Neutral Citation Number: [2019] EWCA Civ 22

Case No: C1/2017/2947

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2017] EWHC 2306 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2019

Before:

Lord Justice Lindblom
Lord Justice Singh
and
Lord Justice Coulson

- -

Between:

R. (on the application of Emily Shirley and Michael Rundell)	**Appellants**
- and -	
Secretary of State for Housing, Communities and Local Government	**Respondent**
- and -	
(1) Canterbury City Council **(2) Corinthian Mountfield Ltd.**	**Interested Parties**

- -

Mr Robert McCracken Q.C. and Mr Charles Streeten (instructed by **Leigh Day Solicitors**) for the **Appellants**
Mr James Maurici Q.C. and Mr Alistair Mills (instructed by **the Government Legal Department**) for the **Respondent**
Mr James Pereira Q.C. (instructed by **Canterbury City Council**) for the **First Interested Party**
Mr Reuben Taylor Q.C. (instructed by **Clyde & Co.**) for the **Second Interested Party**

Hearing dates: 18 and 19 September 2018

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Under Directive 2008/50/EC "on ambient air quality and cleaner air for Europe" ("the Air Quality Directive") and the Air Quality Standards Regulations 2010 ("the 2010 regulations") the United Kingdom is subject to binding commitments aimed at improving air quality. As the ClientEarth proceedings have shown, the courts in this jurisdiction will enforce those commitments when it is legally possible and necessary to do so (see, most recently, *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2017] P.T.S.R. 203 and *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No.3)* [2018] Env. L.R. 21). The central question in this case arises against that background. It is a narrow question. Did the Secretary of State for Communities and Local Government – now the Secretary of State for Housing, Communities and Local Government – act unlawfully, contrary to the legislative regime for air quality, when he decided not to call in for his own determination a proposal for a large development of housing in Canterbury?

2. The appellants, Ms Emily Shirley and Dr Michael Rundell, appeal against the order of Dove J., dated 23 September 2017, dismissing their claim for judicial review of the decision of the respondent, the Secretary of State, on 29 December 2016, not to call in under section 77 of the Town and Country Planning Act 1990 an application for planning permission for 4,000 dwellings and other development on land at New Dover Road, to the south-east of the city. The interested parties are the local planning authority, Canterbury City Council, and the applicant for planning permission, Corinthian Mountfield Ltd.

3. Permission to apply for judicial review was granted on three of the four grounds originally pleaded. The first ground was that the Secretary of State, in making his decision not to call in the application, failed to take into account his obligation under the Air Quality Directive to bring air quality into compliance with the relevant threshold values, disregarded his responsibilities as "competent authority" in England, and neglected the requirement under the Air Quality Directive to achieve the threshold exposure value for nitrogen dioxide within as short a time as possible. The second ground was that the Secretary of State's decision was irrational. The third was that it was perverse for him to contend that any error of law on his part could be remedied either by raising any concerns over air quality with the city council while the application for planning permission was still undetermined, or by challenging the grant of permission by a claim for judicial review. Dove J. rejected all three grounds. Permission to appeal was granted by Arden L.J., as she then was, on 18 June 2018.

The issues in the appeal

4. There are three grounds of appeal, which raise these main issues:

    (1) whether the preparation and implementation of an air quality plan complying with Article 23 of the Air Quality Directive would be a sufficient response to breaches of limit values (ground 1 in the appellant's notice);
    (2) whether the Secretary of State had a duty as "competent authority" to use his planning powers to avoid the worsening or prolongation of breaches of the limit

values, and was therefore obliged to call in Corinthian Mountfield's application for planning permission (ground 2); and

(3) whether it was irrational for the Secretary of State to assume that any errors in the city council's approach could be put right if it reconsidered the application, or could be brought before the court in a claim for judicial review if planning permission were granted (ground 3).

The decision under challenge

5. In April 2006 the city council declared an Air Quality Management Area ("AQMA") along a stretch of the A28 between Broad Street and Military Road, after high levels of nitrogen dioxide had been recorded there. The AQMA was extended in November 2011, to include most of the area within the city centre ring road.

6. Corinthian Mountfield made their application for planning permission on 4 March 2016. One of the documents submitted as part of the environmental statement was an air quality assessment. Its conclusions were criticized by Professor Stephen Peckham, Professor of Health Policy at the University of Kent, in a report dated 25 March 2016. It was reviewed by the city council's air quality consultants. An addendum was produced on 12 August 2016. This too was criticized by Professor Peckham, in a report dated 23 September 2016. When the application went before the city council's Planning Committee on 13 December 2016, Professor Peckham addressed the committee.

7. The committee had before it a report of the city council's Planning Applications Manager, recommending approval. The officer's report contained a section dealing with the likely effects of the proposed development on air quality. She reminded the committee that "[the] importance of improving air quality in areas of the district has become increasingly apparent over recent years", and that "[legislation] has been introduced at a European level and at national level in the past decade with the aim of protecting human health and the environment by avoiding, reducing or preventing harmful concentrations of air pollution" (paragraph 322). She acknowledged that "[the] scale of the proposed development has the potential to adversely affect air quality during both the construction and operational phases". She referred to Corinthian Mountfield's air quality assessment, and to the discussions between Corinthian Mountfield and the city council's Environmental Protection Section and its air quality consultants (paragraph 324).

8. The officer told the committee there were "potential adverse impacts upon local air quality during the construction phase, mainly from dust and fine particulate matter (PM10) and additional construction traffic vehicle movements". But these would be "temporary" and could be "mitigated as far as possible through measures secured by condition requiring measures set out in the Environmental Statement as part of the Construction Environmental Management Plan (CEMP)". It was "not expected that the volume of dust or construction traffic from this development, or combined with other construction sites, would have a significant adverse impact upon air quality" (paragraph 325).

9. After it had emerged that the impact of the development on air quality might have been underestimated, the city council had required Corinthian Mountfield to undertake additional modelling work (paragraph 326). The officer said it was "important to recognise that, in accordance with official guidance from Defra, the baseline concentration in 2031 at [the St

Dunstan's] junction without the South Canterbury development is predicted to be 37.2μg/m3, only marginally below the limit value of 40μg/m3". But she concluded that, in either of the two options considered, the effect of the development at the St Dunstan's junction would be "only 0.8μg/m3 resulting in a 2031 'with' development concentration of 38.0μg/m3", which, she said, "equates to a very low 2% increase" in nitrogen dioxide (paragraph 327). It was "predicted that by 2031, and taking into account background traffic growth, St Dunstan's junction would be removed from any [AQMA], given the expected general decrease in vehicle emissions levels by 2031 in line with official guidance from Defra". Even in "an overly conservative scenario, based upon the assumption that road traffic emissions will not improve between 2014 and 2031, … the proposed development accounted for only 2% increase in NO2" (paragraph 328). The city council had required Corinthian Mountfield "to put together a proposed mitigation package in relation to air quality impacts, in line with adopted Local Plan policy C39 and draft Local Plan policy QL11". And "to mitigate air quality impacts, [it had] requested additional air quality mitigation measures". These had been agreed by Corinthian Mountfield at a cost of approximately £3.7million, and would include the installation of domestic electric vehicle charging points in both the residential and "commercial/retail" areas, the "monitoring of St George's Place …" and "the provision of an electric bicycle per dwelling …" (paragraph 329).

