January 2027

ClientEarth vs SSEFRA 2: High Court Judgement 2016

Briefing for Birmingham City Council Scrutiny Inquiry

Summary

In November 2016, the UK High Court ruled in favour of ClientEarth in its latest case against the UK government over illegal levels of nitrogen dioxide pollution. The Court declared that the 2015 Air Quality Plans (AQP) produced by the UK Government did not comply with the requirements of the Ambient Air Quality Directive (the Directive) and ordered the preparation of modified plans.

Notably, this is the first time a UK court has ruled on whether the Government had complied with Article 23 of the Directive, which requires that where limit values (i.e. legal limits) of air pollutants are breached, air quality plans must be prepared containing "appropriate measures so as to keep the exceedance period as short as possible".

The judgment gives the most definitive interpretation by a national court of the obligations which flow from the Directive. In particular:

- Air quality plans must contain measures which will achieve limit values as soon as possible, with a high degree of certainty.
- Air quality plans must contain scientifically feasible, effective and proportionate measures.
- The primary consideration when selecting measures must be their effectiveness. Measures cannot be excluded on grounds of cost if they would achieve earlier compliance.
- Air quality plans must choose the route to compliance which minimises human exposure to air pollution.

The Court found that the Government had "erred in law" by aiming to achieve compliance by a too distant date (2020 and 2025 for Greater London), by relying on overly optimistic modelling and by failing to model compliance in years prior to 2020. In doing so, the Government had denied itself the information it needed to determine what measures were necessary to ensure earlier compliance.

The Court ordered that the 2015 AQP be modified to achieve nitrogen dioxide limits as soon as possible. The modified plans must be published in draft on 24 April 2017 for public consultation, along with relevant technical information, before being published in final form by 31 July 2017.

The precise measures selected in the modified AQP will depend on the revised modelling carried out by the Government. However, the judgment's requirement that the new plans are based on more realistic assumptions will inevitably mean that without additional measures more zones will be in non-compliance for a longer period of time.

Mandated Clean Air Zones (CAZs) - where targeted types of vehicles are charged to enter an area unless they meet certain emission standards – were identified as the most effective measure in the 2015 AQP. In fact the only significant national measure was the requirement for just five cities[1] to implement CAZs by 2020 and for the existing CAZ in London to be improved.[2]

In those cities where CAZs have already been mandated, it is likely they will have to apply to more classes of vehicles in order to achieve compliance as soon as possible. For example, Birmingham will probably require a Class D CAZ, which will impose charges on passenger cars.

More realistic modeling is also likely to require CAZs to be mandated in other cities, and to more classes of vehicle. In fact, information disclosed as part of the legal challenge revealed that in developing the 2015 AQP, Defra had proposed at least 16 CAZs. This was reduced to six by the Treasury who wanted to reduce the cost of implementing the AQP.

A range of other complementary measures which were not included in the 2015 AQP, partly because they were not considered necessary to achieve compliance by 2020, will also have to be reconsidered. For example, changes to fiscal policy and scrappage schemes. It will also put pressure on the Government to push for more stringent EU regulations of diesel vehicles.

ClientEarth's recommendations for the national framework for CAZs are outlined in the appended consultation response.

The Legal Basis

The Government is under an obligation to reduce nitrogen dioxide (NO_2) concentrations throughout the country to the legal limits set under the EU Ambient Air Quality Directive,[3] as transposed into UK law by the Air Quality Standards Regulation 2010.[4] The duty to meet legal limits is a strict duty in the sense that it imposes an absolute, unqualified duty. The Directive was enacted to safeguard human health as NO_2 is a harmful gas and is associated with respiratory illnesses, inflammation of the lung lining and bronchitis.

The following provisions of the Directive were most relevant to the proceedings:

- Article 13 sets out limits for NO_2 that were to be met by 1 January 2010.

