

Brexit and the Environment Bill: an opportunity for the rolling back of EU environmental laws?



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Introduction (1)

- Since 1973 the provisions of the EU Treaties and the vast amount of EU legislation (in the form of Directives, Regulations, Decisions and other soft-law measures) on the environment have been a constant in UK environmental law;
- EIA Directive since 1985; Habitats since 1992; Birds since 1979; Waste since 1975; SEA since 2001 ... all constants ...
- Whatever the legal claims brought relying on such law (including those brought by “*activist lawyers*”) and however much such the requirements of the Treaty or legislation derailed schemes the Government supported they were stuck with it;
- The need to adhere to the jurisprudence of the CJEU has also been a constant;
- However lacking in common-sense or wrong-headed these decisions were thought to be by our Government and/or our Courts they could not be departed from;
- **That all about to change ...**

Introduction (2)

- Lord Denning MR once famously characterised EU law as “*like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute*”: **HP Bulmer Ltd v J Bollinger SA** [1974] Ch 401, 418.
- Denning later expressed himself more forcibly: “*No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all.*”
- With Brexit the attempt will now be made to reverse the tide ...

Introduction (3)

Following the Implementation Period, so as from 1 January 2021:

- (i) Environmental principles derived from Treaties – (e.g. the precautionary principle, the preventative principle, the polluter pays principle etc.) no longer binding and applicable via EU law;
- (ii) The UK Government (and devolved Governments) can: (i) legislate to depart from pre-exit EU environmental legislation, and (ii) are not required to transpose and adhere to any post-exit amendments to existing EU legislation or any new EU legislation;
- (iii) No role for the EU Commission in overall enforcement of EU environmental law; and
- (iv) No role for CJEU in determining the law, domestic courts not bound by post-exit case-law, and at least some ability to depart from pre-exit case-law.

Introduction (4)

- So really three things in play:
 1. The loss of established environmental principles (the precautionary principles etc) and EU governance mechanisms following Brexit;
 2. Government's new ability to repeal or amend environmental legislation derived from EU environmental legislation in a way impossible up to now;
 3. The ability of our Courts to take a different line to that taken by the CJEU on environmental law derived from EU law.

Look at each of these in turn ...

(1) Principles and governance: the Environment Bill

- *“The Bill sets out the measures needed to ensure that there is no environmental governance gap on withdrawal from the EU. The Bill will require the setting of long-term, legally binding and joined-up targets tailored to England, embed consideration of environmental principles in future policy making and establish the independent Office for Environmental Protection.”* (para. 17 Explanatory Notes)
- *“The Bill legislates for environmental principles to protect the environment from damage by making environmental considerations central to the policy development process across government. The principles work together to legally oblige policy-makers to consider choosing policy options which cause the least environmental harm. The Statement on Environmental Principles will set out how the principles should be interpreted and applied by policy makers.”* (para. 19 *ibid.*)
- *“The Bill also creates a new public body – the Office for Environmental Protection (OEP) – as a domestic independent watchdog who will be responsible for taking action in relation to breaches of environmental law...”* (para. 20 *ibid.*)

(1) Principles and governance: the Environment Bill

- Mixed messages:
- (1) Under the earlier Withdrawal Agreement the principle of “non-regression” was applied by the draft Protocol i.e. that environmental controls post-Brexit would be at least as rigorous as those applicable in the EU, but this was removed from the final Withdrawal Agreement and Protocol;
- (2) NB though <https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>: “*The Environment Bill will help deliver the government’s manifesto commitment to delivering the most ambitious environmental programme of any country on earth. It is part of the wider government response to the clear and scientific case, and growing public demand, for a step-change in environmental protection and recovery.*”

(1) Principles and governance: the Environment Bill

- (3) More recently:
 - a. PM speech 30 June “ ... *time is money, and the newt-counting delays in our system are a massive drag on the productivity and the prosperity of this country and so we will build better and build greener but we will also build faster and that is why the Chancellor and I have set up Project Speed to scythe through red tape ...*” “*we will build, build, build ...*”
 - b. Environment Secretary speech July 2020 “*Later this autumn we will be launching a new consultation on changing our approach to environmental assessment and mitigation in the planning system. If we can front-load ecological considerations in the planning development process, we can protect more of what is precious. We can set out which habitats and species will always be off-limit, so everyone knows where they stand ...*”
 - c. The Planning White Paper ...

(1) Principles and governance: the Environment Bill

What can we make of all these very mixed messages?

