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CJEU Case Law – Recent Important Environmental Law Cases Post-Brexit

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English lawyers would be well advised to cast their eyes south of Dover and across the water to the Court of Justice of the European Union ("CJEU"). Although the United Kingdom has left the European Union, the caselaw of the CJEU still has an important role to play in environmental litigation within domestic courts.

Section 6(2) of the European Union (Withdrawal) Act 2018 makes clear that a domestic Court or Tribunal may have regard to anything done on or after the implementation period completion day (which was 31 December 2020) by the European Court, another EU entity or the EU so far as relevant to any matter before the Court or Tribunal. The Court of Appeal, for example, in *Tuneln v Warner Music* [2021] EWCA Civ 441 found (at paragraph 91) that a CJEU decision was "*highly persuasive*". Neglect not, therefore, after all these years, what is argued and decided at the CJEU. That begs the question as to what cases have emerged recently from the CJEU which may be of interest to environmental lawyers in the UK? In this article I will explore three decisions which repay close consideration.

The EU Biomass Case

Sabo and Others v Parliament and Council (Case C-290/20 P), or the EU Biomass Case, was a challenge to a directive and a regulation which promoted the use of renewable energy. The legislation treated, however, the burning of forest biomass, i.e. trees, branches and bark, etc, as a source of renewable energy. The CJEU was concerned with an appeal against an order of the General Court. The Appellants had sought the annulment of the directive, but the General Court ruled that the complaint was inadmissible. The case engaged article 263 of the Treaty on the Functioning of the European Union ("TFEU") which provides that a natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, or against a regulatory act which is of direct concern to them and does not entail implementing measures. The CJEU held, at paragraph 26:

"that it is apparent from the settled case-law of the Court that a natural or legal person can be individually concerned by a provision of general application only if that provision affects him or her by

reasons of certain attributes which are peculiar to him or her or by reason of circumstances in which he or she is differentiated from all other persons, and by virtue of these factors distinguishes him or her individually just as in the case of a person to whom an act is addressed".

It held, therefore, at paragraph 28 that the General Court had not made an error of law in the interpretation, and application to the present case, of the condition that applicants must be individually concerned as the appellants "*were not in a situation which was different from that of the indeterminate and indeterminable body of EU citizens and were, therefore, not differentiated by the fact of holding a specific acquired right*". The Court further held, at paragraph 29, that "*the claim that an act infringes fundamental rights is not sufficient in itself for it to be established that the action brought by an individual is admissible*". The Court, at paragraph 34, also rejected the Appellants' invitation to give a more open interpretation to the admissibility condition when concerned with an environmental case. The Court held that this "*would have the effect of setting aside that condition as to admissibility and such an interpretation would go beyond the jurisdiction conferred on the EU Courts*". The decision of the General Court was, therefore, upheld.

The People's Climate Case

In *Carvalho & Others v European Parliament and Council of the European Union* (Case C-565/19 P), or the People's Climate Case, 36 appellants, all of whom were operating in the agricultural or tourism sectors, as well as a Swedish organisation representing young indigenous Samis, challenged the legislation adopted to enable the EU to meet its 2030 greenhouse gas emissions reduction target. They sought a partial annulment of the EU legislative package and claimed that the legislative package set reduction goals which were too low to comply with the obligations of the EU, and member states, under the Paris Agreement. They also argued that the reduction goals were insufficient to protect their rights of life, health, occupation and property under the Charter of Fundamental Rights of the EU. The complaint was again dismissed as inadmissible due to the absence of the requisite standing under article 263 TFEU. The Appellants appealed on the basis that the General Court had erred in finding that they were not individually concerned and in failing to adapt the settled case law on legal standing to guarantee the legal protection of fundamental rights.
The CJEU dismissed the appeal. It endorsed the finding, at paragraph 37, of the General Court that:

"*It is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application. As can be seen from the case-law cited…a different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating locus standi for all without the criterion of individual concern within the meaning of the case-law*".