10. The officer therefore advised the committee (in paragraphs 330 to 332):

> "330. The Council is satisfied that the measures outlined above will mitigate air quality impacts arising from the proposed development, and these will be secured through the legal agreement. Furthermore, these measures will assist in achieving modal shift in relation to cycle use, and provide electric vehicle charging points in properties to facilitate the use of electric or hybrid cars in the future. Measures such as improvements to cycle and bus lanes within the vicinity of the development will also promote means of transport other than the car for journeys into the City and beyond.
>
> 331. Along with the mitigation measures proposed, it is considered appropriate for a scheme of air quality monitoring to be carried out (and funded by the applicant) to assess future impacts and should it be found that adverse impacts arise, the developer will be required to provide further mitigation, either in the form of a contribution towards air quality projects within the city being undertaken by the City or County Council, or provide additional mitigation directly associated with the development such as further public transport subsidy or alternative means of transport to the car.
>
> 332. With the proposed mitigation and the monitoring regime secured through the legal agreement, it is the view of the Council that the proposed measures will mitigate air quality impacts in the City, in line with policy C39 of the adopted Local Plan, policy QL11 of the draft Local Plan and the National Planning Policy Framework."

11. Finally, (in paragraph 549), the officer concluded that "taking all factors into account, the proposed development would provide housing that is required in the Canterbury district and the necessary infrastructure … to support it", and that "subject to appropriate mitigation measures being secured through a [section] 106 agreement and safeguarding conditions, …

the balance of considerations is such that the proposal would represent a sustainable form of development …".

12. The committee resolved to grant planning permission. On 16 December 2016 the city council referred the application to the Secretary of State under the Town and Country Planning (Consultation) (England) Direction 2009. In a letter dated 19 December 2016 Professor Peckham urged the Secretary of State to call in the application for his own determination, "on the grounds that the issues raised … are of national importance and concern material conflicts with national policy on important matters". Other objectors made the same request. In his letter Professor Peckham said (at paragraphs 4.1 and 4.3):

> "4.1 Any development that negatively impacts on the AQMA and air quality limits more generally (eg ozone levels) should automatically be considered of significant importance in planning decisions. It is unquestionably apparent that the air quality impact in the Canterbury AQMA of this development would be materially worse than without it. It would in all probability have a negative effect on air quality within the Canterbury AQMA. As a result, it would conflict with the provisions of paragraphs 109, 120 and 124 of the NPPF …
>
> …
>
> 4.3 … The failure of the Council and the applicant to *re-calculate* the adverse impact, in accordance with the method mandated as a result of [*ClientEarth*], is in addition a valid reason for calling in the application …".

13. Refusing to call in the application, the Secretary of State said this in his letter to the city council dated 29 December 2016:

> "…
>
> The Secretary of State has carefully considered the case against call-in policy, as set out in the Written Ministerial Statement by Nick Boles on 26 October 2012. The policy makes it clear that the power to call in a case will only be used very selectively.
>
> The Government is committed to give more power to councils and communities to make their own decisions on planning issues, and believes planning decisions should be made at the local level wherever possible.
>
> In deciding whether to call in the application, the Secretary of State has considered his policy on calling in planning applications. This policy gives examples of the types of issues which may lead him to conclude, in his opinion that applications should be called in. The Secretary of State has decided, having had regard to this policy, not to call in the application. He is content that the application should be determined by the local planning authority.
>
> In considering whether to exercise the discretion to call in the application, the Secretary of State has not considered the matter of whether the application is EIA Development for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The local planning authority responsible for determining these applications remains the relevant authority responsible for

considering whether these Regulations apply to these proposed developments and, if so, for ensuring that the requirements of the Regulations are complied with.

… ."

14. On 13 January 2017 Professor Peckham sent a pre-action protocol letter to the Secretary of State. In his letter in response, dated 27 January 2017, the Secretary of State confirmed that, in deciding whether to call in the application, he had taken into account the representations made by Professor Peckham in his letter of 19 December 2016. Having referred to some of the relevant case law, the Secretary of State's letter went on to say:

> "… The issue of whether to call in the application is pre-eminently one of planning judgment for the Secretary of State. The Secretary of State is not mandated to call in an application if any particular criteria are met. Even where your representations raise matters of real concern about the substantive decision of the local planning authority, these can be dealt with by the local planning authority itself and/or by any legal challenge to their decision."

The Secretary of State's power to call in

15. The normal procedure for the determination of applications for planning permission is that applications are made to, and determined by, local planning authorities (sections 58, 62 and 70 of the 1990 Act). Under section 77 the Secretary of State has an exceptional power to call in applications for his own determination. His function in determining an application he has called in corresponds to that of the local planning authority when it is making such a decision. Section 77 provides:

> "77. – (1) The Secretary of State may give directions requiring applications for planning permission or permission in principle … to be referred to him instead of being dealt with by local planning authorities.
>
> …
>
> (3) Any application in respect of which a direction under this section has effect shall be referred to the Secretary of State accordingly.
>
> (4) Subject to subsection (5) –
>
> (a) where an application for planning permission is referred to the Secretary of State under this section, sections 70, 72(1) and (5), 73 and 73A shall apply, with any necessary modifications, as they apply to such an application which falls to be determined by the local planning authority;
>
> (b) where an application for permission in principle is referred to the Secretary of State under this section, section 70 shall apply, with any necessary modifications, as it applies to such an application which falls to be determined by the local planning authority;
>
> …
>
> (5) Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose.
>
> … ."

16. The Secretary of State's discretion under section 77 is wide. In *R. v Secretary of State for the Environment, ex p. Newprop* [1983] J.P.L. 386 (at p.387), Forbes J. described it as "in essence a purely administrative discretion …". In *R. v Secretary of State for the Environment, Transport and the Regions, ex p. Carter Commercial Developments Ltd.* [1999] P.L.C.R. 125 (at p.132), Robin Purchas Q.C., sitting as a deputy judge of the High Court, said "the exercise of the discretion would … fall to be examined on normal administrative law principles …". In *R. (on the application of Persimmon Homes Ltd.) v Secretary of State for Communities and Local Government* [2008] J.P.L. 323, Sullivan J., as he then was, acknowledged that only "exceptionally" would the Secretary of State call in an application for his own determination (paragraphs 41 and 45 of his judgment). The discretion under section 77 was, he said, "very broad indeed" (paragraph 49). Similar observations were made by Edwards-Stuart J. in *R. (on the application of Saunders) v Secretary of State for Communities and Local Government* [2011] EWHC 3756 (Admin) (at paragraph 48).

