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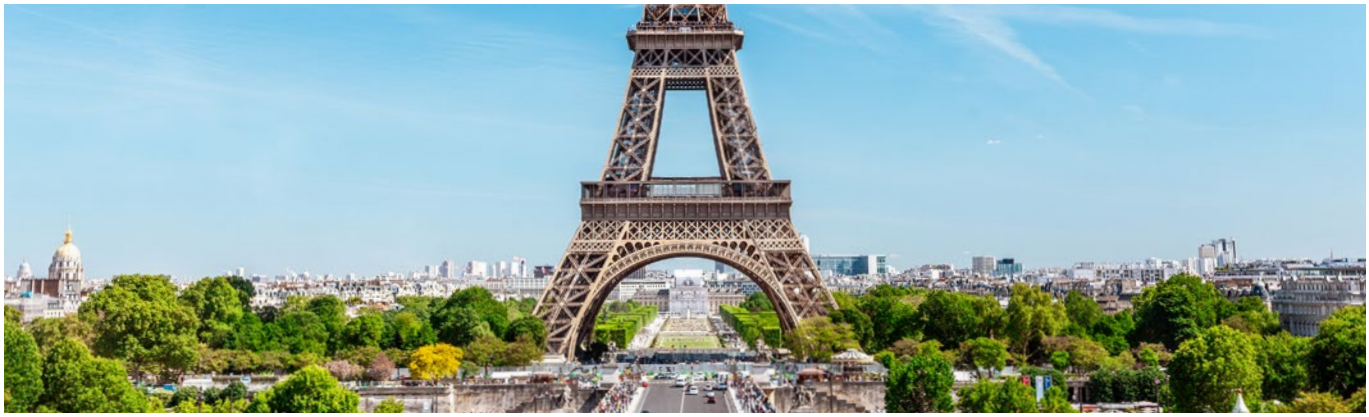

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

The Paris Agreement in the English courts: what role can it play in holding the State to account?

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Entry into force of the Paris Agreement on climate change in November 2016 was a watershed moment in global efforts to address climate change. It imposes binding international law obligations on 196 signatory States with the goal of limiting global warming to well below 2 degrees Celcius, or preferably to 1.5 degree Celsius, compared to pre-industrial levels. The recitals to the Paris Agreement also recognise the urgency of achieving this goal – they state that climate change represents an *"urgent threat"* and *"a common concern of mankind"*.

Given the binding legal framework established by the Paris Agreement and its express recognition of the urgency of addressing climate change, it is not surprising that campaigning organisations have sought to deploy the Paris Agreement in domestic litigation as a means of holding States to account for failures to take adequate steps to reduce emissions. In England, that has been done through judicial review claims against public authority decisions. However, there are certain challenges in relying on an unincorporated international treaty such as the Paris Agreement in the domestic context, exemplified in particular by the recent Divisional Court decision in *R (Friends of the Earth Limited) v UKEF & Others* [2022] EWHC 568 (Admin) (the "Mozambique Case"), which the case-law is only just beginning to address. This post argues that over time the obstacles to reliance on the Paris Agreement in English judicial review proceedings are likely to weaken, and one can expect compliance with the UK's obligations under the Paris Agreement to become increasingly important as a basis for judicial review.

There are three major obstacles to successfully challenging a public authority's decision on the basis of non-compliance with the Paris Agreement. We address each in turn:

(1) Relevance of the Paris Agreement to the decision under challenge

A challenge to a public authority decision has to fit within the usual grounds for judicial review. The two which are most likely to be relevant are: (i) irrationality, on the basis that the decision-maker should have taken account of obligations under the Paris Agreement, but did not do so, and (ii) an error of law, on the basis that the public authority did attempt or purport to take into account those obligations, but misunderstood them. In either case, the starting point is to assess whether the decision maker should have taken into account obligations under the Paris Agreement, or alternatively whether it said that it was doing so.

