19 October 2023

R (Greenpeace Limited) v (1) Secretary of State for Energy Security and Net Zero and (2) Oil and Gas Authority (CO/4583/2022)

-and-

R (Uplift) v Secretary of State for Energy Security and Net Zero CO/4830/2022)

Summary

This summary is provided to assist in understanding the court's decision. It does not form part of the reasons for the decision. The full judgment of the court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 2pm on Thursday, 19 October from the following websites:

- https://www.judiciary.uk/judgments/
- https://caselaw.nationalarchives.gov.uk/

Mr Justice Holgate today handed down judgment in the High Court on applications for judicial review against the Secretary of State for Energy Security and Net Zero and the Oil and Gas Authority (the OGA) brought firstly by Greenpeace Limited and secondly by Uplift.

Introduction

These claims for judicial review challenged decisions taken by the Secretary of State for Business, Energy and Industrial Strategy (now the Secretary of State for Energy Security and Net Zero) and the OGA in relation to the licensing of additional offshore oil and gas exploration and production. A key issue in both claims is whether the Secretary of State acted unlawfully by not including in his assessment of the environmental impacts of further licences emissions of greenhouse gases ("GHGs") produced when refined products, such as fuel, are eventually used by consumers.

Judicial review ensures that ministers and public bodies act within the legal limits of their powers and comply with their legal obligations, relevant procedures and principles. As such, the court in these applications is only concerned with deciding questions of law and whether legal arguments raised by Greenpeace and Uplift demonstrate that the defendants acted unlawfully. The court is not concerned with political or socio-economic or scientific issues.

In a written statement in March 2021 the Secretary of State announced that he would introduce a "checkpoint" so that he could consider the compatibility of any future licensing with the UK's climate change objectives before any licensing round is offered to the market.

A consultation on the design of the checkpoint was launched on 20 December 2021. It proposed six tests. Test 5 was to consider whether "scope 3" emissions – or downstream GHGs from UK produced oil and gas – are expected to fall in line with the 1.5°C temperature target for climate change if a further licensing round is approved.

The Secretary of State also announced a new Offshore Energy Plan to "underpin future licensing rounds". He was under a duty to carry out Strategic Environmental Assessment ("SEA") of the Plan in accordance with the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633) ("the 2004 Regulations"). This process was referred to as OESEA4. On 17 March 2022 the Secretary of State published for consultation the Environmental Report for OESEA4. The draft Plan included further offshore licensing of renewable energy projects, oil and gas exploration and production, hydrocarbon gas importation and underground storage, carbon dioxide transport and storage, and offshore production and storage of hydrogen. After taking into account the consultation responses and making some modifications, the Secretary of State adopted the Plan on 7 September 2022.

The Secretary of State approved the final design of the checkpoint on 8 September 2022. It contained only three tests:

1. Whether the UK oil and gas sector has met its reduction targets in the North Sea Transition Deal historically and is projected to do so in the future;

2. The sector's performance in reducing the emissions intensity for its oil and gas production relative to other oil and gas producing nations;

3. The scale of current and future UK offshore oil and gas production relative to UK demand for oil and gas in a net zero scenario (assuming continued licensing and development). This will show whether the UK is projected to remain a net importer of oil and gas or to become a net exporter.

The checkpoint is intended to inform decisions taken by the Secretary of State, but not be determinative. Ministers will also have regard to other matters including: the contribution of the oil and gas sector to the UK economy; the impact of not offering new licences on the investment climate for UK oil and gas; and the additional level of future energy security that a new licensing round could provide for the UK.

The factual background of both claims is set out in paras. [23] to [48] of the judgment. The court then analyses the statutory framework that governs the UK's climate commitments, the granting of petroleum exploration licences, and legal requirements for SEAs in paras. [60] to [88]. A discussion of each ground of challenge follows on from that analysis.

Grounds of challenge

The court was asked to decide the following issues:

1. Issue 1: Whether the Secretary of State's decision not to assess in OESEA4 end use GHG emissions from further oil and gas licensing rounds was irrational/and or in breach of the 2004 Regulations;
2. Issue 2: Whether the Secretary of State failed to assess "reasonable alternatives" in breach of the 2004 Regulations, by failing to assess properly the alternative of not proceeding with further licensing rounds;

3. Issue 3: Whether the Secretary of State unlawfully failed to publish any reasons for deciding that a new licensing round would be compatible with the final checkpoint and the UK's climate objectives;
4. Issue 4: Whether the Secretary of State's decision to approve the final checkpoint design was unlawful because it excluded test 5 for unlawful or irrational reasons;
5. Issue 5: Whether the Secretary of State acted irrationally by relying upon the checkpoint when deciding to adopt the Offshore Energy Plan and deciding that the latest licensing round would be compatible with the UK's climate objectives.