[1] The five cities that were mandated CAZs in the 2015 AQP are Birmingham, Derby, Leeds, Nottingham and Southampton.
[2] The London ULEZ was considered to be broadly equivalent to a "Class D" CAZ.
[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0050
[4] http://www.legislation.gov.uk/uksi/2010/1001/contents/made

- Article 23 provides that if limits are breached after the relevant deadline, member states are required to prepare air quality plans containing measures so that the duration of the breach will be kept "as short as possible."

For the purposes of the Directive, the UK is divided into 43 "zones and agglomerations" (cities and regions). Birmingham sits within the West Midlands Urban Area agglomeration zone. The Government has so far failed to meet limits for NO_2 for 37 of the 43 zones (including the West Midland Urban Area). Plans adopted in 2015 projected that the limits would not be met until 2020 in the majority of zones, with nine zones requiring additional measures (including the West Midlands Urban Area) to comply by 2020 and 2025 in the case of London.

In 2016 ClientEarth commenced judicial review proceedings over the failure by the Secretary of State for Environment, Food and Rural Affairs (Defra) to keep the duration of the breach as short as possible in accordance with Article 23 of the Directive. ClientEarth's case was that the plan was flawed by two errors of law:

1. it did not ensure that the duration of breach was kept as short as possible; and

2. disproportionate weight was placed on other considerations, such as the cost of measures, which were not relevant.

The Government's defence was that they had correctly construed Article 23 and that the AQP contained proportionate, feasible and effective measures.

The Mayor of London was involved in the case as an "interested party" and supported the position of ClientEarth.

Previous legal action

This case follows earlier proceedings by ClientEarth in the High Court, Court of Appeal, UK Supreme Court, and Court of Justice of the European Union (CJEU).

In 2015 the UK Supreme Court said that in view of ongoing breaches of NO_2 legal limits, which were not projected to stop until in some cases after 2030, the UK Government had to prepare new air quality plans in accordance with Article 23 of the Directive by the end of December 2015.

However, it did not rule on the proper interpretation of Article 23 as this was not at issue in this case. Determination of whether the plan contained measures that would keep the duration of the breach "as short as possible" (i.e. complied with Article 23) was therefore left to future legal proceedings. See our previous briefing for more detail on the earlier proceedings.[5]

[5] http://documents.clientearth.org/wp-content/uploads/library/2015-09-17-the-uk-supreme-court-ruling-in-the-clientearth-case-consequences-and-next-steps-ce-en.pdf

2016 High Court Judgment

As required by the Supreme Court order, the UK Government published a new AQP in December 2015. However, ClientEarth was not satisfied that the measures included in the AQP were sufficient to meet legal limits in the shortest time possible and so in March 2016 brought new legal proceedings to challenge the AQP before the High Court.

In November 2016 the Court ruled in favour of ClientEarth, declaring that the AQP did not comply with the Directive and ordering that it be quashed.

The Court held that the Government must aim to achieve compliance with limit values by the soonest date possible. The Government must take steps which ensure meeting the value limits "is not just possible, but likely".[6] This is because the Directive imposes an obligation of result (i.e. the obligation is to achieve the legal limits, not simply to prepare a plan).[7] Though the Secretary of State can determine the measures it wants to adopt, the selected measure must be both scientifically feasible and effective in achieving compliance. Accordingly, the discretion given to the Secretary of State under Article 23 is narrow and greatly constrained.

This means that the Government cannot take any consideration of cost when fixing the target date for compliance or in determining the route by which compliance can be achieved where one route produces results quicker than another. The effectiveness of the measure and not the cost must be the determinative consideration. Costs can be taken into consideration where a choice is to be made between two equally effective measures or where a national Government is deciding which body of government (a department of central government or a local government authority) pays.

The Court stated that measures adopted should be "proportionate", but this means only that "they must be proportionate in the sense of being no more than is required to meet the target."[8] It does not allow measures to be excluded on grounds of cost.

