CO/7207/2011

Neutral Citation Number: [2011] EWHC 3623 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 13 December 2011

B e f o r e:

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF CLIENTEARTH

Claimant

v

SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

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(Official Shorthand Writers to the Court)

Mr S Hockman Q.C. and Mr B Jaffey (instructed by Clientearth) appeared on behalf of the **Claimant**
Miss K Smith (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE MITTING: By this claim the claimant seeks declaratory and mandatory orders in respect of the Government's failure to comply with emission limits set by Directive 2008/50/EC of the European Parliament and Council of 21 May 2008. Article 13 of that Directive required Member States not to exceed limit values of nitrogen dioxide set for 1 January 2010. The limit values are calculated by reference to an hourly limit not exceeding 200 micrograms per cubic metre more than 18 times per calendar year, and by reference to a calendar year when the limit is 40 micrograms per cubic metre.

2. In September 2011 the Government submitted its plans to the European Commission in respect of, amongst other things, nitrogen dioxide. I have not seen that submission but I have seen a draft United Kingdom overview document of June 2011 in which the Government's plans are outlined. I do not understand there to have been any material change since. That document demonstrates that out of the 43 areas and agglomerations in the United Kingdom only three had achieved the nitrogen dioxide limit by 1 January 2010 and only a further 23 are likely to achieve that limit by 1 January 2015. 17 areas or agglomerations, mostly built up areas, will not achieve the limit until 2020. One, Greater London, will not achieve it much before 2025.

3. 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. Flesh was put on the bones of that Directive by 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 nitrogen dioxide did not exceed the limit values set out in Annex 11 from the dates there set out. Those dates were those I have already stated, 1 January 2010. Recital 9 of the 2008 Directive stated that where objectives for air quality laid down in the Directive are not met:

> "Member States should take action in order to comply with the limit values ..."

Recital 16 stated:

> "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."

5. As I have noted, Article 13 provides that limit values for nitrogen dioxide may not be exceeded by the dates specified in Annex X1. Article 22 contains, however, a proviso:

> "1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide... cannot be achieved by the deadlines specified in Annex X1, 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."

6. Article 22(2) dealt with classes of pollutants other than nitrogen dioxide. Article 22(4) provides:

> "Members 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."

Article 22(4) goes on to provide:

> "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"

but…

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

Article 23 deals with air quality plans. Under the heading "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…specified in Annex 11…
>
> In the event of exceedences 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.'

7. Article 23 goes on to provide that air quality plans shall be communicated to the Commission without delay but no later than two years after the end of the year the first "exceedence" was observed. The Commission interpret the second paragraph of article 23 so as to deal with exceedences which first occur after the deadline imposed by Article 13 or extended by Article 22 apply.

8. In paragraph 9 of the communication from the Commission dated 26 June 2008 the Commission state:

> "As regards nitrogen dioxide…the limit values may not be exceeded from 1 January 2010 at the latest. Where the conditions are met (a reference to those to be imposed under Article 22 of the 2008 Directive) 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. If an exceedence of the limit values for nitrogen dioxide…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."

9. At first sight I was inclined to think that the English version of 23(1) could not bear the meaning put on it by the Commission. I have been referred to the French text which states:

> "En cas depassement de ces valeurs limites apres le delai prevu pour leur application, les plans relatifs a la qualite de l'air prevoient des mesures appropriees pour que la periode de depassement soit la plus courte possible. Its peuvent comporter des mesures additionnelles specifiques pour proteger les categories de populations sensibles, notamment les enfants."

The Commission's interpretation is clearly a viable reading of the French text.

10. As originally brought, this claim focused upon the consultation which the Government undertook with interested parties, who asserted it was inadequate or unlawful or both. The issue which underlies this claim is of much greater substance. The claimant's case is that the Government was and is obliged to put to the Commission a plan for reducing nitrogen dioxide levels below limit values by 1 January 2015. The Government's answer is that it was under no such obligation. Its obligation was and is, in respect of nitrogen dioxide, to comply with the limit values by 1 January 2010, which it has not done.