The CJEU agreed, at paragraph 40, that "*the fact that the Appellants, owing to the alleged circumstances, are affected differently by climate change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue*".

The Court then held that the claim that the legislation being challenged infringed fundamental rights was not sufficient in itself to establish admissibility. It was not open to the CJEU to interpret the conditions under which an individual may institute proceedings against an act in a way that had the effect of setting aside those conditions as that would require the Court to go beyond its jurisdiction.

The 'Stichting Varkens in Nood' case

In *Stichting Varkens in Nood & Others v College van burgemeester en wethouders van de gemeente Echt-Susteren* (Case C-826/18), which was a preliminary ruling following a request from a District Court in the Netherlands, the Court was concerned with the Aarhus Convention. Domestic legislation provided for the right to participate in a public participation activity leading to the adoption of a decision concerning an environmental activity but predicated access to a court to challenge any final administrative decision upon two conditions. First, that the person was an interested party with its interests directly affected (although note that associations promoting environmental protection are automatically interested parties) and that, secondly, the person must have participated during the public participation procedure by submitting its observations concerning the activity in question or the draft decision, unless that person may not reasonably be criticised for not having done so. The question which arose, however, for the Court was what about those members of the public who are either not directly affected or who did not submit any observations during the public participation procedure? Did this infringe the requirements of the Aarhus Convention and the access to justice provisions of that Convention?
The Court, at paragraph 38, held that:

"*Specific procedural rights are thus provided for members of the public concerned, who are, in principle, the only ones who may participate in the decision-making procedure, in so far as they are part of the circle, which it is for Member States to determine reasonably and in accordance with the objective of giving the public concerned wide access to justice, of persons affected or likely to be affected by the envisaged act or transaction*".

There would be no infringement, therefore, of article 9(2) of the Aarhus Convention where an individual was not a member of the "*public concerned*" unless domestic law had granted an individual a more extensive right to participate. It held, however, at paragraph 55, that "members of the 'public concerned' within the meaning of the Aarhus Convention must be able to bring a legal action against the acts referred to in Article 9(2) of that convention, whatever role they may have played in the examination of the application" such that domestic law could not "*therefore, provide for the inadmissibility of such an action on the ground that the applicant participated in the decision-making procedure of the contested decision and was able to put forward his or her point of view on this occasion*".

It noted, at paragraph 58, that:
"the objective of ensuring 'wide access to justice' provided for in Article 9(2) of the Aarhus Convention and compliance with the effectiveness of that provision would not be ensured by legislation which would make the admissibility of an action brought by a NGO conditional on the role that it may or may not have played during the participatory phase of the decision-making procedure, even though that phase does not have the same purpose as the exercise of judicial proceedings and the assessment that such an organisation may have of a project may, moreover, evolve depending on the outcome of that procedure".

Again, the position would be different if proceedings were brought by a member of the public on the basis of more extensive rights conferred by domestic legislation.

Conclusion

The above three decisions concern what is a frequent issue in environmental litigation; standing. Although, it should be noted that since the EU Biomass decision and the People's Climate Case, the rules on standing have been somewhat reformed. Those two decisions represented a harsh approach to the issue of standing, but an approach which was, however, in line with the Court's previous jurisprudence. For example, Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to

Community institutions and bodies has been amended to make it easier to request an "*internal review*" which is a procedure that allows some NGOs to request the European Commission to consider whether an administrative act it has adopted is contrary to EU environmental law. The "*request for an internal review*" procedure has recently been employed by NGOs to challenge the decision to include natural gas and nuclear energy in the Taxonomy Regulation for Sustainable Finance. It seems, therefore, that we are unlikely to have saw the last attempt to bring rights-based climate litigation before the CJEU. The third case is a useful exploration of what the Aarhus Convention requires by way of public participation. Public participation is one of the key pillars of the Aarhus Convention. This decision helps to illuminate the interaction, and potential for conflict, between domestic rules as to standing and the obligations imposed by the Convention.

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