Avosetta Meeting 2009

Recent and Forthcoming Legal Developments: United Kingdom

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New Legislation

(i) Climate Change Act 2008

The headline provision is section 1 which states in admirably simple terms: *It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.* The UK Government claim this is the first legislation in the world to impose legally binding national long term climate gas reductions.

Although expressed as a legal duty, most lawyers feel it would be difficult to enforce in the administrative courts in the conventional way. But it would equally wrong to dismiss the Act as mere political rhetoric. It is true that the legislation is mostly about targets and plans rather than substantive policy, but it imposes continuing duties on Government to report to Parliament and the public on progress in meeting the long term target, as well as interim targets expressed in the Act. It creates a new high level permanent scientific committee which is likely to play a major role in keep the Government to check. The long term aspirations of the legislation are novel, and it is the first national legislation to contain express provisions about climate change adaptation as well as reduction.

(ii) Planning Act 2008

UK land use planning laws have long provided a key mechanism for public participation where new projects are concerned. Where major new works are proposed (such as a new nuclear power station, a new waste incinerator, or an airport extension etc.) public inquiries are normally held, and have provided opportunities for NGOs to question fundamental assumptions about need, demand forecasts, etc. Some such inquiries have lasted over a year. For over 25 years there has been debate about the effectiveness of these procedures, with many in Government and industry feeling that participation should be confined to local environmental issues, and that Government or Parliament should determine in advance questions of national policy and need. NGOs and others argue that the types of inquiries provide a way of improving the development of policy.

The new Planning Act 2008 clearly favours the Governmental perspective. Government will have power to establish new National Policy Statements (defining the need etc for new types of project) and approval consents for a whole range of 'national infrastructure projects' (e.g. power stations, railways, airports) will be a given by a new Planning Infrastructure Commission, a non-elected body appointed by Government. Although there is provision for public participation, the Commission will have great discretion is curtailing questioning.

Many feel that the new legislation gives excessive power to Central Government to 'steam-roller' major projects over the wishes of local authorities and local communities, and there is some concern it may contravene the spirit of the Aarhus participation requirements. The basic provisions are drawn in such broad terms that it would be possible for Government to micro-manage (for example, a national policy statement may "*set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area".* But others argue that powers of this sort will be

needed to upgrade the infrastructure needed to meet climate change challenges in the time-scales demanded.

Regulatory Enforcement and Sanctions Act 2008

This legislation gives effect to many of the recommendations made in Richard Macrory's report for Government published in 2006 "*Regulatory Justice: Making Sanctions Effective".* The report was concerned with the regulation of business generally (environment, health and safety, consumer protection, building standards etc.), and argued for a more imaginative range of sanctions for businesses and individuals who breached such laws. Criminal law will remain an important sanctioning tool, but the 2008 Act gives powers to enforcement bodies to have additional powers such as administrative sanctions, binding undertakings etc. This range of powers exist in many countries, but distinctively in England and Wales both the powers of criminal prosecution and administrative sanction will rest with a single enforcement body (e.g. the Environment Agency for waste disposal) with the same worded offence giving rise to a choice of sanctions. The enforcement body will have the discretion to decide which is the most effective sanctioning route to follow set against a published enforcement policy and sanctioning principles contained in the Review. Following Macrory's recommendations, the Act contains requirements about regulatory governance which are designed to avoid distortions in the choice of sanction (e.g. no revenue from administrative penalties can go directly to the enforcement body) and require transparency in how the enforcement body is carrying out its functions. As part of the reforms, a new Regulatory Tribunal will be set up in 2009 which will hear appeals against administrative fines.

Government - New Department of Energy and Climate Change

In Autumn 2008 a major reorganization of Government departments took place with the creation of a new Department of Energy and Climate Change (DECC). DECC acquired the energy policy functions of the Department of Business and Regulatory Reform, and many of the climate change functions of the Department of Environment, Food and Rural Affairs. The Government signalled three key aims for the new Department: ensuring that energy that is affordable, secure, and sustainable; bringing about the transition to a low-carbon Britain; and achieving an international agreement on climate change at Copenhagen in December 2009.

It is too early to judge whether the new Department will make a significant difference. Because of the pervading nature of environment and climate change issues, there is no correct way of dividing responsibilities, and reorganization of departmental functions is often a distraction that disguises lack of substantive policy progress. This particular reform, however, is likely to be important, particular as its first Secretary of State, Ed Milliband, is a strong and respected figure from a younger generation of politician.

