

To what extent is deference to the views of the regulatory authorities a problem when bringing a JR?

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Introduction

- Two cases/ two different approaches
 - *HCA v Competition and Markets Authority*
 - *ClientEarth (No 2) v SSEFRA*
- Some common themes?

HCA v CMA

- *HCA International Ltd v Competition and Markets Authority* [2014] CAT 10, para 4(b):

“In relation to decisions of this character taken by a body of this kind, the well established legal approach is that a substantial degree of discretion or significant margin of appreciation is allowed in relation to expert assessments made by the CMA. This reinforces the review function of the Tribunal and emphasises how far removed from a merits appeal these kinds of proceeding are. In our view, the Tribunal is rightly resistant to attempts by any party to try to convert this review jurisdiction in this context into something resembling an appeal on the merits.”

ClientEarth (No 2)

ClientEarth v SS for the Environment, Food and Rural Affairs [2016] EWHC 2740 (Admin), para 55:

“Ms Lieven advances three primary criticisms of the air quality plan. First, she says that the adoption of five yearly intervals for the projection of nitrogen dioxide emissions was arbitrary and the date chosen for the compliance of 2020 (and 2025 for London) was too far distant. Second, she says the particular modelling method chosen, and in particular reliance on the COPERT emission factors, was mistaken. Third, she says the decision to rely entirely on Clean Air Zones (and the ULEZ in London) as the means of achieving compliance with the obligations set out in the directive was flawed. ...”.

Conclusions

- Why the difference in approach?
- *ClientEarth (No 2)*, jmt at paras 46-47:

“Although I accept Ms Smith’s arguments that Article 23 gives some discretion to the Member State, it is plain on the face of the Article, in my judgement, that that discretion is narrow and greatly constrained. ... this is an obligation of result ...”.

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