

CO/1508/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 27 April 2017

B e f o r e :

MR JUSTICE GARNHAM

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Between:

THE QUEEN ON THE APPLICATION OF CLIENTEARTH_ **Claimant**

v

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS_ **Defendant**

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(Official Shorthand Writers to the Court)

Ms N Lieven QC and Mr R Mehta (instructed by ClientEarth)
appeared on behalf of the **Claimant**

Ms P Jackson (instructed by Transport for London In-House
Solicitors) appeared on behalf of the **Mayor of London**.

Mr J Eadie QC and Ms J Kerr Morrison (instructed by Government
Legal Department) appeared on behalf of the **Defendant**

J U D G M E N T

(Draft for approval)

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MR JUSTICE GARNHAM:

Introduction On 2 November 2016, I gave judgment in judicial review proceedings brought by ClientEarth against the Secretary of State for the Environment, Food and Rural Affairs. I concluded that the 2015 Air Quality Plan published by the Secretary of State failed to comply with Article 23(1) of the Air Quality Directive 2008 and its domestic manifestation, Regulation 26(2) of the Air Quality Standards Regulations 2010. I found that, on its proper construction, Article 23 of the Directive meant that the Secretary of State was required to seek to achieve compliance of the Directive by the soonest date possible, that she must choose a route to that objective which reduced nitrogen dioxide as quickly as possible and that she must take steps which meant meeting the values prescribed by the Directive were not just possible but likely.

On 22 November 2016, after further submissions from the parties, I ordered the Secretary of State to publish a draft modified Air Quality Plan by 4 pm on 24 April 2017 and a final Air Quality Plan by 31 July 2017. The date of 24 April 2017 was the date suggested by the Secretary of State; in other words, in imposing that date for the publication of the draft report, I was adopting the date requested by Defra.

On 12 April 2017, the Cabinet Office published guidance in respect of the local government elections which are due to

take place on 4 May 2017. That guidance indicated a "period of sensitivity", covering a three week period preceding the elections. That period, commonly called "Purdah", ran from 13 April 2017. The guidance provided that care should be taken "in relation to the announcement of UK Government decisions which could have a bearing on the elections". On 13 April 2017, the Department issued an application for an order varying the terms of my order of 22 November 2016 to postpone the date for publishing the draft plan from 24 April to 9 May 2017. It was said that that order was:

"... sought on account of Purdah restrictions in place as a result of the forthcoming local elections."

On 18 April 2017, the Prime Minister announced that the Government would seek approval from the House of Commons for a general election to be held on 8 June 2017. That proposal was approved by the House of Commons the following day. On 20 April 2017 the Cabinet Office published guidance in respect of the general election. That guidance came into effect at midnight on 21 April and applies until the date of the general election on 8 June 2017.

That same day, 21 April, the Department prepared a fresh application for a variation of my order of 22 November 2016, which application suggested that the draft AQP should be

published by 30 June 2017 and the final AQP would be published by 15 September 2017. It was said that the order was sought:

"... on account of Purdah restrictions in place as a result of the forthcoming local and general elections."

Although dated 21 April 2017, that application notice was served after the close of business on that day so that it first came to the attention of the court on the following Monday, 24 April 2017. That, of course, was the date by which my earlier order required the publication of the draft plan.

In support of this application, I was provided with a revised witness statement from Ms Sue Gray, a Director General in the Cabinet Office with responsibility for propriety and ethics issues. I have also today heard argument from Mr James Eadie QC on behalf of the Secretary of State, Ms Natalie Lieven QC on behalf of ClientEarth and from Ms Philippa Jackson on behalf of the Mayor of London who was an interested party in the original proceedings. I am grateful for their careful and economic submissions.

Mr Eadie submits that in the context of both local and general elections, this application addresses matters of importance to the democratic process and to the effectiveness and efficiency of the process by which an Air Quality Plan will

be introduced. He submits that purdah is designed to preserve the necessary space for the proper conduct of the elections and to avoid competition for the attention of the public. He says that holding a consultation in the run-up to an election would constitute a distraction from the election and would undermine the effectiveness of the consultation.

