



**IN THE SUPREME COURT OF THE UNITED KINGDOM**

16 JULY 2013

*Before*

Lord Hope  
Lord Mance  
Lord Clarke  
Lord Sumption  
Lord Carnwath

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

AFTER hearing Counsel for the Appellant and Counsel for the Respondent on 7 March 2013 and

AFTER consideration of the written submissions filed by the parties

THE COURT DECLARED 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 and

THE COURT ORDERED THAT

- (1) The questions set out in the Schedule 1 to this order be referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union, Schedule 2 to this order setting out the factual and legal background to this reference
- (2) costs be reserved.

*Louise di Mambro*

Registrar  
16 July 2013

## SCHEDULE 1: QUESTIONS REFERRED

(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?

## SCHEDULE 2: ANNEXE

1. This Annexe sets out the factual and legal background to the reference and summaries of the parties' submissions.

### **Factual and legal background**

#### *Introduction*

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.

#### *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 (inter alia) 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.

4. Article 2 contained the key definitions which have been carried into the later directives. "Limit value" was defined as –

"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."

5. 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 was a risk of the limit values being exceeded. By Article 8, for those zones and agglomerations in which levels of one or more pollutants were excessive, they were required to take measures to ensure that a plan or programme was prepared or implemented for attaining the limit value within a specific time limit.

6. 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, including nitrogen dioxide. The deadline for achieving the limit values was 1 January 2010.
7. The 2008 Air Quality Directive was a consolidating and amending measure. As paragraph (3) of the preamble explained, the earlier directives needed to be substantially revised in order to incorporate the latest health and scientific developments and the experience of the Member States. 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. Article 13 provided that in respect of nitrogen dioxide and the limit values may not be exceeded from the date specified in annex XI, that is 1 January 2010.
8. Of direct relevance to the present appeal are articles 22 and 23:

*“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...”

9. Annex XV section A lists categories of information to be included in air quality plans generally; 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.
10. The purpose of Article 22 and annex XV section B 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.”

#### *Air Quality Plans in the United Kingdom*

11. For the purposes of assessing and managing air quality, the UK was 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. Draft air quality plans published on 9 June 2011 for public consultation indicated that in 17 zones and agglomerations, including Greater London, compliance was expected to be achieved after 2015.

12. 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 was made under Article 22 for a time extension, but air quality plans were prepared projecting compliance between 2015 and 2025.
13. 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.

### *The proceedings*

14. The present proceedings for judicial review were commenced on 28 July 2011 following the publication of the draft plans. The claimant is a non-governmental organisation interested in protection of the environment. There is no issue as to its standing to bring these proceedings. It sought (inter alia) a mandatory order requiring the Secretary of State to 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.
15. 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)



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. Permission to appeal to the Supreme Court was granted by the court on 19 December 2012.

*The decision to refer*

16. On 1 May 2013 the Supreme Court gave its decision declaring the United Kingdom to be in breach of its obligations under article 13 of the Directive. Such an order was thought 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 at national or European level. Subject to that order, the court stayed the proceedings to enable the present reference to be made. The issues before the court, relating both to the interpretation of the Directive and its enforcement, are regarded as raising difficult questions of European law, which are likely to affect a number of member states and have not hitherto been addressed by the CJEU in this form. In the circumstances it is considered that as the final national court we are obliged to make a reference.
17. Because the normal time-limit for compliance has expired, and the extended time-limit will expire in January 2015, the case warrants the Court of Justice giving its decision quickly. A request is therefore made for the application of the expedited procedure under article 105.

**Submissions of the parties in response to the questions referred**

*Appellant*

18. (1) A member state that cannot achieve conformity with the limit values for nitrogen dioxide by the deadline of 1 January 2010 must seek postponement of the deadline in accordance with Article 22:
  - i) On a proper reading of the Directive, Article 22 is a mandatory procedure which applied to any member state which remained in breach of the relevant limit value as at 1 January 2010.



ii) Article 4(3) TEU requires a member state which remained in breach of the relevant limit value as at 1 January 2010 to apply for a time extension under Article 22 of the Directive because it is the only means by which the member state can promptly cure its breach of Article 13. The only lawful alternative to an application under Article 22 is immediate compliance with the limit values.

