in fact, some 40 zones where exceedances were expected in 2010. Initially, the United Kingdom proposed to prepare and submit Time Extension Notifications for all 40 zones under Article 22. On 20 December 2010 Defra wrote to the appellants in terms on which Mr Jaffey has relied in his skeleton argument, though the letter has not figured in his oral submissions. The letter has this:

> "However, in accordance with Article 22 [the air quality plan] will aim to demonstrate compliance by 2015...
>
> Second, the obligation to comply with air quality limits gives rise to an obligation to prepare an air quality plan for that zone which brings about compliance in the shortest possible time, but in the case of NO_2 by 2015 at the latest. The Secretary of State is already working on a plan in accordance with this obligation and plans for Greater London and any other relevant zones will be published and consulted upon as soon as possible in the new year and in any event by around May at the latest with a view to submitting these to the Commission in September."

It seems plain to me that this reflects what was at the time still the Department's hope or expectation, namely that they would submit Time Extension Notifications for all 40 zones. However, it became increasingly apparent that for some of them, and particularly Greater London, it would be impossible to demonstrate full compliance with the NO_2 limit values by 2015.

12. On 9 June 2011 the Secretary of State published draft air quality plans for public consultation. It was made clear to consultees that time extension notifications would be put to the Commission, but only for those zones where compliance with the NO_2 limit values by 2015 was projected. These did not include the London zone, where compliance was expected only by 2025. In September 2011, after the close of the consultation period, the Secretary of State informed consultees that:

> "...the UK will be submitting plans with a view to postponement of the compliance date of 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."

The reference to Article 23 is of course to the second paragraph, which I have read. The United Kingdom submitted its air quality plans to the Commission by the end of September 2011.

13. I turn then to the issue on the construction of the Directive. Mr Jaffey submits that Articles 22 and 23 must be read together. Article 22 thus provides for a maximum extension period of five years from 1 January 2010 and, as respects any zone where there remain exceedances after 1 January 2010, the Member State in question must notify a proposed extension under Article 22 with proposals to ensure compliance by 1 January 2015. Otherwise, it is submitted, Article 22 is rendered nugatory and the effectiveness of the scheme of environmental and public health protection secured by the Directive is undermined. Compliance by 1 January 2015 at the latest cannot be avoided, says Mr Jaffey, by the United Kingdom sitting on its hands and leaving it to the Commission to take enforcement action pursuant to Article 258 of the Treaty or the functioning of the European Union once 1 January 2010 has passed and the limit values have not been complied with.

14. Mitting J rejected this argument. He said:

> "12. ... Article 22(1) gives to Member States a discretion to apply to postpone the deadline by a maximum of five years. The use of the word 'may' in the English test and 'peut' in the French text is unequivocal. It confers a discretion. 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."

15. In my judgment, Mitting J was right. First, as the judge said, the subjunctive "may" and in the French text "peut" are unequivocal. Giving full weight to the more liberal approach to construction which is apt to be applied to European measures, I cannot accept that the legislature intended by the terms of Article 22 to create a mandatory and absolute cut-off point for compliance with NO_2 limit values as at 1 January 2015. Mr Jaffey submitted this morning that the word "may" is used because the period of extension is or may be uncertain, but that is catered for by the expression "a maximum of five years".

He referred also to the use of the term "shall" in Article 22(2), but this does not seem to me to assist either. Article 22(2) establishes a regime for a different pollutant. Its construction and its use, in particular, of the term "shall" does not, as I see it, throw decisive or significant light on how the verb "may" is to be understood in Article 22(1). Both of these provisions enable certain positions to be arrived at or deployed by Member States if the conditions which Article 22(1) stipulates are met. All this is consistent with Mitting J's construction of Article 22(1).

16. Nor does Article 22(3) take the matter further. It only applies where Article 22(1) or (2) is deployed. It is unsurprising that rigorous requirements are attached to Article 22 extensions. I do not consider that there is persuasive force in Mr Jaffey's submission that the rigour of Article 22(3) and indeed of the extra information required by section 2 of Annex XV tends to show that Article 22(1) was intended as a compulsory regime.

