IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

CO/4922/2017

[2018] EWHC 398 (Admin)

Royal Courts of Justice
Wednesday, 21st February 2018

Before:

MR JUSTICE GARNHAM

B E T W E E N :

THE QUEEN (ON THE APPLICATION OF CLIENTEARTH) NO.3 — Claimant

- and –

(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) SECRETARY OF STATE FOR TRANSPORT
(3) WELSH MINISTERS — Defendants

- and –

MAYOR OF LONDON — Interested Party

NATHALIE LIEVEN QC and RAVI MEHTA (instructed by ClientEarth) for the Claimant.

KASSIE SMITH QC and JULIANNE MORRISON (instructed by Government Legal Department) for the First Defendant.

JONATHAN MOFFETT QC (instructed by Government Legal Department) for the Third Defendant.

J U D G M E N T

MR JUSTICE GARNHAM:

1 I ended my judgment in this case with an invitation to all parties to make submissions on remedies. I received skeleton arguments, and earlier this morning heard oral submissions, from Ms Lieven on behalf of the claimant, Ms Smith on behalf of the Secretary of State, and Mr Leary for the Welsh Ministers. I am grateful to them for their assistance.

2 Four matters remain in dispute. First, the terms of the declaratory relief. In my view, it is necessary for the sake of clarity to set out in full the respects in which the 2017 Plan was unlawful, as I have done in the judgment. It follows that I prefer the claimant's formulation on declaratory relief rather than the summary form offered by the Secretary of State.

3 Second, the mandatory order. Ms Smith focuses her submissions on para.85 and para.89 of the judgment where I dealt with one aspect of the deficiency of the current plan, namely the absence of a mechanism to develop plans in the 33 local authority areas referred to in the judgment. That is to ignore para.80 and para.81 which identify the over-arching respects in which the 2017 Plan failed to comply with the Directive and the Regulations.

4 In my view, it follows from the judgment that subject to the question of exact timing, the declaratory relief must be that set out in the first sentence of para.3 of the claimant's draft order. I see no requirement for the second sentence of that draft; it is not for this Court to direct the precise form of the plan and whether the plan needs to be accompanied by technical information. That is a matter for the Secretary of State.

5 As to timing, I heard Ms Smith's explanation of the difficulties of producing the plans by September, the date advocated by Ms Lieven. Ms Smith suggests instead that ten months is needed if an end-date is to be fixed. However, as Ms Lieven points out, that is longer than was permitted either by the Supreme Court in *ClientEarth No.1* or by me in *ClientEarth No.2*. There must be a demanding timetable, given first the prolonged delay since 2010 in ensuring compliance and, second, the fact that the aim is to improve on compliance by 2019 or 2020, which is the date by which the government anticipates compliance in these zones without further work. The order will accordingly provide the publication of the supplementary plan by 4.00 p.m. on 5th October 2018.

6 Third, liberty to apply. I posed the question in the judgment whether it would be appropriate, on the particular facts of the present case, for the Court to exercise a more flexible supervisory jurisdiction than is usual. An application to that effect had been made to me when the November 2016 judgment was handed down. I refused it on that occasion, opting for a more conventional form of order, but it seems to me that it is right to reconsider the matter again in the light of this latest judgment in which the government's plans have again been found wanting.

7 Ms Smith says that the Secretary of State understands the concerns outlined at para.108 to para.109 of the judgment, but she submits it is neither appropriate nor necessary for the Court to exercise a greater supervisory jurisdiction over the future implementation of the 2017 Plan as supplemented, than it has done to date. Instead, the Secretary of State invites the Court to include the same kind of extended liberty to apply in the new order as was include in the order of November 2016. She reminds me of what I said last time when the claimants raised this issue. She points out that I noted that the Court can, where necessary, respond to claims with great expedition. She says the present claim is a case in point. She refers me to the authorities to which I referred on the previous occasion, *R (On the application of P) v Essex County Council* and *Yusuf v Secretary of State for the Home*

Department. In the former, Munby J, as then was, said that it was not part of the function of the Administrative Court to:

> "monitor, regulate or police the performance by the county council [in that case] of its statutory functions on a continuing basis. The function of the Administrative Court is ... to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function. In other words, the Administrative Court exists to adjudicate upon specific challenges to discrete decisions."