Modelling Methods

The Court also held that the AQP was unlawful for two main reasons:

1. It fixed on a projected compliance date for 2020 (and 2025 for London); and

2. It relied on overly optimistic modelling assumptions for future emissions.

Five Yearly Intervals

Defra chose to adopt five yearly intervals for modelling future projections of NO_2 and selected 2020 as the target date for compliance (and 2025 for London). The Court held that the failure to model compliance at a date prior to 2020 was flawed as it deprived the Government of the evidence it needed to identify what measures would ensure compliance sooner.

---

[6] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2016] EWHC 2740 (Admin), Paragraph 95.

[7] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2016] EWHC 2740 (Admin), Paragraph 47

[8] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2016] EWHC 2740 (Admin), Paragraph 51.

The Court rejected the Government's argument that it was standard practice across Europe to model at 5 year intervals. While this may be appropriate under normal circumstances, it was not appropriate where the obligation was to achieve compliance as soon as possible.

Selection of Optimistic Assumptions

The AQP used modelling to project future compliance with NO_2 legal limits. These models were highly sensitive to estimates of future emissions from diesel cars and vans – one of the main sources of NO_2. The emissions factors used were the "COPERT" emissions factors which are developed at the European level.

The COPERT emission factors were overly optimistic as they overestimated future nitrogen oxides (NOx)[9] emissions reductions from diesel light duty vehicles (cars and vans). It was known at the time the plans were prepared that this was the case. Defra acknowledged that "emerging data" undermined the assumptions and if more realistic assumptions for emissions were used the rate of emissions from vehicles in the real world increases. As explained by the Court:

"The Government is acknowledging that its plan is built around a forecast based on figures which "emerging data" is undermining and that if higher, more realistic, assumptions for emissions are made the number of zones which will not meet the limit value in 2020 increases substantially."[10]

Adopting a plan based on such optimistic assumptions was a breach of the Directive and the relevant domestic Regulations as it does not keep the duration of the breach as short as possible.

Next Steps

The Government has accepted the judgment and confirmed that it will not appeal.

The Court has declared that the existing plans should remain in force for the time being to avoid any further delay in implementing those measures included in them. In particular, the Government had committed to publishing its national framework for Clean Air Zones in early 2017, along with enacting secondary legislation which will mandate five cities (including Birmingham) to implement clean air zones.

However, the Court ordered that the plans be modified to ensure they meet the requirements of the Directive. The Government must publish draft modified plans by 24 April 2017 alongside technical information such as the modelling assumptions used for projecting future compliance. This should allow proper scrutiny of the modified air quality plans by consultees. The Government then has until 31 July 2017 to finalise the modified plans and submit them to the European Commission.

In a highly unusual step, the Court granted both parties "liberty to apply" (i.e. the right to go back to the Court) to ask it to determine any legal issues arising during the preparation of the modified air quality plans.

[9] Nitrogen oxides (NOx) is a group of gases that includes NO_2
[10] R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.2) [2016] EWHC 2740 (Admin), Paragraph 85

FAQs

Will the judgment affect other policy areas?

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

Will there be any implications for local government?

While the judgment binds the Secretary of State as the representative of central government, local authorities may be required to deliver many of the measures included in the new air quality plans. This is likely to have resource implications for local government.

Alan Andrews
Clean Air Lawyer
020 7749 5976
aandrews@clientearth.org
www.clientearth.org

Andrea Lee
Healthy Air Campaigner
020 7749 5979
alee@clientearth.org
www.clientearth.org

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

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

Brussels
Rue du Trône 60
5ème étage
1050 Bruxelles
Belgique

London
274 Richmond Road
London
E8 3QW
UK

Warsaw
ul. Żurawia 45
00-680 Warszawa
Polska

9 December 2016

Defra consultation on the implementation of Clean Air Zones in England

ClientEarth response

This consultation response is made on behalf of ClientEarth, and is made in addition to the online response in order to provide the following additional legal context.