17. In this court too, the breadth of the call-in discretion, and the essentially administrative nature of it, have been recognized. In *R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 W.L.R. 2515, Dyson L.J., as he then was, said (at paragraph 49):

> "49. … [The] fact that the exercise of the section 77 power is an alternative to an application for planning permission being "dealt with" by the local planning authority shows that it was not the intention of Parliament that the function of the Secretary of State should be to make good any shortcomings in the process undertaken by the planning authority. Parliament intended that applications for planning permission would usually be dealt with at local level by local planning authorities; but that, exceptionally, they could be dealt with by the Secretary of State if he decided to call them in. The two procedures are plainly alternatives. The purpose of the power conferred by section 77 is as described by Lord Clyde [in paragraphs 140 and 159 of his speech in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295]. It is to give the Secretary of State the power to call in planning applications where he considers that this is necessary or desirable in the national interest. It is not to exercise some supervisory control over the process by which local planning authorities perform their functions in individual cases. That is the function of the courts. … "

(see also the judgment of Coulson L.J. in *R. (on the application of Save Britain's Heritage v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137, at paragraph 21).

18. The Secretary of State's policy on call-in at the time of the decision under challenge in these proceedings was in a Ministerial Statement to Parliament made by the then Under-Secretary of State for Communities and Local Government on 26 October 2012, which said:

> "…
>
> The policy is to continue to be very selective about calling in planning applications. We consider it only right that as Parliament has entrusted local planning authorities

> with the responsibility for day-to-day planning control in their areas, they should, in general, be free to carry out their duties responsibly, with the minimum of interference.
>
> …
>
> The Secretary of State will, in general, only consider the use of his call-in powers if planning issues of more than local importance are involved. Such cases may include, for example, those which in his opinion:
>
> > may conflict with national policies on important matters;
> > may have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority;
> > could have significant effects beyond their immediate locality;
> > give rise to substantial cross-boundary or national controversy;
> > raise significant architectural and urban design issues; or
> > may involve the interests of national security or of foreign Governments.
>
> However, each case will continue to be considered on its individual merits."

The air quality legislation

19. Recital (2) of the Air Quality Directive says that "emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes". Recital (9) states:

> "(9) Air quality status should be maintained where it is already good, or improved. Where the objectives for ambient air quality laid down in this Directive are not met, Member States should take action in order to comply with the limit values and critical levels, and where possible, to attain the target values and long-term objectives."

Recital (18) states:

> "(18) Air quality plans should be developed for zones and agglomerations within which concentrations of pollutants in ambient air exceed the relevant air quality target values or limit values, plus any temporary margins of tolerance, where applicable. Air pollutants are emitted from many different sources and activities. To ensure coherence between different policies, such air quality plans should where feasible be consistent, and integrated with plans and programmes prepared pursuant to Directive 2001/80/EC … on the limitation of emissions of certain pollutants into the air from large combustion plants … , Directive 2001/81/EC, and Directive 2002/49/EC … relating to the assessment and management of environmental noise … . Full account will also be taken of the ambient air quality objectives provided for in this Directive, where permits are granted for industrial activities pursuant to Directive 2008/1/EC … concerning integrated pollution prevention and control …".

Recital (30) states:

"(30) … [This] Directive seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development …".

20. Article 1, "Subject matter", states that the Air Quality Directive lays down "measures" aimed at six "objectives", one of which is "5. maintaining air quality where it is good and improving it in other cases". Article 2, "Definitions", defines a "limit value" 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". It defines "air quality plans" as "plans that set out measures in order to attain the limit values or target values". Article 3, "Responsibilities", states:

> "Member States shall designate at the appropriate levels the competent authorities and bodies responsible for the following:
> (a) assessment of ambient air quality;
> (b) approval of measurement systems (methods, equipment, networks and laboratories);
> (c) ensuring the accuracy of measurements;
> (d) analysis of assessment methods;
> (e) coordination on their territory if Community-wide quality assurance programmes and being organised by the Commission;
> (f) cooperation with the other Member States and the Commission.
>
> Where relevant, the competent authorities and bodies shall comply with Section C of Annex 1."

Article 13, "Limit values and alert thresholds for the protection of human health", states:

> "1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.
> In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.
> Compliance with these requirements shall be assessed in accordance with Annex III.
> The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).
>
> 2. The alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII."

The dates by which the limit values are not to be exceeded are set in Annex XI. Article 22 provides for the postponement of deadlines for complying with limit values for nitrogen dioxide for a maximum of five years, "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 …". Article 23, "Air quality plans", states:

> "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. …
> …".

Article 26(3) provides that the public must be notified of the competent authority or body designated "in relation to the tasks referred to in Article 3". Article 33(1) requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it, before 11 June 2010.

21. The Air Quality Directive was transposed into domestic law by the 2010 regulations. Regulation 3, "Designation of competent authority", states:

> "3. …
> The Secretary of State is designated as the competent authority –
> (a) for the United Kingdom for the purposes of article 3(f) of [the Air Quality Directive], and
> (b) save as set out in paragraph (a), in England for the purposes of [the Air Quality Directive] and for the purposes of Directive 2004/107/EC ["relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air"]."

Regulations 4 to 7 provide for England to be divided into a number of zones and agglomerations, in each of which air quality is to be assessed and monitored. Canterbury lies in the South East zone, which comprises the administrative areas of 72 local authorities. Article 13 of the Air Quality Directive was transposed by regulation 17, "Duty in relation to limit values", which states:

> "17. …
> (1) The Secretary of State must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2.
> (2) In zones where levels of the pollutants mentioned in paragraph (1) are below the limit values set out in Schedule 2, the Secretary of State must ensure that levels are maintained below those limit values and must endeavour to maintain the best ambient air quality compatible with sustainable development."

Article 23 was transposed by regulation 26, "Air quality plans", which provides that where exceedances of annual mean limit values occur, the Secretary of State must draw up and implement an air quality plan to achieve the limit value. The air quality plan must include measures to ensure compliance with any limit value within the shortest time possible.

Is the preparation and implementation of an air quality plan complying with article 23 of the Air Quality Directive a sufficient response to breaches of limit values?

22. This ground invites us to consider what action must be taken by a Member State when any of the limit values in article 13 of the Air Quality Directive is breached. But we must keep in mind that the only complaint in these proceedings goes to the Secretary of State's decision not to call in Corinthian Mountfield's application for planning permission for his own determination. There is no challenge to any other act or decision of either the Secretary of State or the city council.

23. Dove J. concluded that when the limit values in the Air Quality Directive are exceeded, if article 13 is read with articles 22 and 23, the preparation and implementation of an air quality plan with a view to overcoming those exceedances and keeping their duration as short as possible is the "specific and bespoke remedy". There was, he said, "no room within the scheme" of the Air Quality Directive for any "freestanding responsibility" to take any specific action on "permits" or "development consents" (paragraph 49 of the judgment). Articles 13 and 23 had been "carefully and accurately transposed" in regulations 17 and 26 of the 2010 regulations. Those two regulations, said the judge, "make clear that the duty of the Secretary of State in relation to ensuring that limit values are not exceeded is to be enforced by the drawing up and implementation of an [air quality plan] in the event that exceedances occur to achieve the limit value and ensure any period of time when it is exceeded is resolved within the shortest possible time". He was "unable to read into the legislation any requirement to take particular actions in relation to permits or development consents" (paragraph 50). There was "no warrant within the legislation to regard the exercise of the power under section 77 of the 1990 Act as some form of "appropriate measure" [under article 4(3) of the Treaty on European Union] required to ensure fulfilment of the obligations under [the Air Quality Directive]" (paragraph 51). These conclusions were "reinforced" by the case law (paragraph 52). This was, "a construction which is both clear on the face of the legislation, and also supported by the relevant CJEU authority on [the Air Quality Directive] and its predecessors" (paragraph 57).