Access to Environmental Justice

Although the UK's liberal approach to standing in environmental cases is compliant with the Aarhus Article 9 requirements, it is doubtful whether the costs of public law litigation (and especially the potential exposure to the other side's costs should a case fail) meets the Aarhus requirement that the cost of court action is not 'prohibitively expensive'. In a recent survey commissioned by the European Court, Hungary and the UK were singled out as the worst offenders on this costs issue. The UK Government is continuing to resist any change arguing that the Aarhus provision only refers to court fees rather than general litigation costs - the European Commission is bringing an infringement action against the UK on this point.

The courts led by Lord Justice Carnwath (a senior Court of Appeal judge and a leading light in the European Forum for Environmental Judges) have increasingly been raising doubts in cases before them as to whether the UK complies with Aarhus. In one recent case involving costs issues, Carnwath called for the Government (not a party to the proceedings) to report in open court what it was doing to comply with Aarhus - an almost unknown use of judicial power.

Again instigated by Carnwath, an informal committee was set up at the end of 2007 chaired by a leading High Court judge to examine Aarhus Access to Justice requirements. Its members included lawyers normally opposing each other in environmental cases, and both the senior lawyer of the Environment Agency (the main national regulator) and the staff lawyer for a national environmental NGO, WWF-UK. The Sullivan Review's report *Ensuring Access to Environmental Justice in England and Wales* (2008) was critical of the Government's complacency, and called for a radical rethink of traditional approaches to costs provisions in the light of Aarhus. Although the Review had no formal status, the fact that all its members with experience from such differing perspectives unanimously came to uncompromising views has given its considerable weight. The Review has been quoted in subsequent case law, and the European Commission has said it will take its next decision on enforcement in the light of the Government's response to the Sullivan review.

Case Law

Two recent cases in the High Court are of interest in raising environmental issues of wider significance, not least because their ultimate result depend on EC law, though that was not at the forefront of either case.

(a) *Boggis v Natural England ([2008] EWHC 2954*

Boggis owned property near a cliff subject to continual erosion from the sea, and constructed his own sea defence works to protect his property. Natural England is the national nature conservation body. The exposed fossils in geological face of the cliffs were of national significance but what really interested Natural England was the continual exposure of the cliff face from natural erosion. They designated the site under national nature protection law, indicating that once the site was designated they would not permit the maintenance of the defence works but allow natural erosion to take place.

Boggis challenged the designation as illegal. The primary legal duty of Natural England was one of 'conservation' and to allow something to be destroyed was destruction not conservation. The judge disagreed: conservation was "*a dynamic concept that may involve keeping things as they are but does not necessarily do so. It may also involve allowing natural processes to take their course..."*

However, Natural England came procedurally unstuck on the Habitats Directive. A little down the coast was a Special Protection Area. Boggis argued that the removal of his defence works would have a knock on effect on the SPA. Designation of the nature conservation site was a 'plan or programme under the Habitats Directive likely to harm the SPA, and therefore should nave subject to an assessment. The judge, picking up on the ECJ decision in Waddensea agreed, though Natural England are to appeal that part of the decision.

If the area is designated and English Nature refuse to allow the sea defence works, that decision is likely to be challenged as contrary to the home-owners human rights. Earlier in the year, a neighbour to Boggis who had also constructed a smaller defence works won on these grounds in an administrative appeal. Conflicts between human rights and climate change adaptation may become more prevalent in future.

(b) *Downs v Secretary of State for the Environment, Food and Rural Affairs Administrative Court, High Court,* [2008] EWHC 266

Downs is a young woman who has for many years been campaigning on the possible harmful effects of agricultural pesticide drift on local residents. The Government's specialized pesticide scientific committee has used various modelling techniques on exposure and has argued that current spray requirements were adequate and that there were no ill effects on local residents. In 2005 the Royal Commission on Environmental Pollution (a high level advisory body) investigated the issue and largely agreed with Downs. It advocated a more precautionary policy with the introduction of buffer zones and warnings to local residents before spraying took place. There followed a major public row between the Royal Commission and the Government's scientific committee.

The Government rejected the Royal Commission and Downs challenged their decision as irrational. The judge said the court was not equipped to determine which of the advisory bodies was correct, and that where a Government had conflicting advice it had to choose, and it was not possible here to say that the choice in favour of the Pesticide Committee was irrational and therefore illegal.

If the case had been decided on purely national principles, Downs would have lost. But the judge noted that EC Directive 91/414 on plant protection products required that Member States ensure that a pesticide is not authorized unless, inter alia, "it has no harmful effect on human or animal health, directly, or indirectly." In the judges view "harmful effect" encompass any harm chronic or otherwise which was not trifling, and could include, for example, eye or skin irritation, and sore throats. Furthermore, given it was an EC Directive, the precautionary approach should apply.

On that test, he felt the Government's current polices failed to meet the 'no harm' requirement, and it was up to Government to reconsider what should be done. The judge indicated that many of the Royal Commission's recommendations would be sensible to adopt if the requirement of the Directive was to be met.