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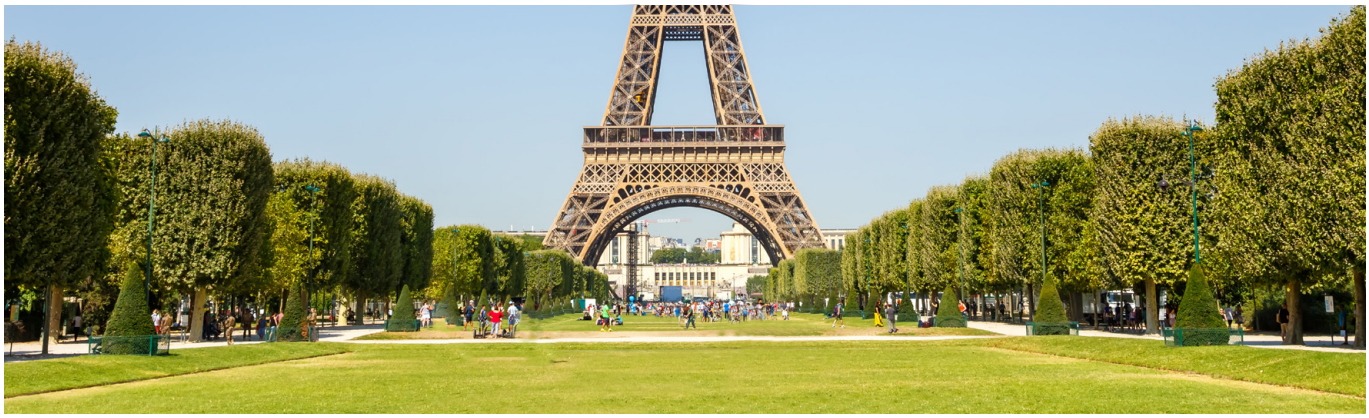

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Climate Change Focused Judicial Review: what must be taken into account?

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Climate Change Focused Judicial Review: what must be taken into account?

There has been a recent series of challenges to government decisions on the ground that the government has not taken into account, or placed sufficient weight on, climate change aims. There have been some conspicuous successes, for example in the context of legal limitations on air pollution. Other challenges have fared less well, but indicate that, in appropriate cases, the courts will be prepared to consider and interpret key international climate change standards, including the UN Framework Convention on Climate Change Paris Agreement (the "**Paris Agreement**").

The Paris Agreement

To what extent must government take into account the Paris Agreement when making decisions? The answer engages a key principle of administrative law that the decision maker must take relevant considerations into account and not take irrelevant considerations into account. In *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 (the "**Heathrow Airport case**") at [117] the Supreme Court identified the following three sorts of considerations:

a. Considerations clearly identified by statute as ones to which regard must be had (such that if no regard is had to them, the decision cannot be lawful);

b. Considerations so identified as ones to which regard must not be had (such that if regard is had to them, the decision cannot be lawful); and

c. Considerations to which the decision-maker may have regard if, in their judgment and discretion, they think it is right to do so (such that the decision will only be unlawful if the matter is so obviously material to a decision that anything short of direct consideration of them by the public authority would not be in accordance with the intention of the act).

These factors were considered recently by the Court of Appeal in *R (Friends of the Earth Ltd) v Secretary of State for International Trade/UK Export Finance (UKEF)* [2023] EWCA Civ 14. Friends of the Earth sought to judicially review the decision of the Secretary of State for International Trade through the Export Credits Guarantee Department (known as UK Export Finance ("**UKEF**") to provide export finance in support of a liquified natural gas project in Mozambique on the ground that it was unlawful as it was not aligned with international obligations imposed by the Paris Agreement. Friends of the Earth relied on Article 2(1)(c) which states that the Paris Agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient developments.