24. For the appellants, Mr Robert McCracken Q.C. submitted that the judge had erred in his understanding of the Air Quality Directive and the 2010 regulations. He had failed to adopt a suitably purposive approach, failed to recognize the high level of environmental protection required by EU law, and failed to follow the approach taken by the Court of Justice of the European Union in relevant authority. He had not grasped that the Air Quality Directive requires the taking of action, not merely the preparation of air quality plans, and that the adoption and implementation of an air quality plan is a necessary but not a sufficient response to breaches of limit values – as was clear, Mr McCracken submitted, in the court's judgments in Case C-488/15 *Commission v Bulgaria* (at paragraph 70) and Case C-404/13 *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] 1. C.M.L.R. 55 (at paragraphs 30 and 49). The judge had distinguished the court's judgment in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland* on the basis that article 4 of Directive 2000/60/EC "establishing a framework for Community action in the field of water policy" ("the Water Framework Directive") had no equivalent in the Air Quality Directive, but he had "failed to appreciate" that article 13 of the Air Quality Directive contained "equally strong, mandatory words". His reliance on the judgment in Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen* [2011] 3 C.M.L.R. 21 was misplaced.

25. I cannot accept these criticisms of Dove J.'s approach. As was submitted by Mr James Maurici Q.C. for the Secretary of State, Mr James Pereira Q.C. for the city council, and Mr Reuben Taylor Q.C. for Corinthian Mountfield, the judge was right to conclude that the preparation and implementation of an air quality plan complying with article 23 is the relevant specific remedy provided for by the Air Quality Directive.

26. In Case C-237/07 *Janecek v Freistaat Bayern* [2009] Env. L.R. 12 the Court of Justice of the European Union considered the consequences of air quality thresholds being exceeded under Directive 96/62/EC "on ambient air quality assessment and management" ("the 1996 Directive") and the risk of exceedances. Article 7(1) of the 1996 Directive stated that "Member States shall take the necessary measures to ensure compliance with the limit values". The court held (in paragraph 39 of its judgment) that "… the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts", and (in paragraph 40) that "[the] fact that those other persons may have other courses available to them – in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which … is provided for under German law – is irrelevant in that regard".

27. In *Commission v Bulgaria* the European Commission had brought infringement proceedings against Bulgaria under articles 13(1) and 23(1) of the Air Quality Directive for exceedances of daily and annual limit values for pollutants in the period between 2007 and 2013, in six "zones and agglomerations". The court did not accept Bulgaria's defence, which was based on its compliance with the requirement under article 23(1) that an air quality plan be produced. It found an infringement of the provisions of article 13(1). It referred (in paragraph 66 of its judgment) to the measures laid down in the Air Quality Directive "aimed at defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole", and (in paragraph 67) to the requirement in the first subparagraph of article 13(1) that the Member States "must ensure that, throughout their zones and agglomerations, levels of PM^{10}, in particular, in ambient air do not exceed the limit values laid down in Annex XI …". It acknowledged (in paragraph 68) that "[the] procedure provided for in Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary legislation". It went on to say (in paragraph 69) that "[exceeding] the limit values is, therefore, sufficient for a finding to be made that there has been an infringement of the provisions of Article 13(1) in conjunction with Annex XI to [the Air Quality Directive] …", and (in paragraph 70) that "an analysis which proposes that a Member State would have entirely satisfied its obligations under the second subparagraph of Article 13(1) of [the Air Quality Directive] merely because an air quality plan has been established, cannot be accepted (see [the judgment in Case C-404/13 *ClientEarth*])". It also rejected the argument that Bulgaria's efforts to reduce PM_{10} levels had been "hindered by its socio-economic situation" (paragraph 75), emphasizing that "[when] it has been objectively found that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary law, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it …" (paragraph 76).

28. In Case C-336/16 *Commission v Poland* the court reminded itself that article 23(1) of the Air Quality Directive provides that, in the event of exceedances of limit values for which the relevant deadline has expired, "air quality plans must set out appropriate measures in order that the exceedance period can be kept as short as possible" (paragraph 75 of the judgment). It went on to hold, citing *Commission v Bulgaria*, that "the fact that a Member State exceeds the limit values for PM^{10} concentrations in ambient air is not in itself sufficient to find that that Member State has failed to fulfil its obligations under the second subparagraph of Article 23(1) of [the Air Quality Directive]" (paragraph 94); that "while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible" (paragraph 95); and that "[in] those circumstances, it is necessary to ascertain on the basis of a case-by-case analysis whether the plans drawn up by the Member State concerned comply with the second subparagraph of Article 23(1) …" (paragraph 96).

29. In *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] 3 C.M.L.R. 29, the Supreme Court referred four questions to the Court of Justice of the European Union. The fourth question, on the hypothesis of "non-compliance with art.13, and in the absence of an application under art.22 [for a postponement of the deadline]", was "what (if any) remedies must a national court provide as a matter of European law in order to comply with art.30 of [the Air Quality Directive] and/or art.4 or art.19 TEU?" (paragraph 39(iv) of the judgment). In its judgment (in Case C-404/13), the court understood this question to mean, essentially, "whether … it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter" (paragraph 50). It went on to say that if limit values are exceeded and the Member State has not applied for a postponement of the deadline under article 22(1), the second subparagraph of article 23(1) "imposes a clear obligation" on the Member State to "establish an air quality plan" that complies with the requirements in article 23(1) (paragraph 53). The court took care to distinguish between the compliance of an air quality plan with article 23(1) and a Member State's compliance with the "obligation to achieve a certain result" in article 13 (in paragraphs 30 and 49).

30. In his judgment in *ClientEarth* [2015] P.T.S.R 909, when referring to the third question – the relationship between articles 13 and 23 – Lord Carnwath observed that the European Commission's answers to the third and fourth questions were "in substance the same as those given by the court …" (paragraph 10), and recorded the submission of the Commission that the Air Quality Directive requires a Member State to bring any "infringement of article 13 to as swift an end as possible by adopting measures that would be appropriate for the specific zone or agglomeration and that would most swiftly and concretely tackle the specific problems in that area" (paragraph 16). He went on to say that the court's answer to the fourth question made it clear that, "regardless of any action taken by the Commission, enforcement is the responsibility of the national courts" (paragraph 28). The appropriate remedy, in the circumstances, was "a mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015" (paragraph 35).

31. In the proceedings before Garnham J. in the Administrative Court ([2017] P.T.S.R. 203), he acknowledged that "the measures a member state may adopt should indeed be

"proportionate", but they must be proportionate in the sense of being no more than is required to meet the target". He added that "[to] do more than is required, especially in the field of environmental protection, may well impact adversely on other, entirely proper and reasonable interests" (paragraph 51 of the judgment). In the most recent proceedings ([2018] Env. L.R. 21), ClientEarth successfully challenged the "UK plan for tackling roadside nitrogen dioxide concentrations", published in July 2017 (see paragraphs 66 to 88 and 104 to 109 of Garnham J.'s judgment). The parts of the plan against which the challenge succeeded did not include Canterbury. We were told that there has been no challenge by the appellants here to the "Air Quality Plan for tackling roadside nitrogen dioxide concentrations in the South East (UK0031)", as published in revised form in July 2017, which does include Canterbury.

