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Climate Change Litigation

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What does the Paris Agreement on Climate Change mean?

A split Divisional Court: Friends of the Earth to appeal disagreement between two judges

By William Moody

In R (Friends of the Earth Limited) v Secretary of State for International Trade and others ([2022] EWHC 568 (Admin), two judges have failed to agree on the meaning of the Paris Agreement in the context of a judicial review brought by Friends of the Earth against a decision of the UK Government to provide financial support to UK exports to a LNG project in Mozambique.

Given the lack of judicial alignment, the claim failed but permission to appeal to the Court of Appeal has been given.

Introduction

1. Friends of the Earth Limited, an environmental NGO, sought to challenge a UK Government decision to provide up to $1.15bn of support for UK exports to a development of a liquefied natural gas ("**LNG**") in Mozambique ("**the Decision**").

2. Friends of the Earth challenged the decision (taken in various steps) by way of judicial review, asserting two grounds [5]:

a. The Decision was based on an error of law or fact, namely that the Project and its funding was compatible with the United Kingdom's commitments under the Paris Climate Change Agreement ("**the Paris Agreement**") and/or assisted Mozambique to achieve its commitments under the Paris Agreement (Ground 1(a)), and/or

b. UKEF's Decision was otherwise unlawful in so far as it was reached without regard to essential relevant considerations in reaching the view that funding the Project aligned with the UK and Mozambique's obligations under the Paris Agreement (Ground 1(b)).

The meaning of the Paris Agreement – Stuart-Smith LJ

3. Central to the case was the meaning of the Paris Agreement and whether the Decision (and hence the Project) aligned with its aims and objectives. Stuart-Smith LJ found that the *"relevant language"* of the Agreement *"is towards the aspirational and high-level political end of the spectrum"* [121].

4. He noted that some of the *"different stated aims or steps"* under the Agreement *"are in tension, if not frank opposition to one another"* [122]. He gave the example of the oppositional tension inherent in the obligation created by article 2.1(c) to make *"finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development"* which tended to prohibit LNG development whereas article 4 permits developing countries to have a longer period for the peaking of GHG emissions, not least to allow for sustainable development and efforts to eradicate poverty.

5. Stuart-Smith LJ noted that *"development of Mozambique's LNG by the Project is integral and essential to its attempts to eradicate poverty for millions of its citizens. The tension between these two objectives suggests that it is too simple to assert that a course of action contrary to the Paris Agreement because it goes*

against one or more principles established by the Agreement is whilst satisfying one or more others." [122].

6. He went on to consider that it was almost impossible to definitively determine what obligations the Paris Agreement imposed on the UK when considering making export support available in connection with a foreign LNG project in a least developed country. He noted that it was impossible to know what article 2.1(c) actually means given that "towards", "low" GHG emissions and "a pathway" are all undefined. He found "*these concepts less than self-evident"* and was unable to say how they were to apply when *"Mozambique's ability to make its way to a carbon-free economy and climate resilient development is dependent upon the income stream from the Project"* [227].

7. Stuart-Smith LJ found that it was not open to the Court *"to pronounce on whether developing the Project has caused or will cause Mozambique to act in breach of its obligations of the Paris Agreement…because of the operation of the Foreign Act of State doctrine…"* Yet, he was prepared to say that *even if* you could say that the Project was contrary to article 2.1(c) because its GHG emissions are too great, that would still not be *"the end of the enquiry since the relief of poverty is a compelling counterweight to the argument…"* [232].

8. Accordingly, the Stuart-Smith LJ found no error in the way in which the UK Government had assessed the impact of the Project before deciding to provide support. UKEF has delegated powers under the Export and Investment Guarantees Act 1991 to ensure that "*no viable UK export failed for lack of finance or insurance from the private sector*". UKEF considered a "*wide spectrum of policy areas*": political policy, economic and scientific judgment. As such, UKEF's margin of appreciation is wide, and is subject only to a "*relatively low intensity of enquiry and review*" [236].

9. He found that UKEF was entitled to come to the conclusion that the Project would be part of Mozambique's longer peaking of GHG emissions over time and that the *"Project would foster climate resilience and increase Mozambique's ability to adapt to the adverse impacts of climate change…in the context of Mozambique's efforts to eradicate poverty"* [233].

10. Further, this meant that UKEF's decision not to quantify scope 3 (indirect GHG) emissions before taking its decision was not irrational because such quantification *"would add nothing material to the qualitative assumptions that were being made"* by UKEF in considering compliance with the Paris Agreement [234] - it was "*implicit, obvious and accepted that the development of a major LNG field would lead to very high levels of emissions*" [237] but this was one of a wide range of factors for UKEF to balance in coming to its conclusions.

11. Accordingly, for Stuart-Smith LJ, the claim failed.

The judgment of Thornton J - a different view

12. Thornton J "*respectfully disagree*[*d*]" with the analysis of Stuart-Smith LJ in relation to the quantification of Scope 3 emissions and, although she found that UKEF must be accorded a wide margin of appreciation, UKEF had failed to discharge their duty in this particular instance. UKEF's "*judgment that a high level qualitative review of the impact was sufficient was unreasonable*" [330-31].

13. Thornton J did feel able to interpret the Paris Agreement in a manner that gave rise to 'hard-edged' obligations, finding that article 2.1(c) must require that *"the provision of finance must be consistent with a pathway towards holding global warming to well below 2°C above pre-industrial levels and pursuing efforts to limit warming to 1.5°C."* [265].

14. Thornton J considered that the UK was bound when providing export support in relation to a GHG emitting Project to demonstrate *"that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C"* [268].

15. Applying the Paris Agreement in this way, Thornton J found that the failure to include Scope 3 emissions calculations undermined the credibility of UKEF's climate assessment. The failures meant there was no rational basis upon which the Project could be consistent with the Paris Agreement [335].

What next?

16. There is little modern authority on what happens when a two judge Divisional Court hearing a judicial review is deadlocked. Some authorities suggest that the claim must be dismissed because all members of the court have not been convinced to grant the claim, others suggest a re-hearing and others note the pragmatic (time and cost saving) course of the judge who would have granted relief nevertheless effectively agreeing to the dismissal of the claim to allow an appeal. In this case, both judges agreed that the claim must fail and proceeded to grant permission to appeal to the Court of Appeal.

17. It will now fall upon the Court of Appeal to grapple with the meaning of the Paris Agreement, the nature and interpretation of the finance flows obligations thereunder (to be imposed on the UK when considering exports support), and whether, taking into account the meaning and effect of those obligations, the steps taken to assess scope 3 emissions were sufficient.

18. This case is one of several pieces of UK and international litigation where parties are seeking to "litigate" the Paris Agreement in order to "enforce" its terms on governments and private sector actors. So far, there has been

little English judicial appetite for such "enforcement" given the multi-factorial political and economic value judgments in play.[1] It will be interesting to see how this latest instalment in the rising tide of climate change litigation develops on appeal.

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[1] See for example *Elliott-Smith v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin).