

Case Name: *Harris & Anor v The Environment Agency* [2022] EWHC 2606 (Admin) (18 October 2022)

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Commentary: This judgment follows written submissions by the parties to an earlier court case (*Harris & Anor v Environment Agency* [2022] EWHC 2264 (Admin) (6 September 2022)) at the direction of Mr Justice Johnson, to establish the appropriate remedy following that judgment.

In his judgment of 6 September 2022, Mr Justice Johnson held that the Environment Agency ("the EA") had acted unlawfully by limiting its investigation into the impact of water abstraction licences to three sites in a special area of conservation (SAC) on the Norfolk Broads. Its refusal to consider the effect on the entire SAC had breached its obligations under Directive 92/43 on the conservation of natural habitats and of wild fauna and flora art.6(2) to avoid the deterioration of protected habitats and disturbance of protected species in SACs, and the Conservation of Habitats and Species Regulations 2017 Pt 1 reg.9(3) which required the agency to have regard to those obligations. Article 6 remained enforceable in the UK courts, notwithstanding Brexit, because its obligations had been recognised in cases decided prior to the UK leaving the EU, and so met the test in the European Union (Withdrawal) Act 2018 s.4(2)(b).

The claimants submitted a draft order which they hoped would be adopted by the court as a remedy to the September 2022 judgment. To summarise, the claimant requested that the EA do the following in order to remedy its unlawful actions and address the ongoing risk of ecological harm:

1. Provide details of the measures it will take along with the scientific and technical methodologies those measures are based upon in order to remedy its actions.
2. Provide deadlines for the commencement and completion of each of the measures identified.
3. Carry out the identified measures in accordance with the deadlines provided.
4. File with the Court, the claimant and the interested party (Natural England) notifications of the commencement and completion of the measures identified at (1) and full details of the measures due to be taken and actually undertaken respectively.

Steps (1) and (2) to be carried out within 8 weeks of the date of the order.

The claimant also sought liberty to apply for (a) further or additional relation, and (b) in relation to any issues arising out of the steps listed above.

Resisting the claimant's draft order, the EA argued that the judgment is a sufficient remedy in itself and that no further order is required. The basis for their argument is as follows:

- The proposed order goes beyond the court's functions by applying a programme of supervision and control of the EA's future compliance with its statutory duties.
- The EA is a public body that should be trusted to comply with its legal obligations.
- The ClientEarth case is distinguished as the statutory context in that case permitted a more prescriptive remedy.
- The EA has a broad discretion as to how it discharges its statutory obligations.
- The proposed requirement to provide "full details" of the proposed measures, along with deadlines and explanations, is imprecise and liable to give rise to difficulty.

Mr Justice Johnson noted that the claimant is entitled to an order that provides an effective remedy, both at common law and as a statutory right. The EA had not provided any compelling reason why the court should withhold a remedy but that is not to say that the court should prescribe how the EA must comply with its legal obligations. An order setting out the precise steps that the EA must take would therefore be inappropriate.

Agreeing with the claimants, Mr Justice Johnson stated that "[u]nless [the EA] formulates a plan (and then takes appropriate subsequent steps) it will continue to be in breach of the Habitats Regulations and the Habitats Directive.". However, he held that the plan proposed by the claimants is "overly prescriptive". He therefore "sought to simplify the language without changing the broad underlying purpose that it seeks to achieve.". The final form order was thus as follows:

"The defendant shall, by 4pm on 7 December 2022, provide to the claimants details of the measures it intends to take to comply with its duties under Article 6(2) of the Habitats Directive ("Art 6(2)") in respect of The Broads Special Area of Conservation. The details shall include an indication as to the time by which the defendant intends to have completed those measures. It shall also include, so far as practicable, the scientific and technical basis for the defendant's assessment of the measures that are necessary to comply with Art 6(2)."

Importantly, Mr Justice Johnson did not think it appropriate to require the EA to actually comply with its plan. The rationale for this being that, "[t]he Environment Agency knows that if it does not now comply with the Habitats Regulations and the Habitats Directive, the claimants are likely to bring further proceedings to secure that end." The judge also noted that, "it is unlikely that a plan formulated in the next 8 weeks will survive wholly intact as the detail is worked through" due to the constantly evolving scientific understanding of water abstraction.

The claimant's request for liberty to apply to the court in the event that the EA does not comply with the order was rejected as the claimants have recourse under CPR Part 81 (applications and proceedings in relation to contempt of court) in any case.

Case summary prepared by Charlie Austin