32. In the light of the authorities, the following points seem clear. It is article 23 of the Air Quality Directive that specifies the steps a Member State must take to achieve compliance with limit values. A Member State's failure to comply with the requirements in article 13 attracts the consequences explicitly provided for in article 23 (paragraph 50 of the judgment of the Court of Justice of the European Union in *ClientEarth*). Article 23 does not require any steps beyond the preparation and implementation of an efficacious air quality plan. The effect of articles 13 and 23, read together, is that a Member State must meet the relevant limit values by the deadlines imposed (paragraphs 66 to 69 of the court's judgment in *Commission v Bulgaria*); that where article 13 is breached and no application has been made by the Member State to postpone the relevant deadline, article 23(1) requires it to establish an air quality plan complying with the specified requirements (paragraph 53 of the judgment of the Court of Justice of the European Union in *ClientEarth*, and paragraph 75 of its judgment in *Commission v Poland*); that a Member State enjoys some discretion in deciding on the content of an air quality plan (paragraph 95 of the judgment in *Commission v Poland*); that the measures included in the air quality plan must be proportionate (the judgment of Garnham J. in *ClientEarth (No.2)*, at paragraph 51); that those measures must, however, ensure that the period for which the limit values is exceeded is as short as possible (paragraphs 75 and 95 of the judgment in *Commission v Poland*); and that compliance with article 23 must be decided case by case (paragraphs 94 to 96 of the judgment in *Commission v Poland*). Neither in *Commission v Bulgaria* (at paragraph 70 of its judgment) nor in *ClientEarth* (at paragraphs 30 and 49) did the court reject the submission that the Air Quality Directive stipulates only the preparation and implementation of an air quality plan in compliance with article 23 as a means of overcoming breaches of limit values under article 13. The preparation of an air quality plan is the single prescribed means of addressing the breach. But it does not follow that a breach of article 13 is automatically removed when an air quality plan is adopted.

33. Dove J.'s description of article 23 as providing the "specific and bespoke remedy" for a breach of article 13 therefore seems apt. This does not mean that Member States may not also adopt other measures to address a breach of article 13, in addition to preparing and putting into effect an air quality plan complying with article 23. But nor does it mean that Member States are compelled by any provision of the Air Quality Directive to do that. A demonstrable breach of article 13 does not generate some unspecified obligation beyond the preparation and implementation of an air quality plan that complies with article 23. The case law does not suggest, for example, that in such circumstances a Member State must ensure that land use planning powers and duties are exercised in a particular way – such as by imposing a moratorium on grants of planning permission for particular forms of development, or for development of a particular scale, whose effect might be to perpetuate

or increase exceedances of limit values, or by ensuring that decisions on such proposals are taken only at ministerial level.

34. I do not think we gain much assistance here from the decisions of the Court of Justice of the European Union in *Stichting Natuur* and *Naturschutz Deutschland*, both of which concerned different legislative regimes.

35. In *Stichting Natuur* the court rejected the proposition that where emission ceilings under Directive 2001/81 "on national emission ceilings for certain atmospheric pollutants" ("the National Emissions Ceiling Directive") were exceeded, or there was a risk of their being exceeded, a Member State's discretion to approve the construction and operation of power stations was lost or limited – the argument being that the competent authorities "should not have granted the permits or should, at least, have granted them subject to stricter conditions" (paragraph 38 of the judgment). It said that the National Emissions Ceiling Directive embodied a "purely programmatic approach under which the Member States enjoy wide flexibility as regards the choice of the policies and measures to be adopted or envisaged …". In its view, the "attainment of the objectives set by the directive cannot interfere directly in the procedures for grant of an environmental permit" (paragraph 75).

36. The proceedings in *Naturschutz Deutschland* related to article 4(1) of the Water Framework Directive. As Dove J. said (in paragraph 55 of his judgment), the relevant legislative provisions considered in that case were "materially different" from those with which we are concerned. Article 4(1) of the Water Framework Directive imposes obligations on Member States "[in] making operational the programmes of measures specified in the river basin management plans", including an obligation that they "shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water …" (article 4(1)(a)(i)). This provision is not mirrored in the Air Quality Directive. Advocate General Jääskinen said (in paragraph 77 of his opinion) that article 4(7) was "crucial for the interpretation of the scope of the *environmental objectives*, for the purpose of Article 4(1)", because "that derogation confirms that the requirement to prevent any deterioration applies to the authorisation of specific projects which may entail a deterioration of the status of a body of water". The court emphasized (in paragraph 33 of its judgment) the concept in article 4(1)(a) of "making operational" the relevant "programmes of measures", and (in paragraph 43) acknowledged that article 4(1)(a) "does not simply set out, in programmatic terms, mere management-planning objectives". Like the Advocate General, it considered the relevant derogations significant (paragraph 44). It was therefore able to hold that, in the absence of a relevant derogation under article 4(7), Member States may be required to refuse authorization for an individual project if it would cause a deterioration of the status of a body of surface water (paragraph 50). The position here, however, is far from being the same. The Air Quality Directive does not contain provisions in similarly prescriptive terms – requiring Member States, in mandatory language, to "implement the necessary measures". Given the significant differences in the wording of the two Directives, I do not think one can infer from the air quality legislation any parallel requirement for the handling of individual proposals for development.

37. In my view, therefore, the appeal cannot succeed on this ground.

Did the Secretary of State have a duty as "competent authority" to use his planning powers to avoid the worsening or prolongation of breaches of limit values?

38. Before Dove J. it was, "in effect, common ground between the parties that the discretion of [the Secretary of State] under section 77 is a very broad discretion and pre-eminently a matter of planning judgment for [him]" (paragraph 19 of the judgment). The judge was "unable to accept that there was some wider duty or responsibility placed on [the Secretary of State] by virtue of [the Air Quality Directive and the 2010 regulations] which required him to exercise his discretion under section 77 … to call in the application for his own determination" (paragraph 57).

39. Mr McCracken submitted that the potential effects of proposed development on air quality are material considerations in planning decisions. Major development can prolong or worsen exceedances of limit values. The Secretary of State is the only domestic body at national level capable of making a planning decision that accords with the duty in article 4(3) of the Treaty on European Union and article 288 of the Treaty on the Functioning of the European Union, with a view to the United Kingdom's compliance with the Air Quality Directive. He normally has a very wide discretion in deciding whether or not to call in an application for planning permission. But he has a duty under EU and domestic law to secure compliance with the limit values in the Air Quality Directive, which a local planning authority, such as the city council, does not have. His call-in discretion in this case was therefore narrower than it would otherwise be. Indeed, the "combined effect" of article 13 of the Air Quality Directive and regulations 3 and 17 of the 2010 regulations was such as to place him under a legal duty to call in Corinthian Mountfield's application for planning permission. By the time he came to make his call-in decision, an air quality plan complying with the Air Quality Directive had still not been produced and, in fact, was long overdue. Indeed, as Mr McCracken pointed out, this was still so. In making his decision the Secretary of State did not recognize that, as "competent authority", he had a duty to seek to achieve the relevant "limit values". Although article 3 does not impose on Member States a specific duty to designate competent authorities other than for the activities identified there, the judge ought to have recognized that the effect of regulation 3 of the 2010 regulations was to designate the Secretary of State as "competent authority" responsible for ensuring compliance with all requirements of the Air Quality Directive.

