29 April 2015

PRESS SUMMARY

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

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

BACKGROUND TO THE APPEAL

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

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

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

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

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

JUDGMENT

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

REASONS FOR THE JUDGMENT

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

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

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

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

References in square brackets are to paragraphs in the judgment

1 May 2013

PRESS SUMMARY

R (on the application of ClientEarth) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent) [2013] UKSC 25
On appeal from [2012] EWCA Civ 897

JUSTICES: **Lord Hope (Deputy President), Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath**

BACKGROUND TO THE APPEAL

This case concerns the Government's obligations under Directive 2008/50/EC ("the Air Quality Directive") to reduce the levels of nitrogen dioxide in outdoor air in the United Kingdom. Nitrogen dioxide is a gas formed by combustion at high temperatures which, when concentrated above a certain level, poses risks to human health. The main sources of nitrogen dioxide are road traffic and domestic heating.

The Air Quality Directive sets limits to the level of various pollutants, including nitrogen dioxide, and sets corresponding margins of tolerance and time limits for compliance. The deadline for compliance with the limits for nitrogen dioxide was 1 January 2010. Each Member State was required by the Air Quality Directive to define "zones" and "agglomerations" to which the pollutant limits would apply. Article 13 imposes an absolute obligation on Member States to ensure that the limits and margins of tolerance for nitrogen dioxide are not exceeded in any zone or agglomeration after the deadline.

Article 22 of the Air Quality Directive provides that "[w]here, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide … cannot be achieved by [1 January 2010], 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 … for the zone or agglomeration to which the postponement would apply". The directive sets out the information required to be included in an air quality plan under article 22. Such plans are to be submitted to, and approved by, the European Commission.

Article 23 of the Air Quality Directive provides that where, in any given zone or agglomeration, the level of nitrogen dioxide in the outside air exceeds the limits set by that directive, the Member State must submit an air quality plan for approval by the Commission indicating how the limits, margin of tolerance and deadlines are to be met. Article 23 further provides that, where the limits have been exceeded and the deadline for compliance has already passed, "the air quality plan shall set out appropriate measures, so that the exceedance period can be kept as short as possible". Less information is required to be included in an air quality plan under article 23 than in an air quality plan under article 22.

In 2010, the limits for nitrogen dioxide set by the Air Quality Directive had been exceeded in 40 of the 43 zones and agglomerations in the United Kingdom. Air quality plans under article 22 of the Air Quality Directive relating to 24 of those zones and agglomerations, including applications for extensions of the deadline for compliance with the nitrogen dioxide limits until 1 January 2015 at the latest, were submitted by the Secretary of State to the European Commission.

However, the Secretary of State indicated that the limits relating to 16 zones and agglomerations in the UK, including Greater London, could not realistically be met by 1 January 2015. Compliance with the limits in Greater London was not expected to be achieved prior to 2025. No application for an extension of time under article 22 was made in relation to those zones and agglomerations. Instead, the Secretary of State submitted air quality plans under article 23 to the European Commission in order to demonstrate that the exceedance periods for those 16 zones and agglomerations would be kept as short as possible.

ClientEarth brought a claim for judicial review of the nitrogen dioxide air quality plans submitted by the Secretary of State to the European Commission. The Secretary of State accepts that there has been a breach of article 13 of the Air Quality Directive. However, it was argued by the Secretary of State that article 22 was not mandatory. The claim was dismissed by the High Court and by the Court of Appeal.

JUDGMENT

The Supreme Court allows the appeal to the extent that it grants a declaration that there has been a breach of article 13 of the Air Quality Directive. The proceedings are stayed whilst the other issues concerning the Air Quality Directive are referred to the Court of Justice of the European Union ("CJEU). The parties are requested to file submissions as to the precise form of the questions to be referred. Lord Carnwath gives the only judgment.

REASONS FOR THE JUDGMENT

- It is appropriate to grant a declaration that the UK is in breach of article 13. The fact that the breach has been conceded is not a sufficient reason to decline to grant such a declaration, where the breach is clearly established and there are no other discretionary bars to relief. **[37]**.

- The proper interpretation of articles 22 and 23 of the Air Quality Directive raises difficult issues of EU law, the determination of which requires the guidance of the CJEU. Accordingly, the Supreme Court as the final national court is required to refer the matter to the CJEU **[38]**.

- The parties are invited to make submissions as to precise form of the questions to be referred to the CJEU. Subject to those submissions, the following questions appear to be appropriate **[39-40]**:

    - 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 of the Treaty on the European Union (TEU) to seek postponement of the deadline in accordance with article 22 of the Directive?
    - If so, in what circumstances (if any) may a Member State be relieved of that obligation?
    - 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)?
    - 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?

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html