11. When I read the summary and detailed grounds of defence and Miss Kassie Smith's carefully worded skeleton argument, I had understood the Government to be contending that the United Kingdom was not in breach of Article 13 of the 2008 Directive. But a careful reading of Miss Smith's skeleton and the detailed grounds,

reinforced by her frank concession in oral submissions, shows that that impression is mistaken. The Secretary of State concedes that the United Kingdom is in breach of its obligations under Article 13. Miss Smith contends that Article 23 and in particular the second paragraph of 23 imposes on the Government an obligation to submit air quality plans showing that the exceedence period can be kept as short as possible in circumstances in which it is in breach of its obligations under Article 30. That is not the view of the Commission. For what it is worth it is not my own view. In my view Article 23 does no more than contain one or perhaps, in deference to the view of Miss Smith's submissions, two functions. Its first and principal function is to define what an air quality plan must contain for the purpose of submitting an application to exempt it from the deadline under Article 22. On the Commission's interpretation, based primarily on the French text, it may serve a subsidiary purpose of requiring Member States to submit air quality plans when exceedences occur after 2011 for the first time. But it is quite unnecessary for me to determine whether Miss Smith's submission as to the interpretation of Article 23 is correct or not because she accepts that, whether or not there is a freestanding obligation on the Government to submit an air quality plan in those circumstances, it does not relieve the United Kingdom from the consequences of breaching Article 13.

12. I turn to the argument of Mr Hockman QC for the claimant that Article 22(4) imposes on the Government an obligation to submit an air quality plan which demonstrates compliance or at least likely compliance with limit values by 1 January 2015 in cases where those limit values are exceeded on 1 January 2010. I do not accept his submission. 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.

13. Article 22(4) provides that:

> "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 ..."

But that, at least in the English text, appears to apply to the whole of Article 22(1), namely to a circumstance in which limit values have been exceeded and the Member State applies to extend the deadline of the compliance. The French text is not identical. It provides:

> "Un Etat membre peut reporter ces delais de cinq ans au maximum pour la zone ou agglomeration en cause, a condition qu'un plan relatif a la qualite de l'air soit etabli conformement a l'article 23 pour la zone ou l'agglomeration a laquelle le report de delai s'appliquerait."

Even those words cannot override the "peut" in the French text of article 22(1).

14. Given that the United Kingdom is not obliged to apply to postpone for up to five years under Article 22, there can be no basis for my issuing a mandatory order requiring to the Secretary of State to do so. Even if that view were wrong, I would not be minded to do so for reasons I will explain in relation to the second way in which the claimant's case is put.

15. The second way in which the claimant's case is put by amendment to the grounds of claim is to seek a declaration that the United Kingdom is in breach of its obligation to comply with the nitrogen dioxide limit values provided for in Article 13 of the Directive. There the claimants are in one sense kicking at an open goal. The Government admits that it is in breach of Article 20. The claimants do not go so far as to seek a mandatory order for compliance with Article 13 and they are wise not to do so, because 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. I would, without hesitation, conclude that it is not just or expedient under section 31(2) of the Supreme Court Act 1991 to grant a mandatory order or injunction in respect of either matter.

16. More difficulty arises in relation to the declaration. It is now common ground that the United Kingdom is in breach of its obligations under Article 13. 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. 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.

17. For those reasons, although I have determined that the arguments for the claimants are in part correct in law, I decline to grant any relief.

18. MISS SMITH: In the light of that judgment the Secretary of State would seek costs limited by the protected costs order.

19. MR JUSTICE MITTING: There is an order against the Secretary of State?

20. MISS SMITH: Yes. It limits the Secretary of State's costs to £10,000 maximum. We have a schedule of costs.

21. MR JUSTICE MITTING: How does the set-off work? There is in existence an order against the Secretary of State. Is it net or gross?

22. MISS SMITH: I will have to check the order.

23. MR JUSTICE MITTING: Leave that to one side.

24. MISS SMITH: I would make the point in support of the application for costs that you have rejected the claimant's primary case. It is the only case on their claim form, that Article 22 obliges the government by 2015. The claimants have failed. The Secretary of State was always meeting that case in these proceedings. The Secretary of State has made clear on its pleadings that it is obliged to ensure compliance under Article 13. I took you to our detailed grounds on that point. This is not a case where we have changed our case. We have been successful in rebutting the case brought by the claimants. I would also say, in the light of your decision not to grant relief in this case, that on the basis of those matters we make an application for our costs to the amount under the protected costs order.

25. MR HOCKMAN: I do not agree with my learned friend's analysis of the way in which the issues have been resolved. I would submit that in substance here the claimants' case has succeeded. We have achieved a ruling by you and you have said that it is unnecessary to make a formal declaration for reasons which we understand, but we have achieved a ruling by you that the government is in breach of its obligations under European law in relation to air quality. That was not clear before. It was not clear to you, let alone to the public at large, and certainly not clear to us, and we had to come to this court to achieve that result. The fact that you have decided that it does not have to be reflected in a formal declaration ought not to detract from our right to have our costs in relation to that issue.