40. I cannot accept that argument. It finds no support in relevant case law. In my view, as Mr Maurici and Mr Pereira submitted, it is not possible to construe the provisions of the Air Quality Directive and the 2010 regulations as constraining the Secretary of State's very wide discretion either to call in or not to call in an application for planning permission when the limit values under article 13 have not been complied with, or when an air quality plan under article 23 has not yet been put in place or has proved to be deficient or ineffective. The air quality legislation does not do that. It does not have the effect of narrowing the Secretary of State's call-in discretion in such circumstances, let alone of transforming that discretion into a duty, or of requiring a particular application for planning permission to be refused. None of the provisions of the Air Quality Directive engages with the process of making decisions to authorize individual projects of development. If a proposed development would cause a limit value to be breached, or delay the remediation of such a breach, or worsen air quality in a particular area, neither the Air Quality Directive nor the 2010 regulations states that planning permission must be withheld or granted only subject to particular conditions. These may of course be material considerations when an application or appeal is decided, and so too the measures in an air quality plan for the relevant zone, if there is one, or in an action plan prepared under the Environment Act 1995. But the Air Quality Directive and the 2010 regulations do not, in those or any other circumstances, compel the decision-maker to refuse

planning permission, or impose on the Secretary of State an obligation to make the decision himself.

41. Three points can be made here. First, article 288 of the Treaty on the Functioning of the European Union states that a Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Consistent with that principle, the Air Quality Directive is binding on Member States. It imposes certain obligations on each Member State, including those in articles 3, 13 and 23. But beyond the specified responsibilities of the "competent authorities and bodies" it does not allocate, or require the allocation, to any particular body or authority within a Member State, the making of particular administrative decisions, including the determination of applications for planning permission. Secondly, as the parties agree, the Air Quality Directive was properly and fully transposed into domestic law by the 2010 regulations. Thirdly, there is no provision either in the Air Quality Directive or in the 2010 regulations stating that, in any particular circumstances, the determination of applications for planning permission must be undertaken by the Secretary of State himself, whether as a "competent authority" or otherwise. And the concept that he is, by implication, responsible for determining applications for planning permission when limit values under the Air Quality Directive are being exceeded, or there is a possibility that they will be, is in my view incorrect. There is nothing, either in the 2010 regulations themselves or in the statutory planning scheme, to indicate that when a development proposal gives rise to concern or objection because of existing or likely exceedances of limit values, the legislature intended to displace the statutory role of local planning authorities or to narrow or remove the Secretary of State's discretion under section 77.

42. I think the judge was right to say (in paragraph 45 of his judgment) that, under article 3 of the Air Quality Directive, the responsibilities of a competent authority are "specific and circumscribed". Article 3 requires the designation "at the appropriate levels" of "the competent authorities and bodies responsible" for the six specified activities. It does not require competent authorities to be designated for activities other than those to which it refers. None of the descriptions of those activities refers to the allocation and performance of land use planning functions, or, in particular, the tasks involved in development control and plan-making. They do not include the determination of applications for planning permission for development of any particular type, or those with likely implications for air quality. Their scope covers the measurement and assessment of air quality (the activities described in paragraphs (a) to (d)), the co-ordination of "Community-wide quality assurance programmes", and co-operation with other Member States and the Commission (the activities described in paragraphs (e) and (f)).

43. There is no reason to suggest that the transposition of article 3 into domestic law by regulation 3 of the 2010 regulations was other than a conventional and straightforward exercise. It was not, on the face of it, an attempt to extend the designation of a "competent authority" beyond the scope for such designation specifically provided for under article 3, or to enlarge the six specific areas of responsibility for "competent authorities and bodies" identified in article 3 to a general responsibility for all matters relevant to air quality, or to some wider though undefined range of responsibilities, including land use planning functions.

44. Regulation 3 is framed in terms of responsibilities "for the purposes of" the Directives to which it expressly relates. As for the Air Quality Directive, which contains specific

provisions for the designation and responsibilities of "competent authorities and bodies" in article 3, it has the effect of designating the Secretary of State as competent authority for all six of the specified activities. In doing so it effectively distinguishes between the activity described in article 3(f) – "cooperation with the other Member States and the Commission" – and the other five, in article 3(a) to (e). For the purposes of "cooperation with the other Member States and the Commission" the Secretary of State is given the role of competent authority in the whole of the United Kingdom (regulation 3(a)). For the purposes of the other five activities, the Secretary of State is given the role of competent authority only in England (regulation 3(b)). Regulation 3 does not, however, purport to give him any greater role as competent authority than that, extending beyond the activities identified in article 3 to a wider remit than is provided for there. And it cannot be construed as enlarging the Secretary of State's functions as competent authority beyond the ambit of the Air Quality Directive, taken as a whole, into the realm of land use planning. Nor does any other provision in the 2010 regulations have such an effect.

45. The fact that in England the Secretary of State is given responsibility for all six of those activities as competent authority under regulation 3 does not mean that his statutory powers and duties outside the ambit of article 3, including his planning functions, must be exercised by him as – or as if he were – a competent authority with those other powers and duties. It does not mean that he assumes a general duty to exercise every ministerial function conferred upon him, in all his various departmental roles, to bring about compliance with the regime in the air quality legislation, even though no such duty is contemplated in the Air Quality Directive itself. It does not mean that only he may, or normally should, determine applications for planning permission for proposed development with likely effects on air quality, or if the United Kingdom is, or may be, failing to discharge its obligations under the Air Quality Directive. He can perform his responsibilities as competent authority to the full without having to do that.

46. This analysis is not undone by the provision in regulation 3(b), which gives the Secretary of State the role of competent authority in England for the purposes of Directive 2004/107/EC. That role necessarily takes its shape from the provisions of Directive 2004/107/EC, which, unlike the Air Quality Directive, does not refer to the designation of competent authorities or identify the particular activities they are required to undertake. But it does not follow from this that the transposition of article 3 of the Air Quality Directive by regulation 3 generated a greater role for the Secretary of State as competent authority under the 2010 regulations than is specifically provided for in the Air Quality Directive itself, under article 3. The 2010 regulations do not purport to do this, and I do not think they can be construed as if they did.