Ms Lieven does not resist the grant of an extension until after the local elections. She recognises that local authorities are important consultees and that there would be advantages in not commencing the consultation on the draft AQP before new councillors are in post. But, she says, the same considerations do not apply in respect of the general election. The Government, she observes, is the consultor, not the consultee, in that case and that once the consultation is launched, its task is primarily receptive rather than active during the period of the consultation.

Ms Jackson, for the Mayor, is neutral on the application but makes submissions on the timetable that should be put in place if the application is granted to vary that provided for by my order.

Four matters fall for consideration. First, I consider the nature of "purdah". Second, I address the question as to the effect of the general principles set out in the guidance

in the context of this case. Third, I consider whether on its proper construction this case falls within the exceptional circumstances described in the guidance. And fourth, I address the exercise of my discretion.

The nature of Purdah:

It is necessary to identify what "Purdah" is and, as importantly, what it is not.

"Purdah" is a word of Indian origin. It describes the curtain once used to screen Hindu or Muslim women from the sight of men or strangers. According to the Concise Oxford Dictionary, the word is used figuratively to describe the Indian system of secluding women of rank from public view. The word has been adopted in English to describe the period before an election in which ministers, public servants, councillors and officials are expected to refrain from taking controversial decisions. That policy serves an important function in protecting the electoral process from interference, intended or accidental, by those holding elected public office. Purdah is, in effect, a self-denying ordinance imposed by local or central governments on its officers and members.

But "Purdah" is not a principle of law. The guidance from the Cabinet Office, to which I have referred, is directed

towards government ministers, other elected officers and officials in central or local government. It is not directed towards the court, nor, consistent with the rule of law, could it be. Purdah does not amend duties imposed on ministers by statute. It does not provide ministers with a defence to proceedings in private or public law. What is set out by the Cabinet Office in the guidance is not law, it is convention. Ordinarily such convention must give way to a duty under statute or an order of the court.

Because of the important functions it serves in safeguarding the electoral process, the concept of purdah will be carefully taken into account by the court in reaching decisions which affect central and local government in the period immediately before elections. However, it is in no sense binding on the courts. It is conceivable that breach of the rules of Purdah might found a claim in the courts against the executive. It is possible to imagine proceedings based on misconduct in public office or on breaches of legitimate expectation. That is because a breach of the rules of purdah may, conceivably, constitute a legal wrong, but enforcement of it is not a legal right vouchsafed to the Government.

Purdah in itself provides no defence to a failure by the Executive to comply with a court order. It provides no

automatic right to an extension of time to comply with an order of the court. It is not a trump card to be deployed at will by one litigant.

The effect of the Guidance

Paragraph 3 of the Guidance on General Elections says this:

"General Principles:

During the election period, the Government retains its responsibility to govern, and Ministers remain in charge of their departments. Essential business must be carried on. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long term character. Decisions on matters of policy on which a new government might be expected to want the opportunity to take a different view from the present government should be postponed until after the election, provided that such postponement would not be detrimental to the national interest or wasteful of public money."

Ms Gray says this about "Purdah periods":

"The Purdah periods act to restrict publications by local or central government in respect of matters that relate to impending elections in the periods set by convention preceding them. The intention of these periods is to prevent central and local government appearing to or actually influencing the outcome of such elections, as well as to avoid competing with the candidates for the attention of the public."

Mr Eadie submits that to publish the Air Quality Plan, the AQP, now would risk influencing the local election because the

plan focuses on the roles local authorities will play in reducing nitrogen dioxide emissions, and the general election because in the constituencies where the proposals might bite, the AQP will inevitably be controversial.

I accept that submission. There will be controversy about air quality in any event whether or not the draft plan is published, but I accept that it will be brought into sharper focus by the publication of the draft AQP.