As the Government formally makes policy with the aim of implementing its Paris Agreement commitments, it is likely that both of these points will become easier to show. A challenge to a public decision made soon after the entry into force of the Paris Agreement, *R (Friends of the Earth Limited) v Heathrow Airport Ltd* [2020] UKSC 52, resulted in the Supreme Court declining to find that there was a sufficiently crystalised policy which engaged public law obligations. This case concerned a challenge

to a decision to approve the construction of a third runway at Heathrow Airport. The claimants said the failure to take into account the Paris Agreement constituted a breach of duty under ss. 5(7) and (8) of the Planning Act, which required the Airport National Policy Statement ("APNS") to explain how the statement *"takes account of Government policy relating to the mitigation of, and adaption to, climate change"*. The Supreme Court rejected this submission. It found that the ratification of the Paris Agreement did not alone constitute Government policy, as it was not a commitment operating on the domestic plane. Also, that there was no established Government policy on climate change beyond the Climate Change Act 2008 ("CCA"), which at that time made the UK's voluntary national targets for the reduction of greenhouse gas ("GHG") emissions legally binding but in June 2018, when the APNS was designated, had not been amended to incorporate the Paris Agreement. As such, the Court found that the UK Government's approach to adapting its domestic policies to meet its obligations under the Paris Agreement was still in development. Without an established policy, there was nothing that the Government was required to take into account, and the judicial review failed.

But increasingly, steps are being taken by public authorities with the aim of ensuring the UK complies with its obligations under the Paris Agreement. The very recent Divisional Court Judgment in the Mozambique Case is an example of a case where the public authority undertook to take into account the UK's obligations under the Paris Agreement. This was a challenge to the UK Export Finance agency's ("UKEF") decision to provide up to USD 1.15 billion in export finance and support in relation to an LNG project in Mozambique. Friends of the Earth argued that the decision was incompatible with both the UK's and Mozambique's commitments under the Paris Agreement. In this case, there was no question of whether a public authority could be required under public law principles to take account of the UK's international obligations in the Paris Agreement, because UKEF had expressly stated that it had regard to those obligations, though the UKEF was at pains in the case to point out that it was a pioneer in taking account of climate change as part of its decision-making process.

Moreover, in 2019, the CCA was amended to introduce a target for a reduction in GHG levels to "net zero" by 2050 (i.e. that the amount of emissions produced will be fully offset). Given the amendment to the CCA, and the urgent need to reduce GHG, it is reasonable to expect that, where appropriate, public authorities will increasing undertake a climate change assessment as part of their decision-making process.

(2) Applicable standards of review

The second obstacle that has, to date, stood in the way of successful judicial review challenges based on the Paris Agreement is the standard of review applied by the court. That standard of review has had the effect of diluting the effect of the Paris Agreement as a basis for challenging government decision-making.

The first point relevant to the standard of review is the margin of appreciation afforded to the decision maker by a reviewing court. In the Mozambique Case, Stuart-Smith LJ adopted the principles set out in *R (Spurrier) v Transport Secretary* [2019] EWHC 1070 (Admin); namely, that cases involving issues that depend essentially on political judgment call for a lower intensity of review. Accordingly, where a decision involved balancing a number of different public interests, all of which contribute to the overall public interest, and where a decision involved *"scientific, technical and predictive assessments"*, an enhanced margin of appreciation should be afforded. Applying this principle to the facts, Stuart-Smith LJ found that UKEF was entitled to a significant margin of appreciation, given that it was conducting an exercise of assessing climate change impact in the context of a long-term foreign project, which was a highly complex and technical exercise; and moreover, UKEF was the first government department to undertake such an exercise. Critical to this finding was also Stuart-Smith LJ's view that "[t]*here is no single prescribed or recognised way in which climate change and consistency with the Paris Agreement should be assessed by governmental decision-makers…"*.

The second point relevant to the standard of review is that there are limitations on the role which the English courts can play in interpreting the Paris Agreement, given that it is an international agreement. The limitation arises because the exercise of the royal prerogative to conclude international treaties is non-justiciable and exists in the international law sphere only. However, *"…where the*