Matt Lucas might say the approach was:

“So we are saying we will fully maintain EU environmental protection, this will be a Green Brexit, but as all this EU derived newt counting causes such huge delays we will be slashing the red tape and allowing people to build, build, build as they like ...”.



(1) Principles and governance: the Environment Bill

- Back to the Bill
- 2 key things in terms of governance:
 - (1) Requirement for a policy statement on Environmental Principles to which due regard is to be had by Minister of the Crown when making policy;
 - (2) Creation of Office for Environmental Protection
- Do these achieve equivalence with what we are losing from EU? No. See <https://www.landmarkchambers.co.uk/wp-content/uploads/2020/05/The-Environment-Bill-2020-%E2%80%93-environmental-principles-and-transparency-of-environmental-protection.pdf>

(2) Repeal/amendment of environmental laws

- So by way of introduction only ...
- (i) much of our environmental legislation enacted under s. 2(2) of the EC Act 1972 and so “retained EU law” as EU-derived domestic legislation;
- (ii) This includes our regulations on EIA, SEA and Habitats for example;
- (iii) Under the Withdrawal Agreement as signed – there is no non-regression provision re environmental protection;
- (iv) Some EU environmental law required to be retained in NI under the Protocol but not EIA, SEA and Habitats ... BUT in any event will the UK comply?
- (v) Post the IP the Government free to repeal or amend “retained EU law”
- (vi) And under no obligation to transpose amends to such law at EU level or new EU legislation on the environment ...

(2) Repeal/amendment of environmental laws

- Example:
- 1. The Conservation of Habitats and Species Regulations 2017
- 2. The Conservation of Offshore Marine Habitats and Species Regulations 2017

Transpose, inter alia, the Habitats Directive ... been with us since 1992 .. First Regulations back in 1994 ...

Already amended both these Regulations – see the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019, which come into force after the IP

Changes minor to reflect leaving EU, e.g. remove references to Natura 2000 and replace with UK network, replace references to Commission in Article 6(4)

But open to make any changes Government sees fit ...

(3) The Courts

- What is the legal regime governing the Courts?
 1. During the implementation period (“IP”), decisions of the CJEU continue to apply to the UK as if it were still a member.
 2. After the IP, s. 6(1) of the EUWA 2018 as amended provides that a court or tribunal is not bound “any principles laid down, or any decisions, made on or after IP Completion day” by the CJEU and cannot refer questions to it.
 3. In relation to the interpretation of EU derived law in the UK after the IP, the EUWA 2018 s.6(2) as it currently stands provides that a court or tribunal “may have regard” to anything done by the CJEU or other EU institution on or after exit day so far as relevant to any matter before it but subject to subsections (3)-(6);

(3) The Courts

- Before turning to s. 6(3) – (6) ...
- S. 6 introduces “retained case law” means
 1. retained domestic case law, and
 2. retained EU case law;
- “retained domestic case law” means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before exit day and so far as they - (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
- “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 exit day and so far as they (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1

(3) The Courts

“(3) 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 IP completion day and so far as they are relevant to it—

- (a) in accordance with any retained case law and any retained general principles of EU law, and
- (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.

(4) But—

- (a) the Supreme Court is not bound by any retained EU case law,...
- (b) (c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.

(5) In deciding whether to depart from any retained EU case law, the Supreme Court ... must apply the same test as it would apply in deciding whether to depart from its own case law.

(6) Subsection (3) does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after IP completion day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.”

(3) The Courts

- To depart from it in which process the Supreme Court will apply the same test as if departing from its own case law.
- The Supreme Court follows the approach previously established by the House of Lords that “*while treating [its] former decisions ... as normally binding, [it will] depart from a previous decision when it appears right to do so*”: *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. In general, the Justices have been reticent in exercise this power: “*this Court should be very circumspect before accepting an invitation to [do so]*” see ***Knauer v Ministry of Justice*** [2016] AC 908, [23]).
- However, as Lord Bingham said in ***Horton v Sadler*** [2007] 1 AC 307 [29], while “*former decisions of the House are normally binding ... too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law*”.

(3) The Courts

- However, section 26 of the European Union (Withdrawal Agreement) Act 2020 (“the EUWAA 2020”), provides for further amendments to these provisions which are not yet fully in force amend s. 6 of the EUWA 2018 so that:
 - A relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations;
 - Confers significant powers enabling the Government to make regulations to:
 1. Expand the range of courts which can decide to depart from retained EU case law;
 2. Change the test which the courts would be required to apply; and
 3. Differentiate between the approach courts take to decisions of the CJEU and decisions of the domestic courts which were themselves founded on CJEU jurisprudence.