Ms Gray says she is concerned to avoid the suggestion that the Government is cherry picking consultations to continue during the Purdah period. I see nothing in that point. If anyone is picking the consultations which must be commenced, it is this court.

Section J, paragraph 2, of the General Election Guidance says this:

"Departments should not take any steps during an election period that will compete with parliamentary candidates for the public's attention."

Mr Eadie argues that it is desirable that the public should be able to focus their attention on the election and that the consultation on air quality might be a distraction. In my view there is some force in this, although there is a real danger of underestimating the ability of the electorate to

consider the two issues. In my judgment, this is a consideration of only modest weight in the present case.

It is to be observed that if this plan is published, and consultation were then to commence, there would be no ground for criticism of the Secretary of State for commencing the consultation. It would not be done at the Secretary of State's own initiative. She would be publishing it because she had been ordered to do so by the court. She is not contemplating launching a consultation now because of a decision her department has taken, she would be launching it because that is a necessary consequence of an order of the court and she is as obliged to comply with orders of this court as any other litigant.

Ms Gray says that if the consultation were to go ahead now in advance of the general election there is a real risk that the quality of the process would be substantially undermined because the Government would not be able to publicise it or hold what she calls "stakeholder events". I accept that the Government would be constrained in what it did prior to the general election and that falls to be taken into account. It may be that the consultation period would continue after the general election but I accept that the limitation on government involvement would adversely affect, to some modest degree, the quality of the process.

Paragraph 3 of the General Election Guidance says this:

"Decisions on matters of policy on which a new government might be expected to want the opportunity to take a different view from the present government should be postponed until after the election provided that such postponement would not be detrimental to the national interest or wasteful of public money."

Ms Gray says that the new government may wish to reconsider both the draft and the final AQPs. Mr Eadie submits that it would make for a very inefficient process for the incoming government to be faced with a draft AQP published by its predecessor and a consultation process partially completed.

Again, this is a consideration that carries some weight in the present debate. Plainly, all other things being equal, it is preferable to avoid making policy decisions in the run-up to an election because of the risk that that constrains the options available to the incoming administration.

But here, as Ms Lieven submits, the incoming government will be facing the identical issues. There will still be in force the Directive and the Regulations. There will still be in place the decision of the Supreme Court in 2005 and my decision of November 2016. The principle restraints as to future government actions will remain, and the draft plan will not, in any event, be set in stone. It would be the future administration which would make the decision on the

final AQP in the light of the responses to the consultation on the draft plan. As Ms Lieven argues, incoming governments are frequently required to deal with issues left incomplete by its predecessor. She cites the proposal for a third runway at Heathrow as an obvious example.

In my judgment, the general principles set out in the Cabinet Office Guidance do apply in the present case and in general terms do support the Secretary of State's application. However, that is not the end of the issue. For the present, it is sufficient for me to observe that the weight to be attached to the general principles in the guidance in the case of the general election are not overwhelming.

The case based on the Guidance seems to me at its strongest in respect of the local elections. The role of the local authorities is, potentially, crucial in the consultation on the draft order and it would be particularly unfortunate if they were inhibited in responding to the draft plan.

Furthermore, in the case of the local elections, a change of timetable need not threaten the date of the publication and final plan.

The Guidance acknowledges that it is open to the Government to launch public consultations during the run-up to an election if there are "exceptional circumstances which make that

launch essential". There is a powerful case, in my judgment, that there are here exceptional circumstances which make the publication of the draft plan and the commencement of the consultation on it essential. I note in particular the following features of this case.

First, the court has ordered the publication of the draft plan and the Secretary of State is obliged to comply with that order. Whilst there is power in the court to amend that timetable, good reason needs to be shown for doing so.

Second, there is here a subsisting duty under both domestic and EU law to achieve compliance with the law by the soonest possible date. There is a strong case that that necessitates the early publication of the draft and then of the final report.

Third, and perhaps most importantly, these steps are necessary in order to safeguard public health. That seems to me the crux of the case.

