The UK Supreme Court ruling in the ClientEarth case: Consequences and next steps

1 Summary

In April 2015, the UK Supreme Court ruled in favour of ClientEarth in its case against the UK Government for failing to achieve minimum air quality standards.[1] This landmark judgment represents a major victory in ClientEarth's five year battle to uphold the right to breathe clean air.

After hearings in the High Court, Court of Appeal, Supreme Court and the Court of Justice of the European Union, the case returned to the Supreme Court in April this year for a final hearing. On 29 April 2015, in view of the "clear and grave hazard to human health"[2] and "the need for immediate action to address this issue",[3] the court handed down judgment in favour of ClientEarth.

The Supreme Court ordered the Government to prepare new air quality plans to achieve nitrogen dioxide limits as soon as possible. The new plans must be published in draft for a minimum eight week public consultation before being submitted in final form to the European Commission by 31 December 2015. As the main cause of breaches of the nitrogen dioxide limits is road transport, and particularly diesel vehicles, the new plans will need to commit to a range of measures to drastically cut pollution from this source as soon as possible.

2 The legal basis

In 2011, ClientEarth launched a judicial review of the failure by the Secretary of State for the Environment, Food and Rural Affairs (Defra) to comply with legal limits for nitrogen dioxide (NO_2) in the Directive. The Directive was enacted to safeguard human health – NO_2 is a harmful gas

[1] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28.
[2] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, paragraph 20.
[3] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, paragraph 31.

associated with respiratory illnesses, inflammation of the lung lining and bronchitis. There were three key provisions of the Directive that were relevant in the ClientEarth case:

- Article 13 sets out limits for NO_2 that were to be met by 1 January 2010.
- Article 22 gave member states the possibility of delaying this deadline for a maximum of five years (i.e. to 1 January 2015), where certain conditions were satisfied. In particular, member states had to apply to the Commission for the time extension, and produce air quality plans demonstrating how compliance would be achieved by the later deadline.
- If limits are breached after the relevant deadline, Article 23 requires member states to prepare air quality plans containing measures so that the duration of the breach will be kept "as short as possible".

ClientEarth's case focused on 16 "zones and agglomerations" (cities and regions) that were not compliant with the original 2010 deadline and for which compliance was not projected until after 2015;[4] the maximum extended deadline under Article 22. Revised projections published in 2014 revealed that the compliance timeframe was going to be even longer, with most of the cities and regions complying between 2015 and 2030, and three, including West Midlands, West Yorkshire and Greater London not until after 2030.

The Government's defence was that their air quality plans complied with the Directive, because this was "as short as possible". ClientEarth's case was that the plans were illegal as they should have achieved compliance no later than 2015.

3 Previous stages

High Court and Court of Appeal

The case first appeared before the High Court in 2011. At an early stage in the proceedings, Defra conceded that Article 13 of the Directive had been breached, and so the main dispute was over the consequences of this breach, which turned on interpretation of Articles 22 and 23.

Justice Mitting found the government to be in breach of its Article 13 duty to achieve the NO_2 limits by 2010. However, he held that enforcement of the Directive was a matter for the European Commission, and declined to give any remedy for the breach.

ClientEarth appealed to the Court of Appeal in May 2012, but again the Court declined to award any remedy.

First Supreme Court ruling

ClientEarth launched a further appeal in 2013 to the UK Supreme Court. This time the Court made a formal declaration that the UK was in breach of its duty to achieve NO_2 limits under Article 13. Before deciding whether any further remedy was needed, it referred several questions to the Court of Justice of the European Union (CJEU) concerning the correct

[4] Greater London Urban Area; West Midlands Urban Area; Greater Manchester Urban Area; West Yorkshire Urban Area; Teesside Urban Area; The Potteries; Kingston upon Hull; Southampton Urban Area; Glasgow Urban Area; Eastern; South East; East Midlands; North West & Merseyside; Yorkshire & Humberside; West Midlands; North East.

interpretation of Articles 22 and 23 and the role of national courts in providing appropriate remedies.[5]

Court of Justice of the European Union

The CJEU ruled on these questions in November 2014. It restated the legally binding nature of air quality limits and ruled that national courts were obliged to provide a remedy where these were breached. While national courts could determine exactly what kind of remedies to give, they must be sufficient to ensure that the responsible authorities establish a plan which meets the requirements of the Directive.

One of the main requirements of the Directive is that plans must include measures to achieve limits in the shortest time possible. The CJEU did not define "as short as possible", but made clear that national courts would have to scrutinise plans to ensure that they were adequate for this purpose. See our previous briefing for more detail on the CJEU ruling.[6]

European Commission infringement proceedings

As a result of the UK Supreme Court's 2013 declaration that the UK was in breach, in February 2014 the European Commission began infringement proceedings case against the UK.[7] This is a separate but closely related legal process to the ClientEarth case. The Commission issued a "letter of formal notice" against the UK: the first formal stage in a process that could end with the imposition of fines by the CJEU. The Commission put its case on hold pending the final outcome of the ClientEarth case.