Unusually, the two judges of the Divisional Court disagreed. Stuart-Smith LJ (who, as the senior of the two judges, held the casting vote) considered

that the Paris Agreement should be approached on the basis that it did not give rise to hard-edged free-standing obligations but was instead "*a composite package of aims and aspirations*", some of which were in tension "*if not in frank opposition to one another*". Thornton J instead took the view that, having lawfully decided to take the Paris Agreement into account, Article 2(1)(c) required UKEF to demonstrate that funding the project was consistent with a pathway towards limiting global warming to well below 2ºC and pursuing efforts to 1.5ºC (at [268]). Thornton J also considered that UKEF had failed to discharge its duty of inquiry (known as the *Tameside* duty) in relation to the calculation of emissions and that its judgment that a high level qualitative review of the impact was sufficient was unreasonable (at [331]). Stuart-Smith LJ, in contrast, dismissed Friends of the Earth's *Tameside* challenge (at [214]-[224]).

The Court of Appeal dismissed Friends of the Earth's appeal in an important Judgment from the Master of the Rolls, Sir Geoffrey Vos MR. The Court of Appeal held that the Paris Agreement, as an unincorporated international treaty, did not give rise to domestic legal obligations. While the Paris Agreement did not merely set out aims and aspirations as Stuart-Smith LJ in the Divisional Court held, it was not helpful to seek to derive from the text hard-edged obligations akin to those found in commercial agreements (at [40(i)], [44], [46]). The Court of Appeal therefore held that the government is not compelled by domestic law to take into account the UK's obligations under the Paris Agreement. Rather, the Paris Agreement is just one of many factors that the government may consider when making a decision (at [40(iii)], [50]) – such that the UK's obligations under the Paris Agreement were a consideration which fell within the third category identified by the Supreme Court in the Heathrow Airport case.

Furthermore, the Court of Appeal held that the applicable standard of review of the government's interpretation of the Paris Agreement, as an unincorporated treaty, was the "'tenable view' standard adopted by Lord Brown in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 (at [50]). The 'tenable view' approach applies where the proper interpretation of international law is uncertain and means the court need only ask whether a decision maker has taken a tenable view of what that international law requires, rather than whether the decision maker's view is correct. Applying that standard, the Court of Appeal found that it was tenable for UKEF to form the view that funding the project was aligned with the UK's obligations based on the circumstances at the time the decision was taken (at [40], [55]). (Although, given the rapid evolution of knowhow in this field, those circumstances are likely to change fast). The Court of Appeal dismissed the *Tameside* challenge on the basis that the quantification of 'Scope 3' emissions (indirect emissions from the fossil fuels extracted by a project which are neither direct emissions nor indirect emissions from the generation of purchased electricity) was within the substantial margin of appreciation given to decision-makers in this particular context (at [63]).

The Court of Appeal's decision therefore demonstrates how the "tenable view" standard is likely to be central to climate-change-focused judicial review claims. The Paris Agreement is likely to be relevant to most aspects of government decision-making in the field of climate change (imposing, as it does, binding international obligations on the UK). Subject to any more prescriptive obligations that have been introduced in law, the way in which those outcomes will be achieved, measured against the current state of scientific learning, is primarily for the government to determine.

The Court of Appeal's approach is consistent with the approach to the Paris Agreement adopted by the courts in other recent decisions. In the Heathrow Airport case, the Supreme Court dismissed a judicial review claim on the basis that the Secretary of State had taken the Paris Agreement into account and lawfully exercised his discretion as to how much weight to attribute to it. Similarly the High Court in *R (Packham) v Secretary of State for Transport* [2020] EWHC 829 (Admin), upheld by the Court of Appeal ([2020] EWCA Civ 1004), held that the Paris Agreement was not automatically an obviously material consideration in any decision where the implications of infrastructure development for climate change were in issue, but in principle it could be, depending on the specific statutory context.

By contrast, situations where the relevant climate aims are enshrined in domestic legislation are more likely to create hard-edged obligations with greater scope for court challenge. An example is where a decision fails to comply with an express or implied requirement of the statutory

decision-making power as in R *(1) Friends of the Earth Limited (2) ClientEarth, (3) Good Law Project and Joanna Wheatley v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841. The challenge concerned the net zero by 2050 target, enshrined in the Climate Change Act 2008. The Government's Net Zero Strategy for the period 2033-2037 was found not to comply with the requirements of the Act because the briefing materials to the Secretary of State did not set out the contribution that each quantifiable proposal or policy in the Net Zero Strategy would make to the carbon budget and the reporting to Parliament did not include quantitative assessments of the contribution of individual policies to the targets or explain the 5% shortfall.

