Neutral Citation Number: [2022] EWHC 2606 (Admin)

Case No: CO/3345/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

(1) MR TIMOTHY CHARLES HARRIS **(2) MRS ANGELIKA HARRIS**	**Claimants**
- and -	
THE ENVIRONMENT AGENCY	**Defendant**
-and-	
NATURAL ENGLAND	**Interested Party**

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Richard Wald KC (instructed by Freeths LLP) for the Claimants
Matthew Dale-Harris (instructed by Environment Agency) for the Defendant

Hearing dates: 8-9 July 2022
Written submissions on remedy: 15, 22 and 29 September 2022

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Approved Judgment

This judgment was handed down by release to The National Archives
on 18 October 2022 at 10.30am

Mr Justice Johnson :

1. The claimants succeeded in this claim, for the reasons I gave in the judgment dated 6 September 2022 ("judgment"): [2022] EWHC 2264 (Admin). I made directions for the parties to make written submissions as to remedy: judgment at [110]. The parties have each filed representations in accordance with those directions. They do not agree what, if any, remedy is appropriate. They each agree (as do I) that the matter can be determined on the basis of the written submissions without the need for a further hearing.

The claimants' case on remedy

2. The claimants seek the following order:

> "…
> 2. The Environment Agency ("EA") shall, within 8 weeks of the date of this order, file with the Court, publish and provide to the Claimants and Interested Party:
>
> (i) Full details of the measures it intends to take, together with the scientific and technical methodologies underpinning those measures, including as to the completion of its Restoring Sustainable Abstraction licensing review process in respect of the Ant Broads and Marshes Special Site of Scientific Interest ("SSSI"), Broad Fen, Dilham SSSI and Alderfen Broad SSSI, in order to achieve urgent compliance with its duties under Article 6(2) of the Habitats Directive ("Art 6(2)") in respect of The Broads Special Area of Conservation and in accordance with the judgment of Johnson J;
>
> (ii) Deadlines for the commencement and completion of each of the measures identified at (i) above;
>
> (iii) An explanation of the scientific and technical basis on which the taking of the measures identified at (i) above, by the deadlines identified at (ii) above, will result in the EA fully complying on an urgent basis with its duties under Art 6(2) and with the judgment of Johnson J;
>
> 3. The EA shall deliver the measures identified at 2(i) above in accordance with the deadlines at 2(ii) above.
>
> 4. The EA shall file with the Court, publish and provide to the Claimants and Interested Party confirmation by each of the deadlines identified at 2(ii) above of the commencement and completion of the measures identified at 2(i) above and full details of the measures due to be taken and undertaken, respectively. 5. There be liberty to apply on notice (a) for further or additional relief; (b) in relation to any issues as may arise in the course of the steps identified at 2-4 above.
> …"

3. They submit that their proposed order is based on, and is justified by, the judgment. They contend that nothing short of an order in these terms will ensure that the Environment Agency now urgently takes effective measures to address an ongoing risk of ecological harm. They say that the scheme of the order they propose is not dissimilar to that granted by Garnham J in *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin).

The Environment Agency's case on remedy

4. The Environment Agency resists the claimants' proposed order. They say that the judgment provides a sufficient remedy, and that no further order is required. Their case is that the claimants' proposed order impermissibly goes beyond the court's functions, by applying a programme of supervision and control of the Environment Agency's future compliance with its statutory duties. They say that the Environment Agency is a responsible public body that can be trusted to comply with its legal obligations, as explained in the judgment. The case is different from *ClientEarth* where the statutory context was more prescriptive as to what was required, enabling a focussed mandatory order. Moreover, by the time of the order of Garnham J (which he explained was justified by "exceptional circumstances"), there had already been rulings by the Court of Justice of the European Union and the Supreme Court which had failed to secure compliance with the Secretary of State's legal obligations. Here, by contrast, and as explained in the judgment, the Environment Agency has a broad discretion as to how it discharges its statutory obligations. It is not subject to previous court rulings on this issue.

5. The Environment Agency also suggests that the proposed requirement that it provide "full details" of the proposed measures, along with deadlines and explanations, is imprecise and is liable to give rise to difficulty. It is not, they say, feasible to formulate a plan which sets out all the measures that will be needed to exclude risk of environmental damage. They submit that if an order is made then they should be given at least 3 months to comply.

What, if any, remedy should be imposed?

6. The claimants succeeded in their claim. They established that the Environment Agency has acted unlawfully. At common law, they are presumptively entitled to an order that, so far as is possible, provides an effective remedy. Although there is a residual discretion to refuse a remedy where a public authority has acted unlawfully, that is "an unusual and strong thing": *R v Lincolnshire County Council ex parte Atkinson* (1996) 8 Admin LR 529 *per* Sedley J at 550.