For the reasons given in my November judgment, the continued failure of the government to comply with the Directive and the Regulations constitutes a significant threat to public health. According to an analysis conducted by the Department itself, the effects of exposure to nitrogen dioxide on mortality is equivalent to 23,500 deaths annually in the United Kingdom. That is, on average, more

than 64 deaths each day of the year. Other studies suggest even higher figures but I am content to work for present purposes on Defra's own figures. That alone can properly be said to constitute circumstances which are wholly exceptional and make immediate publication of the plan essential.

Ms Gray argues that the expression "exceptional circumstances" is to narrowly construed. She says the expression safeguarding public health would:

"... generally be expected to apply if there was an unexpected public health emergency such as contaminated food."

I fail to see why exceptional circumstances applies to unexpected threats to public health and not to threats of which the Government has long been aware. What matters is that the threat is real and is a subsisting and that is undoubtedly the case with NO2 emissions.

Mr Eadie argues that the delay in publishing the final report need not delay implementation of the plan. He points to paragraph 32(a) of the witness statement of Ms Gray. She says this:

"I am told by my colleagues at Defra that the short delays to the timetable (as proposed) are not expected to alter the dates for implementing the measures contained at least within the current draft AQP and consequently the time frame for

achieving compliance. While Defra is inhibited from holding events with affected local authorities during the Purdah period, it will continue to engage with individual local authorities insofar as possible to enable them to be informed about and ready to participate in the consultation process and for Defra to gain a greater understanding of the local situation. After the consultation period and the final decision on AQP, Defra will work closely with relevant authorities to ensure, insofar as possible, that the proposed measures or any new additional measures are implemented within time frames that do not change the ultimate point at which compliance with the annual limit values is achieved. I and Defra acknowledge that we cannot rule out conclusively the risk of delay but everything possible will be done to keep any such delay to a minimum."

I reject that argument. There is simply no adequate explanation as to why later publication of the plan would not mean later implementation of the plan, given that publication of the draft plan and consultation upon it are necessary first steps in the process towards implementation.

The suggestion that the Purdah period will not be wasted because the department will engage with local authorities and learn about the local situation and would work with the relevant authorities with a view to implementing proposed measures as soon as possible does not, in my view, help Mr Eadie. The department should be doing that anyway. The obligation on the Government is to introduce the plan as soon as can be, and to do so by the route which achieves the greatest reductions in emissions in the shortest possible time. If

the Government are being true to that obligation, they cannot make up the lost time by working a little harder. It follows that there are here good reasons for launching a consultation during the purdah period.

Next, the issue of discretion. The grant or refusal of an extension of time to comply with an order of the court is a matter for the discretion of the court. In considering the exercise of that discretion in this case, it is necessary to balance competing considerations.

In favour of the grant of the extension are the various factors set out in Ms Gray's statement to which I have already referred. I do not repeat those matters but I have regard to them all and I take them into account in considering the proper exercise of my discretion.

Critically I accept that there are aspects of the purdah guidance which are applicable here. To a modest degree, the launch of a consultation about air quality would risk influencing both local and general elections. There would be some competition for the attention of the electorate. The limitation on government involvement would, to some extent, adversely affect the quality of the consultation process, and the room for manoeuvre available to the incoming administration would be somewhat more limited but I repeat: in each case the adverse effect would be modest.

On the other side of the equation, I take into account the following matters in favour of refusing an extension:

First, the Secretary of State was under a legal obligation to comply with the order of the court and to do so by the date specified in that order.

Second, as I have found above, there are exceptional circumstances here which would justify the launch of a consultation during the Purdah period.

Third, in my judgment of November 2016 I found that the defendant was in breach of the Directive and the regulation.

There was no appeal against that judgment. Since no proper Air Quality Plan has yet been prepared by the defendant, she remains in breach. As I sought to explain in my judgment, the Secretary of State is obliged to comply with the Directive and the Regulations as soon as possible.