We recognise that this consultation was launched prior to the judgment in *R (ClientEarth (No. 2)) v Secretary of State for the Environment, Food and Rural Affairs* ("ClientEarth 2"). Further to the order of Garnham J dated 21 November 2016, Defra will now have to modify the 2015 Air Quality Plan (the "AQP"). In the meantime, the AQP will remain in force and implementation of measures included in it, such as the Clean Air Zone Framework (the "CAZ Framework"), should proceed without delay. However, the final CAZ Framework will also need to fully and accurately reflect the findings of the Court. To the extent that it does not, we reserve our position to raise further concerns with respect to the final CAZ framework and any related documents.

Responsibility for achieving compliance with limit values and preparing air quality plans rests ultimately with the Secretary of State. It is therefore essential that the CAZ Framework sets out clear principles and criteria for local authorities to follow when implementing and operating a CAZ. The draft CAZ Framework does not do this. Those principles and criteria must be consistent with the obligations laid down by the relevant legislation and the judgment in ClientEarth 2.

The final CAZ Framework will therefore need to be updated in light of the judgment. In particular, the CAZ Framework needs to reflect the Court's interpretation of Article 23 of the Ambient Air Quality Directive, as transposed by Regulation 26 of the Air Quality Standards Regulations 2010.

In particular, the CAZ framework needs to be consistent with the obligation to:

a) Ensure compliance with limit values by the earliest possible date, which entails that the efficacy of the measure (e.g. a CAZ) is the determining consideration, with only a very limited scope for consideration of cost [see §50].

b) Reduce human exposure to nitrogen dioxide as quickly as possible [§52]; and

c) Ensure that compliance with limit values is not just possible, but likely [see §53].

The CAZ Framework also presents an opportunity to explain to local authorities and other stakeholders the process following the judgment, and alert them to the likelihood that the modified AQP will require far more mandatory charging CAZs.

Question 1: Are the right measures set out in Section 2?

No. The voluntary nature of all the measures listed in Section 2, means that they are unlikely to have any impact on improving air quality. The emphasis on "non-charging" CAZs does not reflect the extent and severity of the UK's air quality problem or the urgency with which it needs to be addressed. A non-charging CAZ does not appear to be significantly different from an Air Quality Management Area ("AQMA"). It has been well documented that AQMAs have largely failed to improve air quality.

Section 2 lists many measures which local authorities could take, which may be effective, but without significant additional incentives and other support from national government, local authorities will not introduce them.

Local authorities should therefore be mandated to introduce charging CAZs as soon as possible. The minimum requirements in section 2.2 are too vague to act as any meaningful benchmark of progress. Appropriate metrics should be developed and included in the Framework including:

- Minimum provision of electric vehicle charging points;
- Benchmarks for cycling and walking infrastructure provision and take-up;
- Progress in meeting traffic reduction targets; and
- Minimum criteria for fleet procurement.

Question 2: Are there additional measures which should be highlighted under each theme?

Yes. We welcome the focus on using CAZs to raise awareness. Signage will support this. However, there should also be a requirement for enhanced air quality monitoring and public information in CAZs. Ensuring that a minimum number of monitoring stations are in place within a CAZ, and that data from those stations is made publically available both online and on electronic displays, will greatly enhance public understanding and allow local authorities to more accurately assess the effectiveness of CAZs. A national awareness raising campaign should also be introduced, using social media, television and billboards, explaining why CAZs are being introduced and highlighting the multiple health and environmental benefits which they will bring.

Question 3: In addition to the framework, are there other positive measures that (a) local or (b) central government could introduce to encourage and support clean air in our cities?

Yes. This consultation places too much emphasis on the role of local authorities, with little or no additional resources or support from Central Government. Action at the local level needs to be complemented by action by central government, which holds most of the policy levers capable of delivering the necessary step-change. Central Government should therefore introduce the following complementary measures in the modified AQP:

a. A “clean car” label that identifies if cars actually meet emissions standards when driving on the road. This will not only help guide consumer choice, encourage early implementation of the Euro 6c standard, but could also improve the effectiveness of CAZs.

b. Reform of fiscal policies such as Vehicle Excise Duty and Company Car Tax to dis-incentivise new purchases of diesel cars which do not meet the Euro 6 emission standard under real driving conditions, and further incentivise the uptake of ultra low emission vehicles.