7. Here, the claimants have not just a presumptive common law right to a remedy, but also a statutory right. That is because the Environment Agency has acted in breach of regulation 9(3) of the Habitats Regulations and article 6(2) of the Habitats Directive. The court is required to enforce these provisions as a matter of domestic law: section 4(1)(b) of the European Union (Withdrawal) Act 2018. The effect of regulation 9(3) of the Habitats Regulations and article 6(2) of the Habitats Directive must be determined in accordance with retained general principles of EU law: section 6(3)(a) of the 2018 Act. One such principle is the right to an effective remedy. Article 19(1) of the Treaty on European Union states:

> "…Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

8. The Environment Agency has not given any good reason why the court should withhold a remedy from the claimants. The fact that it is a public body and can be expected to comply with the court's judgment is no answer. First, taken to its logical end point, that would deprive the right to an effective remedy of any meaningful content. Second, for the reasons given in the judgment, there has been a failure over many years to comply with the requirements of the Habitats Regulations and the Habitats Directive. It took the claimants many years to be in a position where they could bring an effective claim against the Environment Agency. Even if it were otherwise permissible to do so, I do not consider, in the particular circumstances of this case, it would be just to deprive the claimants of their right to an effective remedy.

9. None of that means that the court should prescribe how the Environment Agency must comply with its legal obligations. For the reasons given in the judgment that is not permissible: judgment at [105]. It is not therefore appropriate for the court to make a mandatory order that sets out the precise steps that the Environment Agency must take in order to discharge its obligations under the Habitats Regulations and the Habitats Directive. The claimants' proposed draft order deliberately and carefully avoids doing that. It is structured in such a way as to ensure that the decision as to how the Environment Agency discharges its statutory obligations is left to the Environment Agency to determine. The proposed order takes as its starting point an obligation for the Environment Agency itself to formulate a plan as to how it will discharge its obligations. There is nothing objectionable in that. Although the Environment Agency has a choice as to how it discharges its obligations, it has no choice about whether it discharges its obligations: judgment at [104]. In order to discharge its obligations, it will first need to decide how it will achieve that; it will need to formulate a plan. Unless it formulates a plan (and then takes appropriate subsequent steps) it will continue to be in breach of the Habitats Regulations and the Habitats Directive. Making an order that the Environment Agency formulates a plan does not involve the court wrongly stepping into the shoes of the Environment Agency and making decisions that are for the Environment Agency, not the court, to make.

10. I will therefore make a mandatory order that the Environment Agency must formulate a plan.

11. There is then a question as to what the plan must involve. I consider that the claimants' draft is overly prescriptive. I agree with the Environment Agency that some of its detail risks storing up difficulties for the future. It is necessary for a mandatory order to be in clear terms, given the potential consequences of non-compliance. I have therefore sought to simplify the language without changing the broad underlying purpose that it seeks to achieve.

12. There is then a question as to the time within which the Environment Agency must formulate a plan. The claimants suggest 8 weeks. The Environment Agency say it needs at least three months. It is important that sufficient time is given to ensure that the Environment Agency is able to formulate a plan that is as detailed and efficacious as is practicable. The whole background history of the case demonstrates the difficult scientific and technical assessments that will need to be made. As against that, there is a degree of urgency: judgment at [9], [16], [22], [30], [38], [48], [50], [98] – [99] and

[104]. Further, the Environment Agency has been on notice about the claimants' concerns since 2010 and has been on notice about the specific complaints about its approach to abstraction in the Broads SAC for more than a year: these proceedings were issued on 1 October 2021. Because of the time taken with supplemental submissions, the Environment Agency has known that it will need to take remedial steps for more than a month (that is, since judgment was handed down on 6 September 2022). For the reasons already explained, those remedial steps were always going to require, as a first step, the formulation of a plan. The practical effect is that the Environment Agency will have almost 3 months from the date when it submitted (in its submissions of 22 September 2022) that it would need 3 months to comply with the order.

13. In all those circumstances, I adopt the claimants' proposed time limit of 8 weeks, to run from the date of this judgment.

14. There is then the question as to what the Environment Agency should do with the plan. The claimants say that it should be disclosed to them, and to Natural England, and that it should be published. Nothing in the Habitats Regulations or the Habitats Directive requires the Environment Agency to publish the steps that it takes to discharge its obligations under those provisions. Requiring the Environment Agency to publish its plan, or to disclose it to the claimants or to Natural England, goes beyond the terms of the Habitats Regulations and the Habitats Directive. There are other routes by which a public authority can be required to disclose how it complies with its statutory obligations, including the exercise of rights under the Freedom of Information Act 2000 and the Environment Information Regulations 2004. Those provisions are not, however, in issue in these proceedings.