Accordingly, granting an extension would serve to permit a continuing breach of the Directive and the Regulations. In my judgment, such a step by the court could only be justified in the most exceptional of cases.

Fourth, there is nothing in either the Directive or the Regulations which entitles the Secretary of State to more time because the Government has called an election. Purdah does not mean it is not "possible" to publish a plan. The

obligation on the Government is to produce an Air Quality Plan which reduces exposure to nitrogen dioxide as quickly as possible and further delay constitutes further or continued breach.

Fifth, the Secretary of State says that the draft report has been prepared and is fit for disclosure were it not for the purdah restrictions.

Finally, and perhaps most importantly, for the reasons I have given already, continued delays leads to a continued threat to public health. That alone constitutes a powerful reason for refusing to permit further delay in the process to remedy the problem.

In my judgment, the factors in favour of refusing an extension plainly outweigh those in favour of its grant.

Conclusions

In those circumstances, I conclude:

- (i) That Purdah is not a rule of law which overrides the duty on the Government to comply with its statutory duty and the orders of the court.
- (ii) That, properly understood, the general principles set out in the Cabinet Office Guidance apply here but do not in themselves establish that the

publication of the draft AQP before the general election would be unacceptable.

(iii) That in any event, this case falls within the exceptions provided for by the Guidance.

I am prepared to extend time so as to enable the local elections to be conducted, and the new councillors to take up their posts, before the draft is published but I decline to extend time to cover the general election period.

The draft plan must be published the day after the local elections and the date for the publication of the final plan will be unchanged.

Thank you very much.

MS LIEVEN: My Lord, in those circumstances, I think if I can just check the form of the order, I think your Lordship's order would be that in our draft order of paragraph 1, that is that the draft modified AQP be published by 4 pm on Tuesday, 9 May 2017.

MR JUSTICE GARNHAM: In my enthusiasm to get back from the room to read this out, I have left in my room that order.

MS LIEVEN: I'm sorry, your Lordship said the day after the election so I think your Lordship may have meant 5 May.

MR JUSTICE GARNHAM: No, I meant the day after the elected officials take up office.

MS LIEVEN: The new administration. So 9 May is the right date, my Lord.

MR JUSTICE GARNHAM: I would be grateful if you could share this draft with the other counsel involved and let me see it.

MS LIEVEN: Yes, of course.

MR JUSTICE GARNHAM: I confess I don't have it in front of me at the moment.

MS LIEVEN: No, no, my Lord, we won't pursue the points about the modelling techniques and the assumptions, we will let that come on 9 May with the rest so the only other thing I just need to ask for --

MR JUSTICE GARNHAM: Yes, if I need to say anything about that, I am against you on that anyway.

MS LIEVEN: No, you don't need to, my Lord, because of the 9 May date and the only other thing I ask is that you order that the defendant pay the claimant's reasonable costs, to be assessed if not agreed.

MR JUSTICE GARNHAM: When did you indicate that you would be willing to agree to an extension to incorporate the local elections?

MS LIEVEN: My Lord, we did that, I think ... 13 April.

MR JUSTICE GARNHAM: 13 April.

MS LIEVEN: 147, my Lord, tab 14, we said we wouldn't object -- paragraph 4:

"We do not consent to the Secretary of State's application but consider that it is ultimately a matter for the court to decide. We ask this letter be put to the court alongside your application."

MR JUSTICE GARNHAM: Mr Eadie?

MR EADIE: I don't object to that. I have one application which is for permission to appeal and then we will need to take away my Lord's judgment and I don't have formal instructions yet but to save everyone having to come back. What the case raises are at least some important points about (Inaudible) understand the way most of the judgment is constructed so that becomes framed as a matter of weight but issues of principle, in my submission, do arise as a matter of some

importance and the Court of Appeal should --

MR JUSTICE GARNHAM: Well, I am afraid, Mr Eadie, I am not willing to grant you permission to appeal, you will have to make that enquiry of the Court of Appeal. I would indicate this though; that the time between now and the date when this report is to be published is how many days? Not many.