47. Viewed more broadly, the provisions of the Air Quality Directive and of the 2010 regulations do not seek to adjust the arrangements made by Member States for decision-making in the sphere of land use planning. Recital (18) urges that "[full] account" be taken of "the ambient air quality objectives" in the Air Quality Directive in the granting of "permits" for "industrial activities" under "Directive 2008/1/EC … concerning integrated pollution prevention and control". There is no suggestion, however, that such permits or planning permission for any particular form of development – whether industrial, residential or any other use – must always or generally be determined by a minister when the objectives in question are not being met. Article 13 imposes on Member States responsibility for ensuring compliance with the limit values in Annex XI. Regulation 17 of the 2010 regulations requires the Secretary of State to ensure that levels of the specified emissions do not exceed the relevant limit values, and that, where levels are below those limit values, they

are maintained below them. But these provisions do not oblige the Secretary of State to exercise his call-in discretion under section 77 of the 1990 Act in a particular way, in any given circumstances. Article 23 of the Air Quality Directive and regulation 26 of the 2010 regulations are directed to a Member State's responsibilities for establishing air quality plans, and to the content and implementation of them. These provisions do not govern land use planning functions – the preparation of development plans and the making of planning decisions on individual proposals. None of them places the Secretary of State under an obligation, in any particular circumstances, to exercise his discretion under section 77 of the 1990 Act by calling in an application for planning permission. No requirement of the air quality legislation, either alone or in combination with others, has the effect of imposing on the Secretary of State a legal duty to call in an application for planning permission. Contrary to Mr McCracken's argument, that is not the "combined effect" of article 13 and regulations 3 and 17.

48. This is not to deny that the likely effects of a proposed development on air quality are material considerations in the making of the decision on the application for planning permission, to be taken into account alongside other material considerations weighing for or against the proposal. Indeed, the Secretary of State acknowledges in these proceedings that the effects of development on air quality in the local area, or more widely, or the likely consequences of the development for compliance with limit values under the Air Quality Directive, are capable of being, in a particular case, a decisive factor in the determination of an application for planning permission – no matter whether the decision-maker is the Secretary of State himself or, as it will normally be, the local planning authority.

49. There will be cases in which the Secretary of State chooses to exercise his discretion to call in an application for planning permission for development that, if it went ahead, would be likely to affect the local environment substantially in one way or another, perhaps by causing or worsening an exceedance of limit values under the Air Quality Directive. But in such a case he is not required to call in the application, either by the statutory planning scheme or by the air quality legislation. If he decides against calling it in, he is not, for that reason, acting contrary to, or inconsistently with, his responsibilities as competent authority under the Air Quality Directive and the 2010 regulations. It is of course open to him to call in the application if, in the circumstances of the particular case, he is satisfied that the decision should not be made, as it normally would be, by the local planning authority but by himself. But in exercising his call-in discretion, he is not constrained by article 13 of the Air Quality Directive or regulation 17 of the 2010 regulations to conclude that he should determine the application himself. It may be that, in a particular case, he is persuaded that, exceptionally, a decision to call in the application would be justified in view of the potential effects of the development on air quality. If, however, knowing everything he does about the proposal and its consideration by the local planning authority, including the conditions the authority intends to impose on any grant of planning permission and the likely content of any section 106 obligation, he decides not to call in the application but to leave it with the authority, this, in principle, would be a decision he was legally entitled to make without offending any provision of the Air Quality Directive or of the 2010 regulations. His decision against calling it in would not then be vulnerable to the criticism that he had failed to comply with a duty to call it in arising under the air quality legislation, either in regulation 17 of the 2010 regulations or elsewhere. There is no such duty.

50. It would also be wrong to think that the Secretary of State's power to call in must be exercised, in a case such as this, to make good some deficiency in a local planning

authority's own powers and duties under the statutory planning scheme when dealing with proposed development likely to have material effects on air quality, or to overcome a lack of appropriate jurisdiction in the court to review an authority's own decision to grant planning permission for such development. That would be a misconception. A local planning authority's duties under the statutory scheme and its power to refuse planning permission for unacceptable development – including development whose effects on air quality would be unsatisfactory – or to grant planning permission subject to suitable restrictions by way of conditions under sections 70 and 72 of the 1990 Act or planning obligations under section 106, are equivalent to the Secretary of State's. Their respective powers in the determination of an application for planning permission are in the same statutory provisions. A local planning authority's decision to grant planning permission for development with likely effects on air quality is subject to the supervisory jurisdiction of the court in proceedings for judicial review (see the judgment of Dyson L.J. in *Adlard*, at paragraph 49). I do not think it can be suggested that the court's supervisory jurisdiction, though adequate in other cases, is inadequate when it is contended by objectors that the proposed development would have a harmful impact on air quality, or bring about or make worse exceedances of the limit values in the Air Quality Directive.

51. Any directly enforceable rights arising under the Air Quality Directive could be invoked against the State or any emanation of the State. And if there were directly enforceable rights impinging on the activity of a local planning authority, the authority would have to act consistently with them in determining an application for planning permission (see the speech of Lord Templeman in *Foster v British Gas Plc* [1991] 2 A.C. 306). But the Air Quality Directive could only have direct effect if it had not been transposed into domestic law by the due date, or if it had not been correctly transposed – and that has not been contended here. Under the principle in *Marleasing S.A. v La Comercial Internacional de Alimentacion S.A.*, the provisions of the 2010 regulations must be construed, so far as possible, consistently with the Air Quality Directive. And I see no difficulty in doing that.

52. I therefore conclude that the Secretary of State does not have a general duty as "competent authority" under the Air Quality Directive and the 2010 regulations to use his own powers under the statutory planning scheme to avoid the worsening or prolongation of breaches of limit values. Nor in this case was he under an obligation to exercise his discretion under section 77 of the 1990 Act – and thus effectively under a duty – to call in Corinthian Mountfield's application for planning permission because the development might worsen such breaches, or because objectors had said that it would. The air quality legislation did not require him to do that. He was entitled to leave the decision to the city council. It follows that in my view the judge was right to conclude as he did, and this ground of the appeal must fail.

53. Mr Pereira also submitted that the appellants' argument, if accepted, would have the effect of reducing the generous discretion given to a Member State in the preparation of an air quality plan under article 23 – because it would oblige the Secretary of State to tackle breaches, or potential breaches, of article 13 by determining applications for planning permission himself. And Mr Taylor submitted that, to succeed on this ground, the appellants would have to satisfy the court that the only means of achieving compliance with the Air Quality Directive would be to include the refusal of planning permission for Corinthian Mountfield's proposal as a measure in the air quality plan for the South East – which they had not done. We do not need to reach a conclusion on either of those submissions, and I express no view upon them.

54. Mr Pereira and Mr Taylor both argued that the appellants had failed to demonstrate that if planning permission were granted for Corinthian Mountfield's proposed development, whether by the Secretary of State or by the city council, compliance with the limit values would become more difficult, or impossible. That, however, is not a question for the court – and it has no bearing on the outcome of these proceedings.

Was the Secretary of State's decision not to call in the application irrational?

55. Dove J. acknowledged that the city council had "yet to form a concluded view" on the application for planning permission. As its counsel had said, it would "have to give consideration to whether the application should be reconsidered applying the principles [in *R. (on the application of Kides) v South Cambridgeshire District Council* [2003] 1 P. & C.R. 19] were [the Secretary of State's] decision not to call the application in to stand for whatever reason" (paragraph 41 of the judgment). There was "a serious issue joined between [Corinthian Mountfield] and [the appellants] in respect of the air quality issues", and it was "the clear and unequivocal view of [the appellants] that there are current exceedances of the threshold values contained in [the Air Quality Directive] within the AQMA" (ibid.). That this "serious issue" persists is clear from the three witness statements of Professor Peckham for the appellants and that of Ms Emma Barkas for Corinthian Mountfield.