(2) A Member State is only relieved of this obligation in the case of force majeure. It cannot rely on practical, administrative or financial difficulties to justify non-compliance with the Directive.

(3) Article 23 requires any exceedence period to be kept “as short as possible”. Further:

i) Such a period cannot in any event be longer than the final deadline for a time extension available under Article 22.

ii) In any event, “as short as possible” requires compliance as soon as physically possible.

(4) The national court must provide effective and dissuasive remedies for a breach of Article 13 of the Directive so as to ensure prompt compliance with EU law obligations. The national court must grant relief that will promptly rectify breaches of EU law, especially those by public authorities. In the present context, the proper remedy would be a mandatory order requiring production of an air quality plan which demonstrates compliance with limit values by 1 January 2015 and, as appropriate, a fine. In the context of EU law, practical, administrative or financial difficulties are not relevant factors to justify either non-compliance with the Directive or the withholding of effective relief by the national court.

### ***Respondent***

19. (1) Article 22 imposes no mandatory requirement on a Member State to make a time extension notification whenever conformity with the nitrogen dioxide limit values cannot be achieved by the 2010 deadline. It provides that a Member State may postpone the deadline for compliance with the limit value for nitrogen dioxide. A Member State cannot apply for postponement of the relevant deadline under Article 22

unless the condition set out in Article 22.1 can be fulfilled, ie the Member State can demonstrate in an air quality plan how conformity will be achieved with the limit values before the new deadline of 1 January 2015.

Therefore, a Member State is not required to produce an air quality plan for any particular zone or agglomeration demonstrating how compliance will be achieved with the limit values before the new deadline of 1 January 2015 (at the latest) whenever, in that particular 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 the Directive.

(2) Where a Member State cannot demonstrate in an air quality plan how conformity with the nitrogen dioxide limit values will be achieved before the new deadline of 1 January 2015, it cannot fulfil the conditions set out in Article 22.1, and it will not be able to postpone the deadline for compliance with the nitrogen dioxide limit values. In such circumstances, the original deadline of 1 January 2010 will apply.

Member States are not under a duty to submit to the Commission air quality plans under Article 22 even when they cannot demonstrate that conformity will be achieved with the limit values before the new deadline of 1 January 2015 (at the latest).

(3) Where a Member State cannot and has not made a time extension notification under Article 22 of the Directive, the original deadline of 1 January 2010 will apply. For those zones where compliance has not been achieved with the nitrogen dioxide limit values by that 2010 deadline, and no time extension notification has been made, there has been an exceedance of the limit values for which the attainment deadline is already expired.

In those circumstances, the Member State is obliged (pursuant to the second paragraph of Article 23.1) to produce air quality plans setting out appropriate measures so that the exceedance period can be kept as short as possible.

(4) Given that the answer to question (1) is “no”, there is no need for the Court to answer question (4).



If, contrary to the UK Government's submissions, the Court holds that the answer to question (1) is "yes", the UK Government submits that the answer to question (4) should be that, in the absence of a notification under Article 22 and in circumstances where a Member State cannot produce plans that demonstrate that conformity will be achieved with the limit values before the new deadline of 1 January 2015, it is for the national court to determine what remedy it is possible and appropriate to make, subject to the principles of equivalence and effectiveness and with regard to other relevant factors.

In such circumstances, a national court is not obliged to make a mandatory order requiring production of an air quality plan under Article 22.1 of the Directive demonstrating how conformity will be achieved with the limit values before the new deadline of 1 January 2015 (at the latest). It is for the national court to determine whether it is possible and appropriate to make such an order, taking into account all relevant factors.