international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law then the Courts acquire the right and duty of supervision": *Heathrow v HM Treasury* [2021] EWCA Civ 783, at ¶138. The tension that arises out of this is – how is the court to exercise the duty of supervision, without intruding on the royal prerogative to enter into treaties and to choose how (or even, whether) to implement obligations under those treaties? In *R (Corner House and another) v Director of the SFO* [2008] UKHL 60, Lord Brown sought to resolve this tension by adopting the "tenable view" approach proposed by Philip Sales QC (as he then was) and Joanne Clement in an academic article; i.e. where the proper interpretation of international law is not certain, the English court should only ask whether a government decision-maker purporting to comply with that international law has taken a tenable view of what that international law requires. This standard of review means that the court does not bind the hands of the executive, and allows it space to press for a range of possible interpretations of the international law, when the executive acts on the international plane. However, in *Heathrow v HM Treasury* the Court held that it was both possible and appropriate for it to rule on what was *"a clear-cut question of law upon which there is extensive jurisprudence"*. Having reviewed these authorities in the Mozambique Case, Stuart-Smith LJ held that there is a need for caution when a domestic court is being asked to interpret a treaty which has not been incorporated into domestic law, which will usually result in the court adopting the "tenable view" approach when reviewing government decision-making that is required to or purports to comply with that treaty. However, where there is an ascertainable answer to the interpretation point, "tenability" may be displaced: at ¶119. Both Stuart-Smith LJ and Thornton J considered that the "tenable view" approach is appropriate for the purposes of interpreting the Paris Agreement. In Stuart-Smith LJ's analysis, that is because: the language of the Paris Agreement is towards the aspirational and high-level political end of the spectrum; the Paris Agreement states a number of aims and steps which are in tension, if not opposition (such as prohibiting financing by developing countries of a project which increases GHG emissions, while at the same time taking into account the eradication of poverty for developing countries); and there is not yet an established consensus or authoritative view, in jurisprudence from other jurisdictions, of the interpretation that is to be given to specific relevant provisions: at ¶¶121-123. The consequence of applying the "tenable view" standard to judicial review applications brought on the basis of the Paris Agreement, is that the court will not see its role as being to assess whether a public authority has correctly understood the UK's obligations under the Paris Agreement when purporting to take those obligations into account; rather, the court will supervise whether the public authority took a tenable view of what those obligations were.

Both the margin of appreciation, and the "tenable view" standard of review, reflect to a certain extent the fact that operation of the Paris Agreement is in its relatively early days. As the scientific approach to assessing emissions becomes more established and standardised (as to which see below), and the Paris Agreement is increasingly litigated in domestic and/or international courts around the world leading to an accretion of jurisprudence on its interpretation, one may see a degree of international consensus emerging as to what the UK is required to do under the Paris Agreement, and how to measure whether the UK is meeting those requirements. Such international consensus will give the English courts a more certain basis on which to proceed in judicial reviews brought on the basis of the Paris Agreement, reducing the significant amount of deference which the Mozambique Case currently affords to public authority decision makers.

(3) Scientific assessment of emissions

The third obstacle to judicial review claims based on the Paris Agreement is the state of the science to be used for assessing the environmental impact of a decision – specifically, how to calculate likely future GHG emissions. To state the obvious, this is the critical measure for compliance with obligations under the Paris Agreement.

One issue decided in the Mozambique Case was whether the UKEF was obliged to undertake an assessment of the Scope 3 omissions of the Mozambique project (i.e. indirect emissions, other than those arising from the generation of purchased electricity) in circumstances where it was common ground that Scope 3 submissions for the project would be significant. One of the reasons that Stuart-Smith LJ was not persuaded that it was necessary for the UKEF to have quantified Scope 3 emissions when attempting to assess the climate change

impact of the project, was that UKEF had received initial advice, on which Stuart-Smith LJ thought the UKEF was entitled to act, that the calculation of Scope 3 emissions would involve so many variables as to make accurate quantification impossible. By the time experts had indicated to the UKEF that such a calculation could be done, the UKEF was under time constraints which meant that there was insufficient time to plug the gap in the analysis. However, on this point, Thornton J took a different view. She considered that the Greenhouse Gas Protocol, developed by the World Resources Institute as an internationally accepted methodology for calculating emissions and endorsed by the House of Commons Environment Audit Committee, was a *"well-established methodology"* for calculating Scope 3 emissions: at ¶333. Given that this analysis could have been performed, and that the UKEF was advised that the failure to perform this analysis was a *"big gap in the analysis"*, the UKEF failed to make reasonable and legally adequate enquiries in relation to climate risks, which were a key consideration in the decision making.

Final thoughts

Though no breach of Paris Agreement obligations was established in the Mozambique Case, it is at the vanguard of the legal analysis in this area, giving the benefit of the doubt to decision-makers seeking to grapple with balancing public policy concerns and emerging science as to the assessment of climate change emissions. As discussed above, the Court's deferential approach was strongly informed by current lack of certainty as to the nature of the obligations imposed on the UK under the Paris Agreement, and as to how in practice to measure compliance with those obligations. But, as noted above, there is every reason to believe that the current uncertainty will dissipate, at least to some extent, through cross-governmental standardisation of approach when making decisions which impact the UK's carbon budget, increased international jurisprudence on the Paris Agreement, and improvements or standardisation in the scientific analysis. With these likely developments, public law challenges will become not only more frequent, but also stand a greater chance of succeeding as the room for giving the benefit of doubt narrows.

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