On the application of the three categories of consideration set out by the Supreme Court in the Heathrow Airport case, where relevant climate change aims or obligations are enshrined in domestic legislation, they fall within the first category of mandatory considerations. However, where the relevant climate change aims or obligations are in an unincorporated treaty such as the Paris Agreement, which neither gives rise to direct domestic law obligations and rights nor constitutes Government policy (see Lords Hodge and Sales in the Heathrow Airport case), they fall within the third category of consideration and whether the obligations must be considered will depend on context.

In any event, it does not follow that a decision will be automatically unlawful even if a relevant factor is not considered. A decision that does not take into account a relevant consideration will only be incorrect if the consideration is "*so obviously material*" that failure to take it into account constitutes a judicially reviewable error. The test as to whether a consideration is "*so obviously material*" is the *Wednesbury* irrationality test: the Heathrow Airport case [2020] UKSC 52 at [119]. This is a high, but obviously not insuperable, bar, particularly where the issue is a multi-faceted one like climate change. Disclosure and the duty of candour in judicial review litigation are likely to be material tools in determining which there has been proper compliance in a particular situation.

Relevance of Nationally Determined Contributions

The Paris Agreement requires State parties to commit to Nationally Determined Contributions ("**NDC**") which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. The Supreme Court in the Heathrow Airport case held that while the Paris Agreement does not impose an obligation on any state to adopt a binding domestic target to ensure that the common objectives set out in Articles 2 and 4(1) are met, a specific legal obligation is imposed to meet any NDC applicable to the state in question (at [71]).

Whether the targets set out in a state's NDC must be considered or are simply a factor which may be considered was the focus of South Africa's first climate-change-focused judicial review – the *Thabametsi* case (*Earthlife Africa Johannesburg v Minister of Environment Affairs* [2017] 2 All SA 519). There, the approval of a coal-fired power station was successfully challenged on the ground that climate change considerations had not been taken into account, even though there was no express legal obligation to conduct a climate-change impact assessment when considering whether to grant an environmental authorisation (at [87]).

A key reason for the South African High Court's decision was the fact that South Africa's NDC had expressly set out the peak, plateau and decline trajectory of coal-fired power stations in South Africa and committed to build cleaner and more efficient power stations (at [90]). The assessment of climate change impacts and mitigating measures were therefore found to be relevant factors in the environmental authorisation process. The court held that their absence from the environmental review of the project made its approval unlawful and that a formal expert report on the impact on climate change is the best way to assess the impact on the multifaceted issue. The fact that the NDC itself constituted a self-declared commitment was therefore a key aspect which shaped the relevant considerations.

The South African High Court also took into account section 24 of the South African Constitution which establishes a fundamental justiciable environment right (namely the right to an environment not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that *inter alia* secure ecologically sustainable development and use of natural resources while

promoting justifiable economic and social development). There is no comparable constitutional right in English law, albeit whether aspects of the common law, such as the "public trust doctrine", recognise comparable rights remains to be seen.

Nevertheless, given the Supreme Court's finding in the Heathrow Airport case, a similar approach in terms of the relevance of an NDC would probably be adopted by the English courts and targets set out in an NDC would be regarded by the English courts as a consideration within the first category.

Conclusion

The recent decisions illustrate that the courts apply conventional public law principles to climate change decisions by government and no special rules apply. Relevantly, this means that the extent of the court's willingness to intervene will be dependent on the nature of the decision before it, and the extent to which obligations, including those derived from the Paris Agreement, are reflecting in binding statutory, or common law, obligations. It is inherent in the Paris Agreement that, amongst other things, the implementation of further and more onerous NDCs will be necessary along the pathway to Net Zero. These more prescriptive obligations will in turn warrant heightened scrutiny of government decisions along the principles set out above. As the legal framework becomes more specific, so too will decision-makers be held to those increasing standards by the courts.

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