4 The final Supreme Court ruling

In April 2015 the case returned to the UK Supreme Court for it to apply the CJEU's judgment to the facts in the case and determine what action to take. The hearing took place on 16 April 2015, with judgment swiftly following on 29 April 2015. The Court unanimously ruled in favour of ClientEarth and issued a mandatory order requiring Defra to prepare new air quality plans by the end of 2015. Lord Carnwath emphasised in his judgment that:

"The new Government […] should be left in no doubt as to the need for immediate action to address this issue."[8]

The mandatory order requires the Secretary of State to "prepare and publicly consult on new replacement draft air quality plans in respect of the 16 zones and agglomerations…in accordance with Article 23(1) of [the Directive].[9]

The Directive requires that plans must be comprehensive, considering a range of measures to achieve NO_2 limit values, including those listed in an Annex to the Directive.[10] The Supreme

[5] http://curia.europa.eu/juris/document/document.jsf?docid=140698&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=190454
[6] http://healthyair.org.uk/wp-content/uploads/The-right-to-clean-air-in-the-clientearth-ruling.pdf
[7] http://europa.eu/rapid/press-release_IP-14-154_en.htm
[8] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, paragraph 31.
[9] R v SoSEFRA - UKSC final order 29 April 2015
[10] Annex XV, Section B, paragraph 3.

Court highlighted the following measures as being particularly relevant in the context of transport emissions (the main source of NO_2 breaches):[11]

- traffic planning and management;
- congestion pricing;
- differentiated parking fees;
- establishing low emission zones;
- other economic incentives.

The Directive requires that the plans must set out a timetable for implementation of each measure and estimate the impact they will have on the projected date for compliance.

The Court did not specify when the new plans must achieve compliance with the NO_2 limits. However, it took the unprecedented step of granting both parties "liberty to apply" to the High Court (the court of first instance) to determine any legal issues arising from the preparation of the new air quality plans.[12] The legal issue which is most likely to arise is whether the measures in the new plans are adequate to achieve limits in "the shortest time possible." This gives ClientEarth a quick and direct route to take the Government back to court should the new plans be inadequate.

The Court stated that the requirements of the air quality plans are:

"[...] subject to judicial review by the national court, which is able where necessary to impose such detailed requirements as are appropriate to secure effective compliance at the earliest opportunity."[13]

As explained by one legal commentator, this means that *"Our courts will now have to roll up their sleeves and keep Defra up to the mark."*[14]

In any future case, the courts will have to consider the new air quality plans in light of the principles laid down in EU case law which severely limit the Government's scope for excluding measures because of cost or other difficulties.[15] They would also have to take into account the views of the European Commission, to which the UK Supreme Court attached great significance in its judgment.[16]

5 Next steps

Defra has until 31 December 2015 to prepare and consult on new air quality plans, and submit them to the European Commission. The draft plans will be subject to a minimum eight-week consultation period.

Defra have stated that the draft plans will be published for consultation in September 2015. Defra has also stated and that the new plans will cover all 38 UK zones and agglomerations

[11] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, Paragraph 3.
[12] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, Paragraph 33.
[13] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28, paragraph 25.
[14] http://ukhumanrightsblog.com/2015/04/30/supreme-court-no-excuses-uk-must-comply-with-eu-air-pollution-law/#more-25863
[15] Case C-68/11 Commission v Italy [2012] ECR, paragraphs 58 to 65
[16] Case C-404/13 European Commission's written observations

which are currently in breach of the NO_2 limits, not just the 16 which were the subject of the ClientEarth case.

The public consultation represents an opportunity for the public and relevant health, transport and environmental groups to engage with and influence the future of air quality in the UK – in particular given increasing evidence of the dangers and health consequences of air pollution over recent years.

ClientEarth will carefully analyse the new plans to assess whether they comply with the Directive. If they do not, we may take further legal action to challenge them before the High Court.

The Commission will also be analysing the new plans in early 2016. If it deems that they are inadequate it may issue a reasoned opinion against the UK as part of its infringement proceedings – a final warning before referral to the CJEU, which ultimately has the power to issue large fines against the UK.

6 Implications of the judgment

The effects of this judgment are far reaching, both within the UK and beyond. This judgment marks a significant step forward in the evolution of the right to clean air under EU law. The CJEU ruling built on earlier case law to confirm that air quality limits confer rights on EU citizens, which national courts have a duty to uphold by scrutinising plans and providing effective remedies.

The UK Supreme Court has responded by issuing a mandatory order and paving the way for future judicial scrutiny of the new air quality plans. This marks a significant change in the approach taken by the UK courts, which have traditionally been reluctant to issue mandatory orders or conduct detailed review of the substance of Government policy.