In relation to the OGA's decision to carry out the 33rd licensing round, Greenpeace advanced two grounds of challenge:

1. Issue 6: whether the OGA's decision was unlawful because OESEA 4 was unlawful (see Issues 1 and 2).
2. Issue 7: whether the OGA's decision was irrational because it relied upon the Secretary of State's adoption of the checkpoint without test 5 (see Issue 4).

The court's decision

The court rejects all the grounds of challenge and dismisses the claims.

Under Issue 1, the court decides that the Secretary of State's decision not to assess end use emissions in OESEA4 was not irrational [116]. The judge agrees with the Secretary of State's submission that for the purposes of the 2004 Regulations the Offshore Energy Plan only sets the framework for licensing oil and gas exploration and production within the geographic area it covers [105]. The Plan did not purport to say what should happen to oil or gas extracted under a newly-granted licence or how much of it should be consumed in the UK, nor did it put forward policies relating to any intermediate processes for the refinement, storage or distribution of extracted hydrocarbons. On this basis, the GHG emissions from the end use of the extracted gas were not "likely significant effects" of the Plan [104]-[105].

Secondly, the court decides that, as a matter of law, the Secretary of State was entitled to conclude that there was an insufficient causal connection between the Plan's policy for new oil and gas licensing and GHGs from end uses by consumers [106]-[115].

Under Issue 2, the court decides that the Secretary of State did not fail to assess reasonable alternatives when the option of not proceeding with further licensing rounds was considered. The 2004 Regulations were not breached. The claimant's arguments involved a misreading of the Secretary of State's reasons for concluding that there was an insufficient causal connection between end use emissions and the Plan for those emissions [126]. They were also wrong to assert that the Secretary of State had assumed that the licensing proposed in the Plan would not produce a net increase in global end use emissions or that he failed to take into account materials on the 'substitution' argument [125] and [129]. He had already decided that end use emissions would not be taken into account in the SEA, whether for the proposed licensing or any reasonable alternatives. End use emissions from the combustion of hydrocarbons are accounted for in the sector in which that takes place, not in the oil and gas sector, in line with international climate science conventions [130].

Issue 4 and 5 concerned the checkpoint. Under Issue 4 the court decides that the Secretary of State's decision to approve the final checkpoint without including test 5 was not unlawful. Under Issue 5, the court decides that the Secretary of State did not act irrationally when he applied the checkpoint tests and decided that a new licensing round would be compatible with

the UK's climate objectives. In its response to the checkpoint consultation, the Government was entitled to take the view that evaluating downstream emissions in the checkpoint was of limited benefit because: (1) UK oil and gas producers have limited control over downstream emissions of their production beyond simply reducing their output; and in any event (2) there is no suitable test for the reduction of downstream GHG emissions which could be used by a Minister in deciding whether to support a new licensing.

It was a matter of judgment for the Secretary of State as to whether he considered there to be an appropriate test or benchmark for him to use when deciding whether to support a new licensing round. His decision not to include test 5 in the checkpoint was not irrational or tainted by any error of law.

Under Issue 3, the court decides that the Secretary of State was under no obligation to publish any reasons for deciding that a new licensing round would be compatible with the final checkpoint and the UK's climate objectives. Whether there is an obligation to give reasons is highly sensitive to the specific context. The claimants did not contend that that there was any obligation to consult before making that decision. Nor did they suggest that the Secretary of State was involved in the determination of any civil rights, or that Article 6(1) of the ECHR was in some way engaged [157]. The Secretary of State was under no obligation to produce or to use a checkpoint in his decision-making. Here the use of the checkpoint did not involve any procedure which was publicly accessible or subject to the principle of open justice.

Greenpeace's grounds of challenge to the OGA's decisions (Issues 6 and 7) fell away because of the court's rejection of the claimants' case under Issues 1, 2 and 4.

Conclusion

Accordingly, the claimants' applications for judicial review are dismissed.