c. Central government support for electrification and retrofit of buses, targeted at CAZs.

d. A targeted scrappage scheme, focused on drivers of cars and vans who are on low incomes and/or have no alternative to driving their vehicle in a CAZ.

e. The UK to push at the EU level for stricter “Real Driving Emissions” requirements for the Euro 6 standards, i.e. a “conformity factor” of 1 i.e. full compliance by 2020 at the latest.

f. Additional funding for local authorities to cover the implementation costs of CAZs.

g. Development of standardised signage and other equipment to reduce costs for local authorities and ensure coherence, consistency and public understanding.

Question 4: Are the operational standards and requirements set out in Section 3 and Annex A of the Framework acceptable?

No. The Framework does not contain sufficient detail to ensure a consistent, effective and lawful approach to CAZs by local authorities. The Framework should provide clear and consistent direction on the following features of CAZs, in line with the judgment in ClientEarth 2:

a) The size and location of CAZs. To provide clarity and certainty, the CAZ framework should lay down minimum criteria for the location and size of CAZs. This should be consistent with the judgment in ClientEarth 2 i.e. the size of the CAZ must be adequate to ensure compliance is achieved as soon as possible, based on realistic assumptions of future air quality improvements, and be designed so as to minimise human exposure to pollution. Given the limitations of Defra's modelling, CAZs should take into account local monitoring, so CAZs should include roads which local assessment shows will be in breach even if the national model does not. These criteria should be based on evidence from the introduction of CAZs around Europe, which has shown that small CAZs simply displace air quality problems as vehicle operators will simply drive around the CAZ. A certain "critical mass" is necessary to encourage vehicle upgrade rather than simply exacerbating pollution on the perimeter of the CAZ. The boundaries of the CAZ should also be drawn in such a way as to minimise human exposure, for example by including schools, hospitals and large areas of high density housing within the CAZ boundary, which would otherwise be particularly vulnerable to the displacement effect.

b) The level of charge. See further at Question 9.

c) Enforcement of CAZs. As enforcement of CAZs will be the responsibility of local authorities, the CAZ Framework needs to lay down strict criteria for the minimum number and optimal location of cameras, including the need for mobile cameras. This

can draw on evidence from the London low emission zone. The CAZ Framework should also lay down criteria for the proper enforcement of idling bans within CAZs.

d) Inspections. To ensure its effectiveness, the CAZ Framework should outline measures aimed at ensuring vehicles meet the required emissions standards under normal driving conditions. It should therefore require enhanced vehicle inspection within CAZs, including random roadside testing and remote sensing to highlight high emitting vehicles and potentially restrict them.

e) Inclusion of passenger cars through CAZs through Class D CAZs. Diesel cars are a major source of NOx in most non-compliant zones and agglomerations. To achieve compliance in the shortest time possible will therefore require specific measures to address pollution from passenger cars. The CAZ framework therefore needs to lay down minimum criteria for Class D CAZs (the suggested criteria are inexplicably included in a footnote rather than in the main table in Annex A). The Framework also needs to enable local authorities to distinguish between diesel cars which meet the Euro 6 emission standard under real driving conditions, and the majority which currently do not. A consumer labelling scheme could be developed for this purpose and included as an Annex to the Framework.

f) An additional Class E CAZ should be developed, to allow or require local authorities to go further than Class D where necessary to address particularly high pollution and to accelerate the take up of electric vehicles and drive modal shift to more sustainable forms of transport. For example, a Class E CAZ could provide for access restrictions to be placed on all passenger cars, or all passenger cars other than zero emission/ultra low emission vehicles.

g) The CAZ Framework only includes operational standards for road vehicles. Appropriate standards should be developed for other significant sources of pollution, such as non-road mobile machinery, domestic and commercial boilers and CHP units, and integrated in the modified AQP to empower local authorities to tackle all sources of pollution.

h) The Euro 6 standard for light duty vehicles, which includes taxis and private hire vehicles, is inadequate. Emphasis should therefore be placed on moving to zero or ultra low emission taxis and private hire vehicles. The Euro VI standard is more

effective but performance is highly variable. It needs to be bolstered by effective inspections to ensure that emissions abatement technology is working effectively and properly maintained (e.g. ad blue is being refilled).