8 In the ordinary course, that is undoubtedly correct. However, I do not read the judgment of Munby J, nor that of Holman J in *Yusuf*, as excluding the existence of jurisdiction in this Court to make such an order if the circumstances demand it. No party submitted that they did. The common law is an adaptable and flexible instrument well capable of devising remedies that meet the justice of particular cases. The old authorities to which Ms Lieven referred me, *The Attorney General v Birmingham Cooperation* and *Derbyshire 1953 Chancery 149* illustrate the point.

9 Here, however, there is a more immediate consideration. The Court itself is under a duty to fashion a remedy which ensures compliance with the Directive. As Ms Lieven points out, in *ClientEarth No.1* the Court of Justice for the European Union held at para.58 that:

> " ... it is for the national court having jurisdiction ... to take as regards the national authority any necessary measure, such as an order in appropriate terms, so that the authority establishes the plan required by the Directive ..."

10 In the Supreme Court in *ClientEarth No.*1 [2015] UKSC 28 Lord Carnwath said that in the light of the CJEU's judgment "enforcement is the responsibility of the national courts" (para.28); that "the CJEU judgment, supported by the Commission's observations, leaves no doubt ... as to the responsibility of the national court for securing compliance" (para.29) and that pleading points do not "relieve the Court of responsibility in the public interest" to provide the appropriate remedy (para.30).

11 The precise steps which the Court must take to ensure compliance with its orders will vary according to the circumstances and from case to case. Before the Supreme Court a mandatory order requiring the Secretary of State to prepare new Air Quality Plans in accordance with a defined timetable, to end with delivery of the revised plans to the Commission, was regarded as appropriate. In my November 2016 judgment, I concluded that there should be liberty to apply on notice for further or additional relief or for determination of any other legal issues which might arise in the course of the preparation of the 2017 AQP.

12 Here I am faced, despite the substantial progress that has been made, with a continuing failure by the government to meet its obligation to reduce air pollution. As I pointed out in the judgment in this case, it is now eight years since compliance with the 2008 Directive should have been achieved and the 2017 Air Quality Plan is the third unsuccessful attempt the government has made at devising a plan which complies with the Directive and the domestic regulations. All the while, the health of those living in the towns and cities of this country is at real risk.

13 I do not doubt the government's good faith. I do not doubt the fact that substantial efforts have been made by civil servants and by ministers to devise a new AQP which is compliant with the law. I do not doubt the sincerity of the undertaking to address in a supplementary report the errors in the current plan exposed by these proceedings. However, the history of this litigation demonstrates that good faith, hard work and sincere promises are not enough.

14 The Court, it seems, must keep the pressure on the government to ensure the compliance with the regulations and the Directive is actually achieved. The Court itself cannot realistically monitor the performance by the government of its undertakings and obligations in this case, but it can adapt its procedure to provide a quick, efficient and low cost means of enabling the current claimant, which has acted as a valuable monitor of the government's efforts to improve air quality to date, to bring the matter back before the Court if there is evidence that the objective in view is not being, or has not been, achieved.

15 The third paragraph to the Court's order proposed by the claimants would save the time which has to be expended preparing, responding to and determining a permission application and enable the claimants to return to court, if necessary. Ms Smith correctly points out that in the present case the Court did act with considerable expedition. I handed down judgment earlier this morning less than four months after the proceedings were issued. But the need to address air pollution is urgent and eliminating the permission stage, if a further challenge were merited, would make for a yet faster process.

16 In the particular circumstances of this case, where we have an expert claimant, which to date has advanced only what are properly arguable claims, and which has demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim, it is appropriate, in my judgment, to grant this extended liberty to apply. I acknowledge that this is a wholly exception course for the Court to take.

17 As I said at the time of the November 2016 proceedings, there is great value in the healthy discipline that is provided by the Administrative Court procedures in managing and regulating the grant of judicial review in this court. That is, and must remain, the rule in the vast majority of cases. But, for the reasons I have set out, this case is exceptional. In particular, against the delays to date in achieving compliance, the obligation placed on this Court by EU law to make an order in terms that ensures the national authority establishes the plan required by the Directive means, in my judgment, that this course is both necessary and appropriate. That will mean a provision enabling ClientEarth to challenge the final supplementary plan, within the present proceedings and without going through the process of applying afresh for permission.

18 Accordingly, as against the Secretary of State, the parties will have liberty to apply on notice (a) for further or additional relief, (b) in relation to any issue as may arise in the course of the preparation of the supplementary plan to the English AQP and (c) as to the lawfulness of the final supplementary plan.