(3) The Courts

- Government consulted earlier this year on extending ability of Courts to depart: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896830/retained-eu-case-law-consultation.pdf
- Response: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926812/departure-eu-case-law-uk-courts-tribunals-consultation-response-print.pdf published last week ...
- Will extend this to Court of Appeal;
- Court of Appeal to apply the same test as the Supreme Court on whether to depart;
- So CA able to depart from CJEU case-law and SC case-law if that based on EU law ...!!??

(3) The Courts

- Why does this matter?
- Many people think that some CJEU case-law went too far and/or was wrongly decided ...
- Until now nothing that could be done about such decisions ... but that has changed.
- Going to look at 3 examples:
- (1) Habitats: Case C-323/17 ***People Over Wind v. Coillte Teoranta*** [2018] PTSR 1668
- (2) Habitats: the certainty test;
- (3) SEA: Case C-567/10 ***Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale*** [2012] 2 CMLR 909

(3) The Courts

(1) *People Over Wind*:

- Prior to this decision very well-established in domestic case-law that in undertaking the trigger or “screening” stage assessment – e.g. deciding if LSE - it was legitimate for the decision-maker to take into account “mitigation” which would prevent LSE arising, e.g. SANG see: ***R (Hart DC) v SSCLG*** [2008] 2 P&CR 16 and ***Smyth v SSCLG*** [2015] PTSR 1417.
- ***Hart*** “it would have been “ludicrous” ... to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment”. ***Hart*** - “common sense” result;
- Courts trying to wrestle with this see e.g. ***R (Langton) v Secretary of State for Environment, Food and Rural Affairs*** [2018] EWHC 2190 (Admin) and ***Canterbury City Council v Secretary of State for Housing, Communities and Local Government*** [2019] J.P.L. 1321

(3) The Courts

(2) The certainty test;

- Concerns that in recent cases like ***Dutch Nitrogen*** CJEU applying a requirement for certainty that is too high and impractical;
- If that is what this case-law is doing vs domestic law approach as per ***R (Champion) v North Norfolk*** [2015] UKSC 52;
- Courts been navigating around this see ***Compton Parish Council & others v Guildford Borough Council & Secretary of State for Housing, Communities and Local Government*** [2020] J.P.L. 661;
- CA and SC free to depart from this line of cases extolling ever impossible level of certainty ...

(3) The Courts

(3) *Inter-Environnement Bruxelles*:

1. SEA Directive clear SEA only applies of the plan/programme “*required by legislative, regulatory or administrative provisions*”;
2. Clear from the words used and from travaux (as A-G explained in her opinion) this was a deliberate limitation in scope by the EU legislator;
3. CJEU hold “*required*” does not mean required, but merely “*regulated*”;

4.R. (*Buckinghamshire CC*) v *SST* [2014] 1 W.L.R. 324 per Lord Neuberger and Lord Mance (and with whom rest of the Court agreed) “*national court is faced with a clear legislative provision, to which the Fourth Chamber of the European Court of Justice has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend. For this reason, we would, had it been necessary, have wished to have the matter referred back to the European Court of Justice for it to reconsider, hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision.*”

Conclusions (1)

1. Many of the old certainties we have had since 1973 gone;
2. EU derived legislation can be amended by the Government;
3. Amended or new EU legislation will not apply in the UK;
4. The overarching environmental principles are gone, and the Environment Bill does not adequately replace them;
5. No more EU Commission;
6. SC and CA allowed to depart from pre-exit EU case-law;
7. All Courts free to depart from post-exit CJEU case-law.

Conclusions (2)

- Two other issues:
- (1) What might limit departure? International law. E.g. in Environment Secretary's July 2020 speech said "*So while the environmental legislation we currently have is often credited to flagship EU directives like the Habitats Directive or the Birds Directive, these directives themselves were often principally about implementing at an EU level things that had already been agreed internationally through other international conventions like the Bern Convention*". Bigger role for international law: see ***Plan B v Secretary of State for Transport*** [2020] P.T.S.R. 1446 but must read in the light of ***R (Packham) v Secretary of State for Transport*** [2020] EWCA Civ 1004 plus ***Plan B*** under appeal;
- (2) Divergence on environmental law within UK devolved administrations: see my presentation at <https://www.youtube.com/watch?v=PwaxDxvFxml>

Thank you for listening

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