Question 5: Do you agree that the requirements in Clean Air Zones for taxis and for private hire vehicles should be equivalent?

Yes.

Question 6: Do you agree the standards should be updated periodically?

Yes. The standards need to be reviewed to take into account evidence on the effectiveness of the new Euro 6c standard under real world driving conditions. In future, the CAZs need to move beyond Euro standards to require zero emissions.

Question 7: If yes, do you agree that the minimum vehicle standards set out in the Framework should remain in place until at least 2025?

No. The standards should be regularly reviewed to ensure their effectiveness under real driving conditions and revised as soon as practicable once sufficient evidence is available.

Question 8: Do you agree with the approach to Blue Badge holders?

No.

Question 9: Is the approach set out suitable to ensure charges are set at an appropriate level?

No. The framework does not currently lay down any minimum level of charge for entering CAZs. Although it is stated that the final framework will set upper and lower bands within which local authorities can set the level of charge based on local circumstances, this could allow local authorities to set the charge to low so that vehicle operators will simply choose to pay the charge and enter the CAZ. The framework needs to include clear minimum criteria on the applicable charge to ensure it is sufficiently high to drive vehicle upgrade/replacement/rerouting in order to improve air quality. To ensure consistency across the country, any variation should be minimal, for example with only two bands, one for

London, the south east and other more affluent areas, and a second lower band for other less affluent areas. The level of the charge should be set at a level which ensures compliance in the shortest time possible – other considerations such as local economic conditions are only of secondary importance.

Question 10: Do you have any comments on the secondary legislation as drafted?

Yes. The timeframes laid down are too long. For example, the 12 months allowed for submission of a draft charging scheme by local authorities (see Regulation 12) is too long in view of the obligation to achieve compliance with air quality limits as soon as possible. In particular, the five local authorities listed in the draft Regulations have already had nearly a year since the adoption of the AQP to develop CAZ schemes, and have been in discussions with Defra for much longer. This timeframe should be reconsidered in light of the judgment in ClientEarth 2 and the requirement to achieve compliance in the shortest time possible. Similarly, to ensure maximum certainty for local authorities, business and stakeholders, the Regulations should lay down a maximum timeframe for the Secretary of State to issue a notice approving the scheme or requiring a revision to the draft scheme under Regulation 7. This should be the minimum required to ensure consistency with the Secretary of State's obligation to achieve compliance with limit values as soon as possible.

Question 11: Do you agree with the approach undertaken in the impact assessment? If no, please provide supporting evidence.

No. The impact assessment does not assess the full range of costs and benefits of various CAZ scenarios. In particular it does not model the costs and benefits of class D CAZs or more ambitious measures such as a "Class E" CAZ. The impact assessment needs to be updated in light of the judgment in ClientEarth 2.

Question 12: Do you agree with the conclusions of the impact assessment?

No. The conclusions of the impact assessment are invalid as they are not based on the best available evidence and do not consider the full range of potential CAZ scenarios, particularly the impacts of Class D CAZs.

Question 13: Are you aware of the any additional data that could inform the impact assessment?

The impact assessment needs to be based on the latest COPERT emissions factors and other evidence of real world emissions from diesel vehicles, including the DfT diesel emissions investigation, and PEMS testing conducted by Emissions Analytics.

ClientEarth

9 December 2016

Alan Andrews
In-house solicitor
020 7749 5976
aandrews@clientearth.org
www.clientearth.org

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

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

Brussels
Rue du Trône 60
5ème étage
1050 Bruxelles
Belgique

London
274 Richmond Road
London
E8 3QW
UK

Warsaw
ul. Żurawia 45
00-680 Warszawa
Polska