CO/1508/2016

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 5 July 2017

B e f o r e:

MR JUSTICE GARNHAM

Between:

THE QUEEN ON THE APPLICATION OF CLIENTEARTH (NO.2)
Claimant

v

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
Defendant

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(Official Shorthand Writers to the Court)

Ms N Lieven QC and Mr R Mehta appeared on behalf of the **Claimant**

Ms K Smith QC and Ms J Morrison appeared on behalf of the **Defendant**

Mr S Tromans QC appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)

1. MR JUSTICE GARNHAM: By this application, ClientEarth seek an order that the Secretary of State for the Environment, Food and Rural Affairs produces a supplement to the draft air quality plan ("AQP") published on 5 May 2017.

2. ClientEarth argue that the original draft is defective, first, in failing adequately to identify measures to be applied within the jurisdiction of the devolved administrations of Scotland, Wales and Northern Ireland and second, in failing to reflect the findings set out in the Secretary of State's own technical report which accompanies the plan.

3. I give this judgment on this application ex tempore given the urgency of the matter.

4. This application was issued on 31 May 2017. It was issued pursuant to paragraph 3 of my order of 21 November 2016 which granted the parties liberty to apply for further relief relating to issues arising in the course of preparing a modified air quality plan.

5. The AQP published on 5 May 2017 was made the subject of a public consultation. That consultation continued for six weeks, concluding on 15 June. It attracted, according to the Secretary of State, some 747 responses, including one from ClientEarth, the Claimants, which response substantially replicated the material advanced in support of this application.

6. It is well-established that there are circumstances in which this court will grant judicial review of a proposal by the executive to take some action. So in R (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change [2011] EWHC 3575 (Admin), Mitting J held that in the case of a proposal which could only be affected by an executive decision validated by parliamentary resolution or the absence of

a negative resolution or by similar process, the lawfulness of the proposal could be subject to judicial review.

7. In Homesun, Mitting J identified "the true principle" being that set out in the judgment of Carnwath LJ in R (Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government [2008] EWCA Civ 148 at paragraphs 32 to 33:

> "Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests. Typically there is a process of initiation, consultation, and review, culminating in the formal action or event ("the substantive event") which creates the new legal right or restriction. For example, the substantive event may be the grant of a planning permission, following a formal process of application, consultation and resolution by the determining authority. Although each step in the process may be subject to specific legal requirements, it is only at the stage of the formal grant of planning permission that a new legal right is created.
>
> 33. Judicial review proceedings may come after the substantive event, with a view to having it set aside or "quashed"; or in advance, when it is threatened or in preparation, with a view to having it stayed or "prohibited". In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event."

8. It follows that this court has jurisdiction to grant the type of order Ms Lieven for the Claimant seeks. The issue is whether it is appropriate to do so here.

9. At the heart of my judgment in this case of 2 November 2016 were the conclusions that

the proper construction of Article 23 of the ambient air quality directive had three consequences. First, the Secretary of State must aim to achieve compliance by the soonest date possible. Second, he must choose a route to that objective which reduces exposure as quickly as possible. Third, he must take steps which mean meeting the value limits is not just possible but likely.

10. It is important to emphasise that the first and second of those requirements demand different things. The first is directed at the time by which the objective is to be achieved. The second is directed at the exposure to nitrogen dioxide that persists whilst that final objective is being achieved.

11. It is also important to note that the then Secretary of State indicated after it was handed down that she accepted the judgment. There was no appeal against it. I am told the new Secretary of State accepts the judgment too. I can proceed, therefore, on the basis that those three conclusions are accepted as correct.

12. Against that background, I turn to consider Ms Lieven's challenges today. I consider first the complaint about the alleged disconnect between the technical report and the draft plan and consultation document as to the option of employing what are called non-charging clean air zones ("CAZs"). By that expression Ms Lieven refers to CAZz which do not charge a fee for vehicular admission.

13. Whilst it may yet emerge that in most, perhaps all, cases a non-charging clean air zone will be less effective or effective less quickly, I see no illegality in putting out to consultation the possibility of non-charging CAZs.

14. I make three points in that regard.

15. First, Ms Lieven draws attention to the different emphasises in the consultation documents and the technical report produced by the Secretary of State as to the importance of mandating charging CAZs. However, I accept the Secretary of State's submission that the two documents were to be read together. The technical report underpins the consultation documents and consultees can have regard to both in making their responses, as indeed the Claimants themselves have done.

16. It may be that were the Secretary of State to adopt the current proposals as his final AQP and ClientEarth were to challenge that plan, the distinction between the two documents would be a fruitful basis for scrutinising the final report. But I am quite unable to see how, applying the test enunciated by Mitting J in Homesun and Carnwath LJ in Shrewsbury and Atcham Borough Council, that distinction renders the proposal itself unlawful at this stage.

17. Second, it is suggested that the consultation necessary to develop local non-charging CAZs would cause delay and that there was no or insufficient evidence that non-charging schemes would be as effective as mandatory charging schemes. But the plan itself proceeds on the basis of a yardstick provided by charging CAZs. If adopting a non-charging CAZs meant compliance was achieved at a later date than would be the case with a charging CAZ, or if a non-charging CAZs meant exposure was reduced less quickly, then it is likely that the plan would fall foul of the ruling in my November judgment. However, none of that, in my judgment, is inevitable at the present stage.

