Harris v The Environment Agency [2022] EWHC 2606 (Admin) - Remedies

09 November, 2022

In my blogpost dated 23 September 2022, I analysed the judgment in Harris v The Environment Agency [2022] EWHC 2264 (Admin) of 6 September 2022, which illustrated the application of the EU Habitats Directive, and of European law more widely, post-Brexit.

The Claimants succeeded in their claim. Both parties were directed to make written submissions as to the appropriate remedy. On 18 October 2022, Johnson J handed down a further judgment addressing the question of remedy.

The Claimants' proposed remedy

The Claimants submitted a draft Order which, inter alia, would have required the Environment Agency to, within 8 weeks, file, publish and provide full details of the measures it intends to take, together with the scientific and technical methodologies underpinning those measures, in order to achieve urgent compliance with its duties under Article 6(2) of the Habitats Directive in respect of The Broads Special Area of Conservation. The Claimants also sought clear deadlines for the commencement and completion of each of the measures identified and an explanation of the scientific and technical basis on which the taking of the measures identified by the deadlines provided would result in the Environment Agency fully complying, on an urgent basis, with its duties under Article 6(2) and with the judgment of Johnson J.

The Claimants argued that nothing short of an order in those terms would ensure that the Environment Agency urgently takes effective measures to address the ongoing risk of ecological harm. They further argued that the scheme they proposed was not dissimilar to the order made in *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin).

The Defendant's position

The Environment Agency said that the judgment provided a sufficient remedy and that no further order was required. It further argued that the "proposed order impermissibly goes beyond the court's functions,

by applying a programme of supervision and control of the Environment Agency's future compliance with its statutory duties". They sought to distinguish the case from the *ClientEarth* case as there the statutory context was more prescriptive as to what was required which enabled a focussed mandatory order whereas here the statutory context provided the Environment Agency with a broad discretion as to how it discharges its statutory obligations.

The judgment

Johnson J noted that the Claimants were entitled, both under the common law and statute, to an effective remedy. It would be unusual to exercise a residual discretion to refuse a remedy where a public authority has acted unlawfully. He held that the fact that the Environment Agency, as the Defendant had argued, "is a public body and can be expected to comply with the Court's judgment is no answer" to why the Claimants should be denied a remedy. That did not mean, however, "the Court should prescribe how the Environment Agency must comply with its legal obligations" as this "is not permissible". This meant, therefore, that the Court could not "make a mandatory order that sets out the precise steps that the Environment Agency must take in order to discharge its obligations". The Claimants' draft order did not, however, do so. It left the "decision as to how the Environment Agency" is to discharge its statutory obligations "to the Environment Agency to determine".

Johnson J held, therefore, that "Making an order that the Environment Agency formulates a plan does not involve the Court wrongly stepping into the shoes of the Environment Agency and making decisions that are for the Environment Agency, not the Court, to make" and said that he would "make a mandatory order that the Environment Agency must formulate a plan". He concluded, however, that the proposed order was "overly prescriptive" and that he had "sought to simplify the language without changing the broad underlying purpose that it seeks to achieve". He accepted, however, the proposed time limit of 8 weeks.

Johnson J held that nothing in the Habitats Regulations or the Habitats Directive requires the Environment Agency to publish the steps that it takes to discharge its obligations under those provisions such that "requiring the Environment Agency to publish its plan, or to disclose it to the Claimants or to Natural England, goes beyond the terms of the Habitats Regulations and the Habitats Directive". He further held, however, that "Applying the principle of an effective remedy to the circumstances of this case, it is necessary for the Environment Agency to disclose its plan to the Claimants" because "It is only if that is done that the Claimants will know the practical outcome of these proceedings. This is necessary to enable the Claimants to assess whether the Environment Agency's plan will, if implemented, secure compliance with its legal obligations". He ordered, therefore, that the Environment Agency had to disclose its plan to the Claimants but that it was not necessary to require the Environment Agency to publish its plan or to disclose it to Natural England.

Johnson J concluded that he should not, however, require the Environment Agency to comply with its plan. This was because it was not possible to predict how the plan will evolve and develop in the light of further scientific and technical work, it would involve the Court in a rolling programme of live time review of the Environment Agency's decision making and it would avoid the requirement for the Claimants to secure permission in order to pursue a claim for judicial review. It was not necessary to extend the remedy that far in order for the remedy to be effective. He also held that it was unnecessary and undesirable to include a provision for liberty to apply.

The Order which the High Court made, therefore, was that the Defendant must provide to the Claimants details of the measures it intends to take to comply with its duties under Article 6(2) in respect of The Broads Special Area of Conservation, including an indication as to the time by which the Defendant intends to have completed those measures, and, so far as practicable, the scientific and technical basis for the Defendant's assessment of the measures that are necessary to comply with Article 6(2).

Conclusion

The judgment illustrates the issues which can arise when deciding what will be an effective remedy where a public authority, such as the Environment Agency, does not comply with obligations which are couched in somewhat general terms. As pointed out by the Environment Agency, the difference between *Harris* and *ClientEarth* was the way in which the obligation was expressed in statute. Yet, despite the breach in this case being of a general duty, the Court was still willing to make a mandatory order. It also illustrates the need for an effective remedy in judicial review proceedings and the inherent difficulties in finding an adequate remedy where the duty which has been breached is of a general nature. The Court's final order, which is both unusual and creative, illustrates that the Court will, where it is persuaded that it is necessary, be willing to make a mandatory order. The Court made clear, however, that such an order cannot set out the precise steps that the public authority must take in order to discharge its obligations. That is a decision for the authority alone.

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