15 September 2023

[2023]

R (WildFish Conservation) v Secretary of State for the Environment, Food and Rural Affairs

-and-

R(Marine Conservation Society and Ors) v Secretary of State for the Environment, Food and Rural Affairs

Summary

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 2pm on Friday, 15 September from the following websites:

- https://www.judiciary.uk/judgments/
- https://caselaw.nationalarchives.gov.uk/

Mr Justice Holgate, sitting in the High Court, today handed down judgment in applications for judicial review against the Secretary of State for the Environment, Food and Rural Affairs brought firstly by WildFish Conservation and secondly by the Marine Conservation Society, Richard Haward's Oysters (Mersea) Limited ("RHO") and Hugo Tagholm.

Introduction

These claims challenged the lawfulness of the Secretary of State's Storm Overflows Discharge Reduction Plan ("the Plan") published on 26 August 2022. Section 141A of the Water Industry Act 1991, which was introduced by the Environment Act 2021, required the Secretary of State to prepare and publish the Plan and to lay it before Parliament.

When combined sewers become overwhelmed in an exceptionally heavy rain storm, overflows are designed to act as a "safety valve" by releasing contents of the sewer (including diluted but untreated sewage) into waterways. Where the flow of water exceeds the capacity of a wastewater treatment works, untreated sewage may be released via a storm overflow into rivers, estuaries or the sea. This may cause harm to humans and to the environment. For a number of years storm overflows have also been used regularly in dry weather conditions, a use for which they are not intended.

Overall, in 2022 there were 301,091 spills in England and Wales. Approximately 10-12% of storm overflows discharge into estuaries and coastal waters, including Marine Protected Areas. 52% of storm overflows spilled more than 10 times, 39% more than 20 times, 20% more

than 40 times and 11% more than 60 times. The average duration of each spill was 5.8 hours, but a spill may last a full day.

The Plan was published following the setting up of the Storms Overflows Taskforce by the Secretary of State in August 2020, the gathering of evidence through the Storm Overflows Evidence Project, and public consultation.

The Plan proceeds on the basis that water and sewerage companies (WaSCs) must comply with all their existing legal obligations. The Plan then sets three policy targets which are to be met in addition and are more restrictive than the existing regulatory regime:

1. An environmental target that a discharge may not have any local adverse environmental effect (to be met no later than 2035 or 2045 for sensitive areas and otherwise by 2050);

2. A public health target in relation to designated bathing waters to be met by 2035;

3. A backstop target for 2050: by 2050 storm overflows will not be permitted to discharge above an average of 10 heavy rainfall events a year.

The spillage of sewage throughout the country has become the subject of widespread public concern. Judicial review is a means of ensuring that ministers and public bodies act within the limits of their legal powers and comply with the law. The court is not responsible for making political, social or economic choices about the acceptability of the environmental impact of an activity. Such matters may be the subject of political and public debate, but they are not for the court to determine. It is not for the court to assess the merits of the policies in the Plan. In addition, no claim was brought against the Environment Agency or Ofwat: their approach to regulation and enforcement is not the subject of these proceedings.

The factual background of both claims is set out in paras. [9] to [29] of the judgment. The court then analyses the statutory framework that governs regulation and enforcement relating to WaSCs and storm overflows (paras. [30] to [96]). The events which led up to the making of the Plan and the key parts of the Plan and are summarised in paras. [97] to [132]. The judgment refers to the scope of the ongoing investigation by the EA and Ofwat announced in November 2021 ([133] to [144]).

Grounds of challenge

The main issues in the application for judicial review by WildFish Conservation were:

(1) (a) Whether in setting the first and third policy targets the Secretary of State failed to understand that reg.4 of the Urban Waste Water Treatment (England and Wales) Regulations 1994 ("the 1994 Regulations") requires WaSCs to remedy insufficiency of physical capacity in accordance with the decision of CJEU in *European Commission v UK (Re Storm Water Overflows)* [2013] 1 CMLR 24. Those regulations only allow storm overflows to discharge either (a) in truly exceptional conditions, notably unusually heavy rainfall, or (b) in non-exceptional circumstances where improvement of the system so as to avoid discharge would not pass a cost-benefit test;
Alternatively (b) the Plan is unlawful because it has the effect of directing WaSCs to breach reg.4 of the 1994 Regulations, or (c) the Plan will frustrate the purposes of that legislation;

(2) Whether the defendant failed to take into account obviously material considerations, including the enforcement of reg.4 of the 1994 Regulations and

addressing any gap between the requirements of environmental permits and the 1994 Regulations;

(3) Whether the Plan is a "plan" within reg.63 of The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) ("the 2017 Regulations") so that the defendant acted unlawfully by failing to carry out an "appropriate assessment" of its effects on "European sites" (including Special Areas of Conservation and Special Protection Areas);

(4) Whether the defendant acted irrationally in approving the Plan.