Crucially, the CJEU's ruling binds not just the UK but all 28 EU Member States. The subsequent application of this ruling by the Supreme Court, while not binding in other jurisdictions, will be highly persuasive, especially when viewed alongside similar judgments by German and Italian courts.[17]

[17] For example: Regional Administrative Court of Milan, Decision n. 2220/2012, Associazione Genitori Antismog v. Regione Lombardia (upheld in appeal by Consiglio di Stato, Decision n. 4277/2012) or Janecek case, Judgment of the Federal Administrative Court of 29 March 2007

7 Frequently asked questions

What are the main sources of NO_2 pollution nationally?

The main source of NO_2 is road transport, particularly from diesel vehicles, which typically emit almost ten times more nitrogen oxides than an equivalent petrol vehicle.[18] However, other significant sources such as domestic heating and construction will also need to be addressed in new air quality plans, to ensure limits are achieved in the shortest time possible.[19]

Where is affected by the Supreme Court judgment?

The sixteen "zones and agglomerations" which are covered by the Supreme Court ruling are:

- Greater London Urban Area;
- West Midlands Urban Area;
- Greater Manchester Urban Area;
- West Yorkshire Urban Area;
- Teesside Urban Area;
- The Potteries;
- Kingston upon Hull;
- Southampton Urban Area;
- Glasgow Urban Area;
- Eastern England;
- South East England;
- East Midlands;
- North West & Merseyside;
- Yorkshire & Humberside;
- West Midlands;
- North East England.

Both the judgment in this case and the Commission's infringement action specifically address the 16 zones that were originally projected to continue breaching limits beyond 2015. However, 22 other zones are also projected to be in breach of NO_2 limits in 2015. Defra have therefore indicated that they will also prepare new plans for these zones.

The full list of these zones and agglomerations, including maps and the 2011 plans, can be found at http://uk-air.defra.gov.uk/library/no2ten/.

[18] http://www.transportenvironment.org/sites/te/files/publications/2015_09_Five_facts_about_diesel_FINAL.pdf
[19] http://www.cleanerairforlondon.org.uk/londons-air/air-pollution-london

What would ClientEarth like to see included in the revised air quality plans?

- A national network of "clean air zones" banning all but the least polluting vehicles (Euro 6 or better)[20] from town and city centres;
- a national retrofit scheme for heavy duty vehicles such as lorries and buses;
- fiscal incentives to reverse the trend of 'dieselisation' of the UK transport fleet and accelerate uptake of Euro 6 and ultra low emission vehicles (such as electric, hydrogen and natural gas powered vehicles);
- local measures to tackle hotspots, for example, 20mph speed limits, banning or rerouting highly polluting vehicles, reallocation of road space to walking and cycling;
- congestion charging/road pricing; and
- accelerated roll-out of low and zero emission buses.

Can the Government be fined if it doesn't comply?

If the Secretary of State fails to comply with the Supreme Court order they would be in contempt of court: a criminal offence which could result in fines or imprisonment. However, this is highly unlikely; the Secretary of State will almost certainly prepare new plans in accordance with the Supreme Court order. Any challenge to whether the new plans are adequate would be through judicial review in the High Court, which does not normally impose fines.

Large fines are a possibility under the Commission's infringement action, though this would be many years down the line. However, the UK can avoid the risk of paying a fine by preparing and implementing an ambitious plan in accordance with the UK Supreme Court order.

Is the planned Ultra Low Emission Zone (ULEZ) going to fix the problem in London?

The Mayor of London’s ULEZ is a step in the right direction but it does not go far enough. The present proposal is only for a 21 square kilometre area in the capital city. The new plans will need to significantly improve on the Mayor's current policies. The Mayor and Transport for London have set out some of the additional measures that are needed in their "Transport Emissions Road Map."[21]

Will the judgment affect other policy areas?

The judgment could have an impact on other policy decisions, such as major infrastructure projects that are projected to emit significant amounts of pollution and cause further delays to the achievement of air quality limits. Although this was not directly addressed in the case, ClientEarth will be expecting the new plans to demonstrate how the Government will ensure that all policy decisions are consistent with the obligation to meet air quality limits in the shortest time possible.

[20] http://www.daf.eu/UK/DAF-and-Euro-6/Pages/General-Euro-6-Information.aspx
[21] Transport for London: https://tfl.gov.uk/cdn/static/cms/documents/transport-emissions-roadmap.pdf

Will there be any implications for local government?

While the judgment binds the Secretary of State as the representative of central government, local authorities may be required to deliver some of the measures included in the new air quality plans.

Further reading

- Judgment 29 April 2015
- Order dated 29 April 2015
- Press Summary 29 April 2015
- Judgment summary 29 April 2015
- Hearing 16 April 2015, morning session
- Hearing 16 April 2015, afternoon session
- ClientEarth written observations to the CJEU
- European Commission written observations to the CJEU

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, engaged individuals and the UK Department for International Development.

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