17. Next, while Article 22(1) cross-refers to Article 23, the two articles are dealing with separate states of affairs. As I have said, Article 23 recalls provisions earlier contained in the Framework Directive, which included a requirement that in the case of zones where the level of pollutant exceeded the limit value a Member State should draw up a plan to secure compliance by the specified deadline. As I have made clear, Article 22 was not pre-figured at all in the Framework Directive. The duty to comply with either paragraph of Article 23(1) is, in my judgment, not conditional on the Member States proposing a five-year extension under Article 22. It seems to me that the first paragraph of 23 applies where exceedances are found to have occurred before the deadline and the second where they occur after that date, whether as originally provided or as extended by up to five years.

18. I do not consider that these conclusions are in the least contradicted, moreover, by the 16th Recital to the Directive to which Mr Jaffey referred us this morning. I may perhaps be forgiven for not reading it out. Nor does the reference to “disproportionate cost” in Article 16 or 17. I accept that the Article 13 obligation is not qualified, save by Article 22, by reference to any such considerations, but that does not drive forward Mr Jaffey's construction of Article 22(1).

19. Mr Jaffey also submitted that Article 22(4) applies even where no proposal for an extension is made under Article 22(1), but 22(4) only applies where the conditions in 22(1) or 22(2) are met and those paragraphs are, or either of them, is engaged or in play. This cannot be deployed to show that paragraph 22(1) is after all a compulsory requirement. More broadly, I do not accept Mr Jaffey's submission, set out more fully in his skeleton argument, that, unless the Directive is interpreted as his clients would contend, Article 22 will be rendered nugatory and the Directive's purpose undermined. The machinery of Article 22 allows a Member State, with the Commission's approval, to extend the time for compliance in conformity with the Directive by up to five years. But there may be instances, as here on the UK government's case, where even this extended period cannot be met. In such a case it seems to me at least doubtful whether the Article 22 procedure could be

honestly or properly applied at all. And the Member State will be in breach once the primary deadline, 1 January 2010, has passed. The Commission in such a case may bring infraction proceedings pursuant to TFEU Article 28, but the policy of the legislation is not merely to condemn breaches of its provisions and ask the Court of Justice to impose heavy sanctions accordingly. It is, of course, to promote the reduction of pollutant levels in any event. Accordingly, the first sentence of Article 23(1) is designed to support that process by requiring the production of air quality plans before the deadline expires and the second sentence after it, and all this irrespective of an Article 22 notification.

20. It may be supposed that the viability of the plans produced under Article 23 may constitute a material factor in the decision of the Commission whether to take action under Article 258 of the TFEU where there has been, as here, a violation of Article 13. Approached in this way, the scheme of environmental protection which the Directive secures is in my judgment fully effective without recourse to the construction of Articles 22 and 23 for which the appellants contend.

21. I desire to say that I consider that Mr Jaffey has made every submission that could possibly be made on behalf of his clients and has done so with a very great deal of force and elegance.

22. I indicated there was a further issue as to remedies. That is now moot. I will merely indicate very briefly how it arises. Mitting J held (paragraph 14) that, even if the appellants were right as to the interpretation of Articles 22 and 23, he would not issue a mandatory order requiring the Secretary of State to apply for a five-year postponement. Such an order would, he said, "raise serious political and economic questions which are not for this court" (paragraph 15). Mitting J also declined to grant a declaration that the United Kingdom is in breach of its obligations under Article 13. He stated:

> "16. ... It is not necessary for me to declare that that is so. This judgment records the Secretary of State's concession and my view about the correctness of that concession. A declaration will serve no purpose other than to make clear that which is already conceded."

As regards those latter observations by the judge, 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.

23. The first point, namely whether a mandatory order should be granted to require the Secretary of State to issue an Article 22 notification is moot if my Lords concur in my view that the Secretary of State is under no obligation to do so. Mr Jaffey in his skeleton has cited much authority on the principle of effective judicial protection and was, I am sure, fully prepared to advance submissions on the question before us this morning. However, we have not

found it necessary to hear such submissions because it seems to us that, given that the issue is moot, no useful purpose would be served by our entering into it and passing judgment in terms which would certainly be *obiter dicta* and perhaps in the circumstances not helpful to any party.

24. For all those reasons, I would dismiss this appeal.

Lord Justice Pitchford:

25. I agree.

Sir John Chadwick:

26. I also agree.

Order: Appeal dismissed