18. Third, some argument was focused, notably in the skeleton arguments, on the use of the term "modified AQP" in paragraph 3 of my order of 21 November 2016. As was self-evident, that expression was used simply to recognise the facts, first, that the

2015 AQP remained in force after the order and second, that a new plan which built on the 2015 plan was now required.

19. There may well be a good point to be made about the likely consequences of permitting local authorities to consider and investigate alternatives to charging CAZs, but these are the proper subject matter of the responses to the consultation document which the Secretary of State would be obliged to take into account in drawing up his final plan.

20. As to the involvement of the devolved administrations, I accept that there is a risk that involving local authorities, the devolved administrations or the Mayor of London in the process of achieving compliance with the requirement of the Directive and the associated regulations might conceivably slow the process. However, in my judgment, there is nothing inevitable in that. On the contrary, the experience in London suggests that local or regional authorities can on occasion be more proactive than central government.

21. As a matter of EU law, the UK Government retains responsibility for the actions of its constituent authorities, but there is no principle which prevents a Member State delegating responsibilities to the level required by domestic law. On the contrary, Article 3 of the relevant Directive here obliges Member States to designate competent bodies at appropriate levels to take responsibility for elements of the process that leads to a final AQP.

22. It may be if the final AQP were to be challenged by judicial review, that it would be established that such delegation is likely to result in delay in achieving compliance, in which case the Secretary of State can expect particularly close scrutiny of his decision, especially when tested against the second of my conclusions on the proper interpretation

of the Directive.

23. It may well be that the Claimant would have, were it to challenge the final report, substantial arguments about the propriety of the degree of delegation to devolved administrations, but I see nothing inherently or inevitably unlawful in the reference to the devolved administrations in the proposal which is the subject of consultation.

24. In my judgment, there is no merit in the Claimant's argument that the proposal put out to consultation was unlawful so as to undermine the consultation or to demand correction by way of a supplement.

25. Furthermore, in my view, this application achieves the difficult trick of being both excessively delayed and premature. It is excessively delayed in that it was issued 26 days into a 42 day consultation with a view to amending the subject matter of the consultation. That delay meant that it was always going to be difficult or impossible to effect meaningful amendments to the consultation document without delaying the whole process.

26. It also made it likely, even with rapid listing by this court, that the application would come on for hearing after the close of the consultation period with the result that the court would be asked to order a supplement to a consultation which had already closed. That would have the unfortunate consequence, which Ms Lieven accepted was then inevitable, of delaying the eventual publication of the plan and the introduction of measures required to ensure compliance with the Directive. I would have required quite some persuasion to take any step which risked that outcome.

27. It is premature in that that the real complaint, in my view, is about the substance of the

proposals. Voicing opposition to proposals is what consultation is all about. I see no evidence to support any suggestion that the Secretary of State has a closed mind in respect of this consultation. Were that to be the case, this court would not hesitate to intervene.

28. The fact that the Secretary of State has expressed preferences in the proposal as to the likely shape of the final plan is no ground of objection. The obligation on a consultor is to have an open mind, not an empty one.

29. In those circumstances, this application must fail.

30. MR JUSTICE GARNHAM: Yes, Ms Smith.

31. MS SMITH: My Lord, in light of your judgment, I would ask that there be an order that ClientEarth pay the Secretary of State's cost of this application. There has been agreement between the parties in the pre-action correspondence that the costs of the application should be capped and the Claimant's costs liability, it was agreed, should be capped at £5,000.

32. MR JUSTICE GARNHAM: Yes. Thank you.

33. MS LIEVEN: So my Lord, two points. First of all, can I ask for permission to appeal on the devolved assemblies matter? My Lord, I am not by any means saying you will take up such permission.

34. MR JUSTICE GARNHAM: No, but you have to ask.

35. MS LIEVEN: My Lord, I have to ask because I have to not have Ms Smith saying at some later date, "Well, actually, you have to have asked for it in order to appeal."

36. MR JUSTICE GARNHAM: Yes.

37. MS LIEVEN: So I ask, my Lord, only to advance the arguments.

38. MR JUSTICE GARNHAM: No.

39. MS LIEVEN: I assume I need to ask, given the time and your Lordship is listening.

40. MR JUSTICE GARNHAM: You do not, but not in the sense that I am with you; in the sense that I am not.

41. MS LIEVEN: No.

42. MR JUSTICE GARNHAM: Application for permission to appeal is refused.

43. MS LIEVEN: I am grateful, my Lord.

44. MR JUSTICE GARNHAM: Yes.

45. MS LIEVEN: As far as costs is concerned, my Lord, in my submission, this is an application that had to be made. I say that because when we challenged the last AQP, the Secretary of State's summary grounds specifically took the point that we could have raised these points by challenging the consultation. So we are really in a cleft stick.

46. When we brought this application -- I appreciate what your Lordship said about delay. I do not accept it, but it is not the moment to plough back through the witness statements. But my Lord, when we made this application and we wrote the letter before action, we very much hoped we would get on much faster and be able to keep the date of 31 July.

47. In those circumstances, if we had not raised these points of challenge to the consultation, then I think one can fairly confidently predict the Secretary of State would have taken that against us, particularly the devolved assemblies point, when and if the plan turns out in the same form as the draft and the point is raised at a later date because it is precisely the kind of point that the Secretary of State will say, "Well, this is a jurisdictional issue. You should have raised that right at the start."

48. So what I am suggesting, my Lord, or asking for, is no order for costs.

49. MR JUSTICE GARNHAM: Yes. Thank you.

50. No, I am afraid ClientEarth must pay the Secretary of State's costs in the sum of £5,000.

51. Good. Thank you again, all of you.

52. MS LIEVEN: Thank you, my Lord.