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Environmental Law and Retained EU Case Law

12 July, 2021

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This article is based on a presentation given as part of a webinar: 'Environmental law and "retained EU law": where we now stand and what lies in store?' held by FTB on 1 July 2021. It can be viewed.

Much of the UK's domestic environmental law is derived from EU law. This covers strategic environmental assessment, environmental impact assessment and the protection of habitats and species, amongst many other areas. The domestic regulations covering these areas qualify as retained EU law and now need to be considered and applied in light of the arrangements for dealing with EU exit.

Section 2 of the (EUWA 2018) provides for the saving of EU-derived domestic legislation. Section 2(1) says "EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day". The implementation period (IP) completion day is 31 December 2020.

Section 6(3) of the EUWA 2018 provides that any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after the implementation period, in accordance with any retained case law and any retained general principles of EU law.

Section 6(7) of the EUWA 2018 provides that "retained case law" means (a) retained domestic case law and (b) retained EU case law, and also that "retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day, including as they relate to EU-derived domestic legislation.

The position in a nutshell is that European Court (CJEU) case law relating to EU-derived domestic environmental law is retained as it stood on 31 December 2020 and continues to apply domestically. This

article considers how this retained EU case law will be treated and applied in the future.

The starting point is that lower courts – including the High Court dealing with a judicial review or a similar statutory challenge – are bound to decide any question as to the meaning, validity or effect of EU-derived domestic legislation in accordance with the decisions of the CJEU made prior to IP completion day. This was made clear by the Court of Appeal in March 2021 in ***Lipton v BA City Flyer***[2021] EWCA Civ 454 at [69].

This approach was applied by Holgate J in the case of [2021] EWHC 326 (Admin) – the judicial review challenge to the North Vanguard Offshore Wind Farm Order made under the Planning Act 2008 – to mean that the High Court was bound by retained EU case law to apply the more exacting EU law test for discretion to decline to grant relief where a judicial review succeeds on an EU point of law (see [148]).

Beyond the High Court, however, the position is different. The Supreme Court and Court of Appeal are not bound by any retained EU case law. They can depart from it. In deciding whether to depart from any retained EU case law, s6(5) provides that those courts must apply the same test as the Supreme Court would apply in deciding whether to depart from its own case law. This test is set out in the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. It is whether "it appears right to do so".

The ability of the Supreme Court to depart from retained EU case law is set out in s6(4) of the EUWA 2018. The Court of Appeal's power to depart derives from the . However, under Regulation 4, the Court of Appeal is bound by retained EU case law so far as there is post-transition case law which modifies or applies that retained EU case law and which is binding on the Court of Appeal. The two courts are therefore in a slightly different position.

How the higher courts are likely to use this power to depart from retained EU case law can be seen from the case of [2021] EWCA Civ 441. This was a music copyright infringement case relating to an app which allowed access to global radio stations. The parties made reference to 24 CJEU judgments comprising retained EU case law. TuneIn argued that the Court of Appeal should depart from the entire body of CJEU case law on the issue. There was also reference to one CJEU case decided after end of the implementation period.

There were two substantive judgments given by the Court of Appeal on the question of departing from retained EU case law. Arnold LJ said at [75] that "this is a power to be exercised with great caution". He referred to Lord Bingham in [2007] 1 AC 307 who said at [29] that the power is exercised only "rarely and sparingly".

Arnold LJ gave eight reasons why he though the Court of Appeal should not depart from the CJEU's jurisprudence. These included that Parliament had not changed the domestic legislation and there had been no change in the international legislative framework which was relevant in that case. He also noted at [79] that the issue was regulated by international treaties, in relation to which the courts should strive for consistency of interpretation, rather than unilaterally adopting their own interpretations.

Other reasons given by Arnold LJ included that the CJEU has unrivalled experience in confronting the relevant issue in a variety of factual scenarios, and has developed and refined its jurisprudence over time, and that if the Court accepted TuneIn's primary contention, that it should return to the drawing board and start all over again, that would create considerable legal uncertainty (see [80] and [83]).

The Master of the Rolls, Vos LJ, said at [200] that it was well established that Supreme Court should not refuse to follow an earlier decision of the Supreme Court or the House of Lords merely because the court would have decided it differently. He referred to Lord Neuberger in [2016] AC 908 at [22]-[23] and

observed at [201] that the CJEU's approach to the law – in that case on infringement of copyright by communication to the public – was neither impeding nor restricting the proper development of the law, nor was it leading to results which are unjust or contrary to public policy.

Vos LJ also noted at [198] that it was an area of law derived from international treaties and said that the courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony. He said it would be undesirable for one nation to depart from the CJEU's approach without an exceptionally good reason.

Overall, Vos LJ said at [197] that it was a paradigm case in which it would be inappropriate for the Court of Appeal to exercise its new-found power to depart from retained EU law. He concluded at [201] that it was both unnecessary and undesirable for the court to depart from retained EU law in that case, and that to do so would create legal uncertainty for no good reason.

Many of the observations made by the Court of Appeal in *TuneIn* could perhaps be argued to apply also to EU-derived domestic environmental law, especially that which relates to international treaties. There is no shortage of such treaties, including for example: the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention); the United Nations Convention on Biological Diversity (Rio de Janiero); the United Nations Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention); the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention); the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and, the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).

An indication of how the courts are likely to react to retained EU case law departure arguments in the environmental law field can also be obtained from the case of[2020] Env LR 7. In that case the claimant contended that the CJEU judgment in (C-323/17) [2018] Env LR 31 – on considering mitigation at the 'screening' stage under the Habitats Directive – had been wrongly decided and that the High Court should prefer the domestic decision in [2008] EWHC 1204 (Admin). The claimant also reserved its position to argue that the Supreme Court should depart from the CJEU case law, based on the EUWA 2018 provisions. The High Court nonetheless decided that the CJEU's decision in *People Over Wind* had been correct.

It is also worth noting another point which arose in the TuneIn case relating to CJEU case law which was made after IP completion date. Section 6(1) of the EUWA 2018 provides that a court or tribunal is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court. Section 6(2) also provides, however, that a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

In TuneIn, the Court of Appeal considered how to deal with one such CJEU case. Arnold LJ said that the decision should be treated as being highly persuasive because it was directly relevant to the issues the court had to decide, it was a decision of the CJEU Grand Chamber, and it built upon and further refined the CJEU's previous jurisprudence. This is an indicator that the domestic courts may well be likely to follow post-Brexit CJEU decisions in the environmental law field.

Overall, we have retained EU case law in the environmental field as it stood on 31 December 2020, including cases like *People Over Wind.* This will continue to apply, provided the domestic legislation remains unchanged. There is a high bar for domestic courts departing from this case law, and it can only by done by the Supreme Court or the Court of Appeal. It seems very unlikely that domestic courts

will depart from retained EU case law in environmental field. It also seems likely that domestic courts will follow future CJEU decisions in the environmental field.

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