19 Different considerations apply in my judgment as regards the Welsh Ministers. As Mr Leary points out, this is the first occasion on which the Welsh Ministers have been the defendants to a claim relating to Air Quality Plans and they are not what Mr Moffett QC called "recalcitrant defendants." There have not been the same unsuccessful attempts to produce a proper Air Quality Plan by the Welsh Ministers. Furthermore, the Welsh Ministers have not contested these proceeding, but have recognised the need to draft a compliant plan from early on in the proceedings. In addition, they have come up with a realistic, but demanding, timescale for the production of a report for Wales. In my judgment, it is not appropriate to add the third of the three elements of the liberty to apply in their case. The ordinary rules requiring permission to apply for judicial review will apply to any future claim against them.

20 Finally, costs. It is agreed that ClientEarth must have its costs on ground 1 and must pay something towards the Secretary of State's costs on ground 2, because that latter ground failed before me. However, it was not until 19th December 2017 that the government

published its ministerial directions in respect of the five cities and not until 29th December that ClientEarth were informed of that fact.

21 The defendant seeks its cost to be assessed if not agreed from 19th December. The claimant contends that I should assess the costs to be paid by them now in the sum of £1,000. In my judgment, this is too complicated a case on costs to embark on a summary assessment now. The appropriate order is that the claimant should pay the defendant's costs on ground 2 from 1st January 2018 to be assessed, if not agreed. I pick that date because, in my view, the claimant was entitled to a little time to consider the significance of the publication of the ministerial directions.

MR JUSTICE GARNHAM: Anything arising?

MS SMITH: My Lord, I do apply for permission to appeal your decision on liberty to apply. As you might understand, the approach taken by this Court is of importance not just to my client but across government.

MR JUSTICE GARNHAM: Yes.

MS SMITH: We say there is a real issue that should be ventilated before the Court of Appeal as regards the interrelationship between the requirements of European law and the domestic rules on judicial review where the assumption is, in my submission, that the judicial review process will apply, including the requirement to apply for permission for the judicial review of a case. In that situation I say there is a real issue for the Court of Appeal as to what are the limits of the Court's jurisdiction in a case such as the present.

Finally, we also rely on the facts of this particular case. Given the nature of the mandatory order which your Lordship has made, in effect you are giving liberty to apply to challenge a substantive or substantive decisions regarding the measures to be put into place to up to 33 local authorities, all of which could in theory be different measures, without the filter of the permission stage. In those circumstances, we say in so far as there is a jurisdiction to grant such an order, you have exceeded the jurisdiction in this present case.

MR JUSTICE GARNHAM: Do I take it from that that the Secretary of State is not appealing the substantive decision?

MS SMITH: Sorry, my Lord. I think that given the fact that instructions have only been able to be taken at a very late stage given the embargo on this judgment, obviously your Lordship extended the number of people who could see the draft judgment, but even then you can understand the number----

MR JUSTICE GARNHAM: I set it quite widely and by additional tranches every day.

MS SMITH: Yes, I know. Government acts----

MR JUSTICE GARNHAM: By committee.

MS SMITH: Yes. My Lord, I would please apply also for permission to appeal against the substantive judgment. If necessary, I will renew that to the Court of Appeal.

MR JUSTICE GARNHAM: Yes. Any submissions from other parties?

MR MEHTA: My Lord, I think in relation to the substantive judgment our position is your judgment is both detailed and addresses all (inaudible). That is really for the reasons you have set out.

In relation to the specific question of liberty to apply, we do not understand the first objection given that no jurisdictional objection was raised before you. As I understand it, that is how it has now been put as a challenge on principle. In our submission, there is not really a real issue there and certainly not as has been articulated.

The second point is one on the facts of the case and, again, for the reasons that you have set out, we would say there are no grounds for a grant of permission and, if it can be sought from the Court of Appeal, then that is a matter for the Secretary of State.

MR JUSTICE GARNHAM: It does not really concern you.

MR LEARY: No. My Lord knows the circumstances.

MR JUSTICE GARNHAM: Ms Smith, without any hesitation at all I am afraid, I refuse permission on the substantive grounds. You will have to renew that to the Court of Appeal.

As to the question of permission to challenge my decision as to remedy, I take the view effectively advanced by the claimant. Without a challenge being indicated to the question of jurisdiction, it was a matter for the exercise of my discretion. In those circumstances,

I decline to give you permission and will have to ask you to go to the Court of Appeal if you wish to pursue it.

Thank you all very much.

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This transcript has been approved by the Judge.