56. The judge rejected the submission that it was "perverse or irrational for [the Secretary of State] to point out that the matters of substantive concern in relation to air quality remained to be addressed by [the city council] or … within a legal challenge to their decision". The city council's statutory powers in determining an application for planning permission were "precisely identical" to the Secretary of State's. And it was able, "on the basis of the principles set out in [*Kides*]" to revisit the committee's resolution to approve (paragraph 62). As the judge put it, "the question of air quality and the exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission"; and "[these] are matters which [the Secretary of State] was entitled to conclude, on the basis of the evidence before him, were material considerations under active consideration by [the city council] and forming a material consideration for the purposes of considering whether planning permission should be granted and if so subject to what conditions and restrictions" (paragraph 63).

57. Mr McCracken submitted that the judge erred in concluding it was not irrational for the Secretary of State to refuse to call in the application on the basis that any concern raised by the city council's committee's consideration of the application at its meeting on 13 December 2016 could be dealt with in a reconsideration, or by a claim for judicial review if planning permission were granted. When the Secretary of State was making his call-in decision, there was no indication that the city council was reconsidering its resolution to grant planning permission, or intending to do so. Once permission had been granted it would be too late for the Secretary of State to call in the application, and the limited jurisdiction of the court in proceedings for judicial review would exclude any consideration of the planning merits, including the effect of breaches of the limit values in the Air Quality Directive.

58. This issue relates closely to the previous one, and the same basic analysis applies. If, as I have concluded, the Secretary of State's call-in discretion is not cut down by the air quality legislation, his freedom to exercise that discretion one way or the other in a case such as this

without lapsing into irrationality must be considerable. In my view he made no such error here. His decision, in the light of the representations made to him, not to call in the application for planning permission was not irrational. This is not to say that a decision to call the application in would have been irrational, but only that it was clearly not unreasonable in the "Wednesbury" sense for the Secretary of State to decide as he did – to leave its determination to the city council as local planning authority in the normal way.

59. In making his decision not to call in, the Secretary of State will have been aware that his own powers in determining an application for planning permission are the same as the city council's. As he knew, the city council's task was to determine the application on its planning merits, complying with the requirements of the statutory scheme, including section 70 of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004, taking into account all material considerations and having regard to objections – including those relating to air quality. If the city council failed to do this lawfully, its decision to grant planning permission – assuming that was its decision – would be vulnerable to a claim for judicial review. So unless there was some particular factor in this case that made it obviously necessary for the Secretary of State to determine the application himself, his decision not to do that cannot be regarded as perverse. There was no such factor. The city council had considered the proposal on its merits – including the likely effects of the development on air quality and, in both the officer's view and the committee's, the amelioration of those effects to an acceptable level.

60. The Secretary of State also knew that if he did not call in the application, the city council would be able to consider it again, taking account of any further representations made to it, and, with the advice of its officers and professional consultants, revisiting the committee's resolution to grant planning permission. And if planning permission were to be granted, it could be challenged by a claim for judicial review. It was not perverse for the Secretary of State to have these considerations in mind when he made his decision not to call in.

61. Mr Pereira confirmed that the city council intends to reconsider the application for planning permission whatever the outcome of this appeal, and that the reconsideration will include the likely effects of the proposed development on air quality – which leaves open the possibility that it will not be approved. There is no force in the complaint that the Secretary of State will be unable to call in the application at that stage. He will already have exercised his discretion under section 77, and will have done so lawfully. If the city council does grant planning permission and objectors are aggrieved by that decision, they will be able to pursue any allegation of unlawfulness before the court.

62. In my view, therefore, the appeal cannot succeed on this ground either.

Should a reference be made?

63. Mr McCracken submitted that a reference should be made by this court to the Court of Justice of the European Union, on the first ground of appeal. I disagree. I do not think this is a case in which a reference is necessary or appropriate – for four reasons. First, the appeal does not stand or fall on that ground. It fails because the second and third grounds must be rejected. A decision on the questions in the reference would therefore not be "necessary to enable [this court] to give judgment", as article 267 of Treaty on the Functioning of the European Union requires. Secondly, the issue here is, in my view, "acte clair". The relevant

legal principles are mature, and not difficult to apply (see the judgment of Lord Carnwath in *R. (on the application of Hillingdon London Borough Council) v Secretary of State for Transport* [2014] 1 W.L.R. 324, and the judgment of Robert Walker L.J. in *Professional Contractors' Group v Commissioners of Inland Revenue* [2002] 1 C.M.L.R. 46, at paragraph 91). Thirdly, a reference would cause unjustifiable delay in a case where the decision under challenge was procedural, not substantive (see *H.P. Bulmer Ltd. v J. Bollinger S.A.* [1974] Ch. 401, at p.423). And fourthly, it is opposed by all three respondents (see the judgment of Nourse L.J. in *Cambridge Petroleum Royalties Ltd. v Inland Revenue Commissioners* [1982] S.T.C. 325, at p.332).

Conclusion

64. For the reasons I have given, I would dismiss this appeal.

Lord Justice Singh

65. I have had the advantage of reading the judgments of Lindblom and Coulson LJJ in draft and agree with them both.

Lord Justice Coulson

66. I agree that, for the reasons given by Lindblom LJ, this appeal should be dismissed. Section 77 gives the SoS a very wide discretion in deciding whether or not to call in a planning application. No reasons for the decision are required: see *The Queen on the application of Save Britain's Heritage* v *SoSCLG* [2018] EWCA Civ 2137.

67. Despite his protestations to the contrary, I am in no doubt that, if it was correct, the effect of Mr McCracken QC's submission would be to turn a hitherto discretionary and procedural process into a mandatory obligation on the part of the SoS to call in every planning application where there is an issue about air quality. Indeed, Professor Peckham said as much in his correspondence with the SoS. In my view, that would rewrite the long-established principles by which s.77 has always operated.

68. It is accepted that there is no domestic authority to support such a bold proposition. Moreover, with one possible exception, the European cases to which we were referred were of no assistance either. As Lindblom LJ has explained, those cases were simply not concerned with planning issues.

69. As I said during argument, the only possible exception was *Naturshutz*, which was concerned with three proposed projects that might have affected water quality in one particular area of Germany. But the case was about an entirely different Directive, namely Directive 2000/60/EC, which gave rise to broad and prescriptive obligations of a very different kind to those in the Air Quality Directive. That was why the CJEU concluded that the Directive was directly relevant to the planning applications in question. Such mandatory provisions do not arise here. Accordingly, I consider that Mr Maurici QC was right to distinguish *Naturshutz*, and I would endorse Dove J's explanation at [55] of his judgment,

and Lindblom LJ's analysis, at paragraph 36 above, as to how and why, on a proper analysis, *Natureshutz* is ultimately of no relevance to the present application for judicial review.