

13 January 2023

R (Friends of the Earth Limited) v. The Secretary of State for International Trade/UK Export Finance

SUMMARY OF THE JUDGMENT OF THE COURT OF APPEAL

Important note for press and public: this summary forms no part of the court’s decision. It is provided so as to assist the press and the public to understand what the court decided.

1. The main issue before the Court of Appeal (Sir Geoffrey Vos, Master of the Rolls, Lord Justice Bean, and Sir Keith Lindblom, Senior President of Tribunals) was whether the UK Government acted unlawfully in deciding to approve (the decision) UKEF’s £1.15 billion investment in a liquified natural gas project in Mozambique (the project).
2. The project comprises the development of offshore deep-water gas production facilities 50 kilometres from the coast of Northern Mozambique. It is to be operated by Total E&P Mozambique Area 1 Limitada and funded via MOZ LNG1 Financing Company Limited, who appeared before the Court as interested parties. UKEF’s funding was part of a \$14.4 billion package provided by other countries’ export credit agencies and commercial lenders. UKEF’s support was conditional the procurement of UK goods and services and was expected to create approximately 2,000 UK jobs.
3. The Divisional Court (Stuart-Smith LJ and Thornton J) had not been able to agree. As a result, Friends of the Earth’s application for judicial review of the decision had been dismissed.

4. The Court of Appeal, whilst recognising that the 197 state parties to the Paris Agreement 2015 had said that climate change represented an urgent and potentially irreversible threat to human societies and the planet, decided to dismiss Friends of the Earth's appeal. The case had to be decided on the basis of accepted and familiar principles of public law. The Court of Appeal emphasised that nothing it said could be construed as supporting or opposing any political view of the issues. Its task had been only to establish whether the UK Government's decision was vitiated by an error of law.
5. The competing positions of the parties centred on whether article 2(1)(c) of the Paris Agreement imposed positive obligations on the UK. That article provided that the Paris Agreement aimed to "strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: ... (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".
6. The Court of Appeal held that it was important to understand the basic structure of the Paris Agreement. The specific obligations on state parties to the Paris Agreement in other articles (for example, the setting of nationally determined contributions (article 4), and developed countries providing financial resources to assist developing countries (article 9)) were to be undertaken, as article 3 made clear, with a view to achieving the purposes stated in article 2 including "holding the increase in the global average temperature" and "making finance flows consistent with a pathway towards low greenhouse gas emissions". It was against that background that the other issues had to be determined.

7. The issues were:
- i) Was the UK Government required to adopt the correct, rather than merely a tenable, meaning of the Paris Agreement?
 - ii) Had the UK Government behaved irrationally in concluding that the decision was compatible with article 2(1)(c) of the Paris Agreement?
 - iii) Had the UK Government breached its duty of enquiry by failing to quantify the project's Scope 3 emissions?

Scope 3 emissions are all indirect emissions from the gas extracted by a project not included in Scope 1 (direct emissions) and Scope 2 (indirect emissions from the generation of purchased electricity).

8. The Court of Appeal's conclusions on the first and second issues were in outline that:
- i) The Paris Agreement was pre-eminently an unincorporated international treaty that did not give rise to domestic legal obligations.
 - ii) The question of whether funding the project was aligned with the UK's international obligations under the Paris Agreement was accepted to be justiciable.
 - iii) The Paris Agreement was, however, only one of a range of factors to which the respondents decided to have regard in reaching the decision.
 - iv) The question of whether it was an error of law for the respondents to have concluded that funding the project was aligned with the UK's

obligations under the Paris Agreement had to be judged by considering whether the decision-makers adopted a tenable view of that question.

- v) In other words, provided it was tenable for UKEF to reach the view that funding the project was aligned with the UK's obligations under the Paris Agreement, the court could not and should not hold that it had made an error of law.
- vi) UKEF's view was indeed a tenable one, bearing in mind the huge complexities explained in the Climate Change Report obtained by the UK Government.
- vii) This conclusion was an application of the constitutional law principle of dualism: the court could not and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance.
- viii) These views are not affected by the fact that the respondents said they had formed a definitive view that their approval decision was compliant with the UK's obligations under the Paris Agreement, rather than simply saying there was tenable view that it was compliant.
- ix) It could not possibly have been irrational for the respondents to decide to provide finance for the project, when they were being advised that the project could, in some scenarios, align with the UK's obligations under the Paris Agreement. The question of whether, and to what extent, gas from the project would replace more polluting fossil fuels and over what timescale, was very complex. Whilst it was known and understood by

UKEF that Scope 3 emissions from the project were large, it was not clear to what extent the project would contribute to fossil fuel transition.

9. The Court of Appeal's conclusion on the third issue was that the UK Government had not breached its duty of inquiry because it was not possible to say that it was irrational to take the funding decision without quantifying the Scope 3 emissions:

- i) The Scope 3 emissions were always fully understood to be significantly larger than the Scope 1 and 2 emissions, even if no precise quantification was available until the Prime Minister raised the matter.
- ii) It was known at the time that the project would go ahead with or without finance from UKEF.
- iii) The absolute level of Scope 3 emissions did not answer the nuanced question of whether approval of the financing would or would not align with the UK's obligations under the Paris Agreement. The obligations in question were, anyway, not absolute requirements to restrict the increase in global average temperatures, and to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. These were the purposes of the Paris Agreement.
- iv) UKEF's decisions as to the quantification of the Scope 3 emissions and the adequacy of the Climate Change Report it had obtained were well within the substantial margin of appreciation allowed to the decision-makers.