Clean air for all?

An assessment of the recent Supreme Court judgement *in R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*

The problem:

It is accepted on behalf of the Government that every year, the poor quality of British air results in 29,000 premature deaths in the UK. Many more live with the effects of air pollutants - asthma, heart attacks, strokes and cancer. (That is 79 people per day on average)

To put the deaths into context - in 2013, 1,713 people were killed on Britain's roads. (4.6 people/day on average).

The 7th July 2005 bombings in London killed 52.

Those at greatest risk are the young, the elderly and those with respiratory problems.

The Background:

The regulatory framework governing clean air derives primarily from the Air Quality Framework Directive 1996 (96/62/EC). The Framework Directive requires member states to assess air quality to an objective standard, and to maintain ambient air quality where it is good and to improve it where it is not.

As part of the legal requirements member countries are required to identify 'zones' that are parts of the country delimited by the member state and agglomerations (areas where the population concentration exceeds 250,000 people). Member States were then required to identify those areas where the air quality fell below levels that had been fixed to try to protect human health.

The levels fixed relate to a number of pollutants - including NO2 (Nitrogen Dioxide).

In 2008 the Framework Directive (and subsequent Directives) were updated and the Air Quality Directive 2008 replaced them - although this Directive maintained the pre-existing air quality objectives.

The Directive required that by 1st January 2010 compliance was required for Nitrogen Dioxide (and benzene). (Article 13 sets out general requirement to comply, while Annexes set out the specific targets)

The Air Quality Directive also permitted member states to apply for an extension of time to comply with the air quality requirements using Article 22 of the Air Quality Directive. (termed a 'Postponement of attainment deadlines and exemption from the obligation to apply certain limit values')

Article 23 of the Air Quality Directive required Member States to 'set out appropriate measures so that the exceedance period can be kept as short as possible.' The requirements of the European Commission were that while a postponement might be necessary that compliance should be achieved by 2015.

Looking at the UK:

The Government identified 43 'zones and agglomerations'. 40 Of them were found to be in breach of the air quality requirements in 2010.

ClientEarth wrote to the Secretary of State and received a response on 20th December 2010 indicating that air quality plans were being drawn up for Greater London and all other non-compliant zones as part of an Article 22 application. It was said that these plans would ensure compliance by 2015.

However, when draft plans were published, the proposals indicated that in 17 zones and agglomerations, including Greater London, compliance was expected after 2015.

In fact Article 22 extensions were only applied for in 24 cases where compliance was planned by 2015. In the remaining 16 cases, no application was made. Air quality plans were prepared for the remaining 16 cases anticipating compliance between 2015 and 2025.

Of the 24 applications made, the Commission approved 9, required conditions to be added to 3 and rejected 12. No comment was made on the 16 cases where no application had been made. It is understood that the Commission will be looking at enforcement/fines on a Europe-wide basis in due course.

Judicial Review proceedings were started by ClientEarth seeking a declaration that the draft proposals did not comply with EU law, and further seeking a mandatory order requiring revised plans be prepared that demonstrated how the Air Quality Directive was going to be complied with.

The case found its way to the Supreme Court.

At the hearing, the Government admitted that it was in breach of Article 13 (the clean air requirements) and accepted that it had not prepared plans for all areas to demonstrate conformity by 2015. It stated that this was for reasons beyond its control.

Significantly the Supreme Court indicated that UK courts were the correct venue to deal with these issues - that the High Court was an appropriate venue to determine whether the Government had complied with its legal obligations.

The Supreme Court granted the first relief sought - it declared that the Government had failed to comply with its legal obligations.

It then went on to ask the European Court for guidance as to the second part of the case - could it grant a mandatory order - forcing the government to draw up plans to comply? If a Member State is not obliged to draw up a plan, in what circumstances could that be allowed? If a member state has not complied with Article 13 and is not required to apply for an extension, what obligations remain on the Member State? What remedies can a national court apply to ensure compliance with the Directive? (The last question perhaps being the most rhetorical for the Government can hardly fine itself)

A hollow victory for ClientEarth?

The result of the case, to date, has been a declaration that air quality in the UK remains poor.

The Government has been prepared to admit the huge personal consequences and harm that is being inflicted on many of its citizens, but simply puts its hands up and says that even though it signed up to the legal requirements that the problems are beyond its control. They point to other European Countries that are also struggling to comply.

At the same time, the Supreme Court questions its role in enforcing the law. Having ruled that ClientEarth have a proper and valid case, they do not appear to be able to apply any remedy or sanction for non compliance. They look to Europe to the European Court to give guidance, and no doubt the government will await the censure and sanction (perhaps a fine) in due course from the European Commission.