MR EADIE: Well, if it is 9 May, that is Tuesday week.

MR JUSTICE GARNHAM: It will be a matter for Ms Lieven to make submissions but I would be reluctant to encourage, in any way, an application to the Court of Appeal that postdates that date. It seems to me that if you are going to appeal you should get on with it and do it before 8 May.

MR EADIE: My Lord, I don't think Ms Lieven will need to make submissions about that, I am entirely content with that and obviously once the application has been made, we are in the hands of the listing office and the Court of Appeal.

MR JUSTICE GARNHAM: You are, but I did cause enquiries to be made, Mr Eadie, just to make sure that this wasn't impossible and I understand from those enquiries that consideration of your application for permission to appeal might well be manageable.

MR EADIE: Within that time frame.

MR JUSTICE GARNHAM: Within that time frame. That is not to be taken as any encouragement to your appeal, nor is it to be

taken as a guarantee but it is to be taken as
an encouragement to you to get on with it.

MR EADIE: My Lord, certainly. It doesn't sound like my Lord is
envisaging setting a date by which that application should
be made (Inaudible).

MR JUSTICE GARNHAM: I am sorry, I don't --

MR EADIE: I am not sure you have jurisdiction to make that
order anyway but we will obviously get on with it and --

MR JUSTICE GARNHAM: I might just look to the clerk of the
court.

(Pause)

I am not getting any help from that particular quarter at the
moment, Mr Eadie.

MR EADIE: I am extremely pleased to hear that, my Lord.

MR JUSTICE GARNHAM: I don't know whether Ms Lieven can help me.

MR EADIE: I should say this: it is in everyone's interests,
including the Government's, to get this sorted out as
quickly as possible. If we are going to engage the
Court of Appeal, that needs to be done quickly.

MR JUSTICE GARNHAM: Absolutely. Well, the murmurings I got
back from that quarter were that if you were going to do it,
you needed to get on with it. I doubt if I need to say any
more than that really.

MR EADIE: No, you probably don't.

MS LIEVEN: No. My position would be I don't think your Lordship would have jurisdiction to order Mr Eadie's clients to make an application to the Court of Appeal early next week but I am quite happy for it to be on the record so it is on the transcript to say that if Mr Eadie's clients do wish to appeal and they don't apply early week, we will take that as a separate point against them because obviously in the light of your Lordship's indications and the time frame, if they leave it until next Friday or next Monday, then the Court of Appeal is being put in a very difficult position.

MR JUSTICE GARNHAM: I can't imagine that Mr Eadie would do that.

MS LIEVEN: No, my Lord. I don't think there is any more that can -- the one thing --

MR JUSTICE GARNHAM: You can have your costs from the date of the letter to which you have referred.

MS LIEVEN: Certainly. I think the one other thing that could be helpfully dealt with, my Lord, and I appreciate this puts a heavy burden on your Lordship as well as the transcript writer, is to ask for a transcript to be produced highly expeditiously and if possible by next Tuesday. I am conscious that Monday is a bank holiday. Even if it is a draft and your Lordship hasn't had a full -- I don't know what your Lordship's commitments are.

MR JUSTICE GARNHAM: Hideous is the answer to that question.

MS LIEVEN: Difficult to proceed in the Court of Appeal if my learned friend --

MR JUSTICE GARNHAM: Let me stop you, Ms Lieven. It may come as a surprise to both you and Mr Eadie but I wasn't speaking entirely off-the-cuff for that judgment and so I do have a note which I will hand to the shorthand writer, if I can catch her attention, which may make the task a little easier for her. It may not, but I think it will, and I will direct that a transcript of my judgment should be made available as soon as possible to both parties.

MS LIEVEN: I am very grateful.

MR JUSTICE GARNHAM: Very good. Is there anything else?

MS LIEVEN: No.

MR JUSTICE GARNHAM: Thank you all for your help.