IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
[2019] EWHC 2682 (Admin)

CO/2317/2019

Royal Courts of Justice

Thursday, 26 September 2019

Before:

MRS JUSTICE LIEVEN DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
(1) CLIENTEARTH
(2) MARINE CONSERVATION SOCIETY — Applicants

- and -

SECRETARY OF STATE
FOR ENVIRONMENT, FOOD
AND RURAL AFFAIRS — Respondent

MR D. WOLFE QC (instructed by Leigh Day) appeared on behalf of the Applicants.

MR C. SHELDON QC and MR J. AUBURN (instructed by the Government Legal Department) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE LIEVEN:

1 This is an application for permission for judicial review challenging three specific passages or parts in the Environmental Regulations brought into force pursuant to the powers in the EU Withdrawal Act 2018 (the Act). As I am going to refuse permission, I need to give reasons.

2 The claimant's argument is that the offending parts of the Regulations are *ultra vires* because they go beyond the powers given to the Secretary of State to make those Regulations in the Act. This is a renewal application, Sir Duncan Ouseley having refused permission on the papers.

3 The enabling powers lie in the European Union Withdrawal Act 2018 and the two key provisions are s.8, which states:

> "A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate-
>
> (a) any failure of retained EU law to operate effectively or
>
> (b) any other deficiency in retained EU law
>
> arising from the withdrawal of the UK from the EU."

The other enabling power within the Act is Schedule 7, which is referred to by s.22 of the Act. Schedule 7, para.21 says:

> "Any power to make regulations under this Act—
>
> (a) may be exercised so as to
>
> (i) modify retained EU law, or
>
> (ii) make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas, and
>
> (b) includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision re-stating any retained EU law in a clearer or more accessible way)."

There are many other provisions of the Withdrawal Act which have some relevance, but given that this is only a permission judgment I am not going to refer to them.

4 The Regulations under challenge are the Conservation of Habitats and Species (Amendment) EU Exit Regulations 2019. Those regulations amend the 2017 Regulations (the "Habitat Regulations") Conservation of Habitats and Species Regulations 2017. Those Regulations themselves were made under the European Communities Act 1972 to give effect to the Habitats Directive. Again, there are many parts of the Habitats Directive which have some relevance to this claim. I am not going to recite them all, but the most relevant are as follows.

A) Article 1, the definitions, which defines conservation status of a natural habitat as meaning the sum of the influences acting on a natural habitat and its typical species that may affect its long term natural distribution structure and functions, as well as the long term survival of its typical species within the territory referred to in Article 2. It says the "conservative status", but I think it must mean:

> "The conservation status of a natural habitat will be taken as favourable when its natural range and areas it covers within that range are stable or increasing."

B) Article 2 sets out that:

> "The measures shall be designed to maintain or restore favourable conservation status."

C) Article 3, which refers to the setting up of a coherent European ecological network of special areas of conservation under the title "Natura 2000" and the provision in 3(2) about designating such areas. 3(2) starts by saying:

> "Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1."

D) Article 4, provides that each Member State shall propose a list. Then there is the powers about transferring the list to the Commission and I put here that it is the Commission that runs the network. Then Article 9, which states:

> "The Commission, acting in accordance with the procedure laid down in Article 21, shall periodically review the contribution of Natura 2000 towards achievement of the objectives set out in Article 2 and 3. In this context, a special area of conservation may be considered for declassification where this is warranted by natural developments noted as a result of the surveillance provided for in Article 11."

5 There are three specific parts of the 2019 Regulations which the claimant argues go outside the powers of the Act. I am not going to read into these judgments vast parts of the Regulations, I will just make reference to the relevant part, and then read the critical words. So, in reverse order Regulation 13 inserts a new Regulation 16(a) under the heading "Management objectives of the National Site Network" and 16(a)(1) says:

> "The appropriate authority must, in co-operation with any other authority having a corresponding responsibility, manage and, where necessary, adapt the National Site Network so far as it consists of European sites with a view to contributing to the achievement of the management objectives of the National Site Network."

