Avosetta Meeting 2018

National Report UNITED KINGDOM

Richard Macrory

1. BREXIT

I have given up making political predictions. With a minority government with its own internal divisions, and Parliamentarians now trying to constrain government options, it is still very difficult to predict the outcomes of any final agreement (if any) concerning Brexit. In terms of black letter law, a core purpose of the European Withdrawal Bill is to provide that EU Regulations as far as possible are automatically transposed into national law on withdrawal to ensure legal consistency in the immediate period on withdrawal (termed 'roll-over'). Similarly relevant decisions of the Court of Justice made before withdrawal will bind the lower courts – but not the Supreme Court. Decisions taken after withdrawal will no longer be binding on any court, though in practice they may well have regard to them.

2. BREXIT and the environment

Many EU environmental regulations and provisions of national law transposing Directives can be effectively rolled-over. Where there are references to, say, consultation with the European Commission (such as in the Habitats Directive) the terminology will require substituting with a national body. The challenging areas are those EU laws involving intimate involving in EU institutions such as REACH and Emissions Trading. Continuing participation in such bodies will depend on any agreements reached with the EU.

A new Environment Secretary of State appointed last July (Michael Gove, one of the core Brexiteers) is making a strong pitch for a radical environmental agenda post Brexit. He is proposing a new agricultural policy where public subsidy will only be given for public good, *("The government's proposals will see money redirected from direct payments under the Common Agriculture Policy (CAP), which are based on the amount of land farmed, to a new system of paying farmers "public money for public goods" - principally their work to enhance the environment and invest in sustainable food production".* [1]and a more environmentally sensitive fisheries policy. Unlike his predecessor, he has accepted the argument that the absence of the European Commission enforcement powers against the state will present an institutional gap which cannot be filled solely by NGOs bring judicial review actions against government and public bodies.

On May 10 this year, the Dept. of Food Environment & Rural Affairs Government launched a consultation paper *"Environmental Principles and Governance after the United*

[1] '*Health and Harmony: the future for food, farming and the environment in a Green Brexit*" – Consultation Paper 27 Feb 2018

Kingdom leaves the European Union" [2] The paper proposes consolidating environmental principles (which are currently not contained in national law other than via EU legislation) though lays open whether these should be explicitly expressed in a new Environment Act, or contained in a Government Policy statement with some legal force. The paper also proposes a new independent body to replicate the enforcement role of the European Commission post Brexit against government and other public bodies. Various options on its precise role and powers are proposed.

Two general themes are also emerging. First, the relationship with devolved administrations (Scotland, Wales, Northern Ireland). Essentially, the environment is a devolved matter, but Central Government can intervene where EU legislation is not being implemented. Devolved administrations would like to acquire all former EU competencies on Brexit, but Central Government is proposing to retain some as a United Kingdom competence (in effect creating a UK internal market). Tensions are being raised.

The UK will continue to be bound by international environmental treaties (though those which are purely EU exclusive will fall unless the UK ratifies in its own right). The UK has operated a dualist system in respect of international law meaning that their provisions unless implemented in national law cannot directly be relied upon in national courts. Nevertheless national courts increasingly refer to internal conventions as an aid to interpretation. Until now, many international conventions have been 'hidden' by implementing EU environmental legislation (eg Habitats, Transfrontier Movements of Waste). Post Brexit, international law will represent the only supra-national constraint on national government, and is likely to play an increasingly important legal role in the future.

3. 25 Year Plan to Improve the Environment

In January 2018 the Government published a 25 year plan to improve the environment [3]based on the overall goal *"to leave our environment in a better state than we found it*." The core of the plan is a set of ambitious targets. In October 2017 (and updated April 2018) an ambitious Clean Growth Strategy was published by the Government[4], designed boost a low carbon economy and to continue cuts in greenhouse gas emissions.

---

[2] https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/EnvironmentalPrinciples and Governance after EU Exit_Consultation Document.pdf

[3] *'A Green Future: Our 25 Year Plan to Improve the Environment*'
https://www.gov.uk/government/publications/25-year-environment-plan

[4] '*The Clean Growth Strategy Leading the way to a low carbon future'*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf

4. Air pollution and the national courts.

ClientEarth has now made three successful legal actions designed to ensure that Government acts more effectively to deal with breaches of air quality standards under EU Directives (mainly NOx caused by traffic). The cases raise delicate issues of how far the courts can or should judge the detailed effectiveness of government plans.

In the first case, in 2015 the Supreme Court (after some prodding from the CJEU on a reference) ordered the Government to produce a remedial plan by a fixed date (procedural). In the second case, in 2016, Client Earth challenged the dates chosen for bringing back into compliance (in the mid 2020's). The High Court sent the plans back for reconsideration, mainly because the dates chosen for compliance had largely be determined by the government's air modelling programme based on five year cycles (wrong criteria). In the most recent case in February of this year, the High Court again sent back the revised plan because as it had not dealt effectively with a number of local authorities. (insufficient coverage).

Normally, judicial review actions of this sort first require leave from the court (to filter out vexatious litigants or cases without any legal merit). Here the court made an unprecedented order that Client Earth could challenge the revised plan in future without obtaining prior leave. It is worth quoting from the judge's order:

"*"I do not doubt the government's good faith. I do not doubt the fact that substantial efforts have been made by civil servants and by ministers to devise a new AQP which is compliant with the law. However, the history of this litigation demonstrates that good faith, hard work and sincere promises are not enough. The Court, it seems, must keep the pressure on the government to ensure the compliance with the regulations and the Directive is actually achieved……We have an expert claimant, which to date has advanced only what are properly arguable claims, and which has demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim. It is appropriate, in my judgment, to grant this extended liberty to apply. I acknowledge that this is a wholly exceptional course for the Court to take".*