15. The European Court of Justice has held that effective judicial review presupposes, in general, that the court may require the competent authority to notify its reasons for a contested decision. Where there is an issue about the ability to enforce a protected right, those who might wish to enforce that right should have "the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts". This means that the competent national authority must, on request, disclose its reasons for refusing the right in question: *Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football v Heylens, Case 222/86* [1987] ECR 4097 at [15].

16. Applying the principle of an effective remedy to the circumstances of this case, it is necessary for the Environment Agency to disclose its plan to the claimants. It is only if that is done that the claimants will know the practical outcome of these proceedings. This is necessary to enable the claimants to assess whether the Environment Agency's plan will, if implemented, secure compliance with its legal obligations. The history of this case has involved the claimants engaging with the Environment Agency over a period of years and seeking sufficient disclosure to test the legality of its actions. Against that background any remedy would be illusory if it did not enable the claimants to know what the Environment Agency plans to do.

17. I will therefore require the Environment Agency to disclose its plan to the claimants.

18. It is unthinkable that the Environment Agency would not also wish to disclose its plan to Natural England. And it would be surprising if it did not consider it appropriate also to publish it. I do not, however, consider that it is necessary to require the Environment

Agency to do those things so as to ensure that the remedy is effective. Once the plan is disclosed to the claimants they can, if they wish, themselves disclose it to Natural England and/or publish it. I will give them permission to do this: Civil Procedure Rules Part 31 rule 22(1)(b). It follows that it is not necessary to require the Environment Agency to publish its plan or to disclose it to Natural England.

19. There is then the question of whether the Environment Agency should be required to comply with its plan. There is an attraction to the claimants' argument that this does not involve the court prescribing how the Environment Agency must discharge its obligations – it merely ensures that it does so by implementing the plan that it has, itself, formulated.

20. I have, however, concluded that I should not take this further step.

21. First, it is not possible to predict how the plan will evolve and develop in the light of further scientific and technical work. The facts of the case show just how rapidly scientific understanding of water abstraction is developing. The review of consents undertaken in the 2000s is now known to be flawed. The work done during the RSA Programme was constantly evolving in response to knowledge gained from tests and modelling. It is unlikely that a plan formulated in the next 8 weeks will survive wholly intact as the detail is worked through.

22. Second, it would involve the court in a rolling programme of live time review of the Environment Agency's decision making, rather than retrospective assessment of its compliance with the law. That has not, historically, ordinarily been the proper function of the judicial review court: *R (P) v Essex County Council* [2004] EWHC 2027 (Admin) *per* Munby J at [33]. Whether section 29A of the Senior Courts Act 1981 (which introduces conditional quashing orders) changes that remains to be seen, but that provision does not apply to the present case: section 29A(4).

23. Third, it would avoid the requirement for the claimants to secure permission in order to claim judicial review. That is an essential procedural step: section 31(3) of the 1981 Act and Civil Procedure Rules Part 54 rule 4. The claimants secured permission to claim judicial review from Chamberlain J, but that grant of permission relates only to the Environment Agency's past (non-)compliance with its legal obligations rather than the question of whether it will, in the future, comply with those requirements.

24. Fourth, it is not necessary for the remedy to extend this far in order for it to be effective. There is nothing to suggest that the Environment Agency, having been unsuccessful in these proceedings, having formulated a plan to remedy the position, and having disclosed that plan to the claimants, would not then carry out that plan (subject to any modifications as may turn out to be required). The Environment Agency knows that if it does not now comply with the Habitats Regulations and the Habitats Directive, the claimants are likely to bring further proceedings to secure that end.

25. There is then a question of whether the claimants should have liberty to apply to the court in the event that the Environment Agency does not comply with the order. I have concluded that it is unnecessary and undesirable to include a provision for liberty to apply. It is unnecessary, because if the Environment Agency does not comply with the order, then the claimants' remedy is by way of an application under Civil Procedure Rules Part 81 (applications and proceedings in relation to contempt of court). It is

undesirable to make provision for liberty to apply, because there is a risk that recourse to an order providing liberty to apply would avoid the procedural protections that are contained in Part 81.

Outcome

26. The claimants are entitled to an effective remedy. The judgment identifies flaws in the Environment Agency's approach to the Habitats Directive. That is not, in itself, an effective remedy without a mandatory order. The Environment Agency must, within 8 weeks, formulate, and disclose to the claimants, a plan as to how it will comply with the Habitats Directive. I will make an order in these terms:

> "The defendant shall, by 4pm on 7 December 2022, provide to the claimants details of the measures it intends to take to comply with its duties under Article 6(2) of the Habitats Directive ("Art 6(2)") in respect of The Broads Special Area of Conservation. The details shall include an indication as to the time by which the defendant intends to have completed those measures. It shall also include, so far as practicable, the scientific and technical basis for the defendant's assessment of the measures that are necessary to comply with Art 6(2)."