The offending words that the claimant says are *ultra vires* are "and where necessary adapt". Then in regulation 16(a)(2) the management objectives of the National Site Network are "to maintain at or where appropriate restore to a favourable conservation status in their natural range (so far as it lies in the UK's territory and so far as is proportionate)" and the offending words, according to the claimant, are the reference to "and so far as is proportionate". Then I should read 16(a)(6). In para.2(a) "proportionate" means "proportionate to the relative importance of (a) the part of the natural range lying in the UK's territory and (b) part of a natural range lying outside the UK's territory for achieving a favourable conservation status." Then the third provision in issue is Regulation 10, which amends Regulation 12 of the 2017 Regulations, "duty to designate special areas of conservation". Sub-regulation 5 states:

> "For aquatic species which range over wide areas, such sites are to be determined to be of national importance only where there is a clearly identifiable area which is distinct in providing the physical and biological factors essential to their life and reproduction."

It is the words "which is distinct in providing" which the claimant takes issue with.

6 I think the easiest way to address this is to look at each specific provision in issue separately and I will then give my reasons in respect of each one. First of all, Regulation 16(a)(1), the words "and where necessary adapt", Mr Wolfe's argument is that those words do not appear in the Directive and that to the degree it is necessary to adapt the areas at some future date that is outside the scope or *vires* of s.8(1) because it is not arising from the withdrawal of the UK from the EU. Mr Sheldon's argument, first of all, is that the management objective regulation is necessary because the management of these areas will no longer be done by the EU Commission and will be done by appropriate UK authorities and therefore there has to be a management objective provision. He says that the "where necessary adapt" part is reflecting the intentions of Article 9. Mr Wolfe says that Article 9, as I have just read it out, is very specifically constrained, and that is not reflected in this provision.

7 It is plain and not in contest that because of the UK exit from the EU there is going to have to be provision in the Regulations for the management of these areas by a body other than the EU Commission. Although there is no part of the Directive that deals directly with the actual management, management must be done to remain in line with the purposes of the Directive. It is therefore necessary to make provision in the post-exit Regulations for management of the sites which will now be taken on by those UK authorities.

8 On the words "where necessary adapt", I accept that this is merely intended to reflect the power in Article 9, a power to declassify in specific circumstances. It is right to say that the Regulation does not have the specific constraints in Article 9, but a need for the provision plainly falls within s.8 and Schedule 7. If the Secretary of State were to use the power to adapt given in Regulation 16(a)(1) to go beyond the power in Article 9, then that would be very likely, in my view, to be *ultra vires* because of the saving and interpretation provisions in the EU Withdrawal Act, which effectively preserved the EU law position, including any improvement to the terms of the Habitats Directive and the case law as at exit day. Although I can see that the issue is in some general sense important as to the precise scope of the enabling power, in my view a challenge to the Regulations as opposed to a challenge to a specific future decision relying on those Regulations appears to me not to be arguable. The words of the Regulations themselves in my view plainly fall within the enabling power.

9 The answer on the second point, "so far as is proportionate", is, in my view, similar. Mr Wolfe argues that the Secretary of State has introduced a specific concept of proportionality in 16(a)(6) which is not in the Directive because she has referred to "relative importance of the natural range lying within the UK", whereas the Directive does not refer to "relative importance". I struggle to understand in a challenge such as this as, why "relative importance" changes the meaning in any real way from the words of the Directive. Again, if on a particular factual case it could be argued in the future that the Secretary of State, or the appropriate authority, is trying to water down the effect of the Directive by arguably misusing the proportionality provision then that would an entirely different thing and might well give rise to an arguable case on the facts of the case. But in terms of the generality of the words of the Regulations, I again do not think the point is arguable.

10 The third objection is to Regulation 12 and the addition of the words "which is distinct" to after "only where there is a clearly identifiable area". As Mr Sheldon points out, the 2017

Offshore Regulations have already inserted the words "which is distinct". A regulation does not mistranspose a directive because it does not use exactly the same words. Importantly for this limb of the argument, there is the power in Schedule 7, para.21(b) to include provision restating any retained EU law in a clearer or more accessible way. Now, I am not entirely sure that I find the addition of the words "which is distinct" makes anything clearer or more accessible, but I do accept that that is a matter of discretion for the Secretary of State rather than for me and it is clear from the powers that he has an element of judgement in that matter. On the face of it it seems to me, on the justification the Secretary of State is putting forward for the insertion of those words, that they do fall within para.21, as is the intention. To the degree again that the Secretary of State at some future date seeks to use the "which is distinct" words to justify something which is contrary to the meaning of the Directive, then that is a matter that can be dealt with under the wider terms of the Withdrawal Act. It seems to me plain that, in principle, the words set out fall within para.21 of Schedule 7.

11 For these reasons, I agree with Sir Duncan Ouseley and do not think this claim is arguable.

CERTIFICATE

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This transcript has been approved by the Judge.