26. MR JUSTICE MITTING: You have not succeeded in your argument that Article 22 requires the government to put forward an air quality plan that demonstrates likely compliance by 2015.

27. MR HOCKMAN: We have not succeeded on that but if, overall, you have reached a conclusion which is favourable to the claimants, which I would submit you have, then the question arises whether we were being unreasonable in pursuing that point among the points that we chose to pursue.

28. MR JUSTICE MITTING: If the government said to you beforehand "we admit that we are in breach of our obligation under Article 13" and did not seek to postpone it in relation to 17 areas, what then?

29. MR HOCKMAN: As recently as the end of 2010 the government themselves took the view on Article 22 that we advanced before you. My argument is that although we have lost, it was a reasonable case to advance. In the letter from DEFRA they acknowledged their view at that time - it was a DEFRA lawyer writing that letter - that Article 22 meant that in the case of nitrogen dioxide, among others, there was an obligation to submit a plan which could show attainment by 2015. The question is

what the position would have been if we launched proceedings and pursued proceedings on that basis alone, if that had been the only issue. Even then I would have been entitled to say, given the concession by DEFRA, that we ought not to have costs against us. In the present circumstances I say that we should at least have part of our costs for having succeeded on what is an important issue and the fact that we had reasonable grounds for advancing the argument on which we lost. It ought not to be an argument in favour of awarding the costs to DEFRA.

30. MISS SMITH: On the point about the letter from the DEFRA lawyer, tab 31, page 711, the position was set out in response to a letter which did not bring the challenge that was brought. You will see there was a great deal of correspondence between Clientearth and DEFRA in October 2010, and it was not until 22 June 2011, which is the letter at tab 37, that Clientearth set out - this was the letter before action in which the point was made. The action the Secretary of State expected to meet is the mandatory order that is sought in these proceedings. The response that DEFRA made to that letter is tab 38, the letter of 4 July 2011, page 746, paragraph 8 of that letter. DEFRA clearly set out that "the draft air quality plans have been drawn up pursuant to our obligations under Article 23." The position that it took in response to the letter before action is the position it has taken in these proceedings. In previous correspondence, in more generalized arguments before the draft air quality plans were put together, the DEFRA lawyer may have accepted that interpretation put forward by Clientearth. In response to the letter before action the position was made clear as to the basis on which DEFRA has submitted the draft air quality plans to the Commission. I have made the point about the fact that in my submission we have set out our position on Article 13 in our detailed grounds. Although I take on board the point that it may be not as clear as it could have been that was set out on the basis of detailed grounds. That point was made explicitly. To say that the claimants have put in an alternative claim is a mischaracterisation of the proceedings.

31. MR JUSTICE MITTING: How much do you expect to get under the order?

32. MR HOCKMAN: The costs cap of £10,000 was imposed at a stage when both claims were still live.

33. MR JUSTICE MITTING: That may be costs against you. The costs you may claim are £26,000.

34. MISS SMITH: We would submit that a sensible order would be no order for costs which would reflect the fact that both sides have won and lost points.

35. MR HOCKMAN: Would you give me a moment? If you are not inclined to grant our costs in relation to nitrogen dioxide, what my learned friend has said is fair. We would acknowledge the fairness of that. We would suggest that in relation to the other case, the MBM(?) case, the complaint about that consultation and which succeeded, that ought to be kept separate.

36. MISS SMITH: That has been agreed between the parties. It is not an issue.

37. MR HOCKMAN: We are content with that.

38. MR JUSTICE MITTING: Both sides' fallback position is no order for costs of the hearing, and I think that meets the broad merits. The government starts with an unhappy position, to having to admit that it is in breach of the European Directive, but the claimants have not succeeded in obtaining the relief they sought. It seems to me that a draw is the right result.

39. MR HOCKMAN: May I in relation to the Article 22 point ask formally for permission to take the matter further, if so advised. We have made no decision about it.

40. MR JUSTICE MITTING: I do not give you permission to go to the Court of Appeal on that issue, principally for the reason that this is a matter for enforcement at European level rather than domestic level. I see no point in arguing in a domestic court precisely what Article 22(4) means.