The main issues in the claim brought by the Marine Conservation Society and others were:

(1) Whether the Plan fails to accord with or undermines the target in s.3 of the EA 2021 to halt the decline in species abundance by 2030;

(2) Whether the Plan breaches the rights of RHO under Article 1 of the First Protocol to the ECHR ("A1P1") and the rights of Mr. Tagholm under Article 8 of the ECHR;

(3) Whether the Plan is contrary to the "public trust doctrine", which is said to impose a duty on the defendant to maintain coastal waters in a fit ecological state for the purposes of the public's right to fish there.

The Court rejects all the grounds of challenge and dismissed the claims.

WildFish

Under ground 1(a), the court decides that the Secretary of State did not proceed on an incorrect view as to the scope of reg.4 of the 1994 Regulations, namely that it does not require physical incapacity of collecting systems and treatment works to be remedied. It does. Changes in circumstance over time, such as the effects of growth in development, increases in population and climate change, must be taken into account by WaSCs and the regulators in order to ensure continuing compliance with the Regulations. The fact that environmental permit conditions may need to be reviewed from time to time does not mean that there is a conceptual or legal gap between the environmental permit regime (for which the EA is the regulator) and the requirements of the 1994 Regulations. The Secretary of State had not misunderstood the position.

Under ground 1(b), the Plan does not have the effect of directing WaSCs to remedy inadequate physical capacity through the Plan's targets instead of regs.4 and 5 of the 1994 Regulations. The Plan does not water down the requirements of those Regulations, with which WaSCs must comply on a continuing basis. So, for example, the third policy target does not, as WildFish contended, give WaSCs until 2050 to comply with the Regulations.

Under ground 1(c), on a fair reading of the document, the Plan does not frustrate the purposes of the existing legislation governing WaSCs and storm overflows. As Counsel for the Secretary of State submitted, the Plan's policy targets go further. They require improvements to be made regardless of whether they would pass the cost-benefit test in the 1994 Regulations.

Under ground 2, the Secretary of State had taken into account non-compliance with existing legislation and said that that must be remedied irrespective of the Plan's new targets. That is the subject of ongoing work by the EA and Ofwat. The Secretary of State was entitled to publish a plan which set policy targets which are to be met irrespective of cost-benefit considerations, and which therefore go further than existing legislation. That approach, without taking into account the extent of any current non-compliance with the 1994 Regulations, was in law rational.

As for ground 3, the Plan did not fall within the scope of the Habitats Regulations and so there had been no requirement for the Secretary of State to have carried out an appropriate assessment.

Under ground 4, WildFish's argument that the decision to publish the plan was irrational, because Parliament had intended the Plan to enforce regs.4 and 5 of the 1994 Regulations, involved a misreading of s.141A of the Water Industry Act 1991.

Marine Conservation Society, Richard Haward's Oysters (Mersea) Limited and Mr Tagholm

The court also rejects the three grounds of challenge in the second claim. First, the Plan does not have to contain quantitative targets of any sort, including biodiversity measures, in order to comply with its statutory purpose of reducing discharges from storm overflows and their harmful effects. It has not been shown that the Plan will undermine the achievement of the target in s.3 of the 2021 Act to halt the decline in species abundance by 2030.

The second ground of challenge is also rejected. Applying existing case law, Mr Tagholm failed to show that his Article 8 rights were applicable. RHO did not show that the Secretary of State had infringed its A1P1 rights by failing to include any additional positive measures in the Plan in respect of shellfish waters.

As for the third ground, the right to navigate and fish in tidal waters does not go so far as to impose a common law obligation on the Secretary of State to take steps to prevent pollution of waters so that fish and shellfish are fit to eat. That is a matter for Parliament, which has already legislated in this area where it thought appropriate. Mr Tagholm accepted that existing legal authority binds the High Court to decide that he cannot rely upon the "public trust doctrine" in relation to the recreational use of water.

Conclusion

Accordingly, the claimants' applications for judicial review are dismissed.