

Case Commentary

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Challenging policy on climate change grounds

Divisional Court split on challenge against UK Export Finance's decision to provide finance to the Mozambique LNG Project*

In *R (on the application of Friends of the Earth Limited) (‘the claimant’) v The Secretary of State for International Trade / Export Credits Guarantee Department (UK Export Finance) (‘UKEF’), Chancellor of the Exchequer (‘the defendants’) v Total E&P Mozambique Area 1 Limitada, Moz LNG Financing Company Limited (‘the interested parties’)*,¹ two judges considered a challenge by Friends of the Earth (‘FoE’) against UKEF’s decision to provide up to \$1.15 billion in export finance to a liquefied natural gas project in Mozambique (‘the Project’).

In this challenge, the court had to consider the legal implications of the Paris Climate Change Agreement 2015 (‘the Paris Agreement’) to the decision to support a fossil fuel project. In particular, the implications of Article 2.1(c) of the Paris Agreement which provides that the 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’.

FoE sought an order quashing the decision of the Secretary of State that UKEF would provide support to the Project (‘the Decision’).

The claim was made on the basis that:

- 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 Agreement, which FoE contended it was not; and/or,
- The Decision was unlawful insofar as it was reached without regard to essential relevant considerations in reaching the view that funding the Project was aligned with the United Kingdom and Mozambique’s obligations under the Paris Agreement.

Lord Justice Stuart-Smith concluded that FoE’s challenge should fail. Mrs Justice Thornton respectfully disagreed with Lord Justice Stuart-Smith’s conclusion, finding that that UKEF had erred as a matter of law in the approach to its Decision. Although the claim failed following Lord Justice Stuart-Smith’s judgment, the court granted FoE permission to appeal.

Case summary

What was the dispute about?

The Project started with the discovery of a vast quantity of natural gas off the coast of northern Mozambique in 2010. In 2019 UKEF was approached to participate in the Project, UK content for the Project having been identified.

Under statute² the Secretary of State for International Trade may make arrangements to provide financial facilities and assistance to persons carrying on business outside the United Kingdom considered conducive to supporting or developing supplies or potential supplies of goods and services to persons carrying on business inside the United Kingdom. These functions are exercised and performed through UKEF acting as an export credit agency.

Throughout 2019 and into 2020, UKEF carried out its screening process for the Project. Part of that process involved a focus on environmental and human rights and climate change considerations. It was accepted that at the date of its decisions concerning the Project, UKEF was under no free-standing public law obligation that required it to ensure that any investment support for fossil fuels affecting emissions was in line with the Paris Agreement goals and plans.³ Nevertheless, UKEF decided that climate change impacts and consideration of the Paris Agreement were considerations that ought to be taken into account along with other factors in making its decision in respect of the Project.

As part of its process, UKEF prepared a document which became known as the Climate Change Report (‘the CCR’). The exercise included consideration of the potential greenhouse gas (‘GHG’) emissions of the Project. GHG emissions are typically divided into three ‘Scopes’ or categories. The direct emissions associated with an activity (in the present case the extraction of LNG) fall within Scope 1. Scope 2 includes the indirect emissions from the generation of purchased electricity. Scope 3 are all indirect

* A shorter version of this article appears in *Energy Voice*.

1 [2022] EWHC 568 (Admin), 2022 WL 00770182 (‘the judgment’).

2 Export and Investment Guarantees Act 1991 s 1.

3 Judgment paras 47, 303.

emissions not included in Scope 2, including the use of sold products.

UKEF did not conduct an assessment to quantify total Scope 3 GHG emissions for the Project although it did take advice. UKEF submitted in the litigation that its understanding ‘was that there was no clear or comprehensive methodology that could be followed to assess Scope 3 emissions impacts’.⁴

The CCR concluded that:

The Project has a significant impact on [Mozambique’s] emissions but is still considered in alignment to Mozambique’s stated climate policies and by extension with their Paris Agreement commitments.

...

The Project’s Scope 1 and Scope 2 emissions (from the Project Facility) will significantly increase Mozambique’s GHG emissions i.e. account for up to 10% of Mozambique’s national GHG emissions but will on the other hand provide the country with increased financial resources with which to invest in renewable technology and improve climate resilience. ...

The Project’s Scope 3 emissions are caused by the end use of the LNG. Scope 3 emissions will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities ... However ... UKEF agrees with the view that gas is a transition fuel, which will remain part of the global energy mix over the life of the proposed tenor of UKEF support and beyond, and that LNG will therefore remain commercially viable. ...

... UKEF’s view that although the Project’s Scope 3 (along with its Scope 1 and 2) emissions will contribute to global GHG emissions the net effect may be a decrease in future GHG emissions provided that the Project LNG is used to replace and/or displace the use of more polluting fossil fuels.

Gas from the Project is also considered by the Government of Mozambique to be an important contributor to the energy transition of Mozambique in line with its ... Paris Agreement commitments. This aligns with the UK Government’s commitment to support developing countries to respond to the challenges and opportunities of climate change as part of its own Paris Agreement obligations.⁵

Following its processes, UKEF submitted to the Secretary of State a recommendation to underwrite financial support to the Project. UKEF’s submission recommended that

ministers ‘may wish to pay particular attention to the [CCR]’.⁶ In summarising the decision to provide support to the Project, the Chief Executive of UKEF said that he had taken into account key considerations including,

the [CCR] setting out the significant impact that the project will have due to increased GHG emissions but also taking account of gas as part of the overall energy mix for the world’s power transition for the foreseeable future and beyond the lifetime of the potential UKEF supported facility.⁷

While the Treasury noted that support for a fossil fuel project was contentious and several ministers expressed reservations, consent from the Treasury to UKEF’s recommendation was received and the Chief Executive of UKEF approved the underwriting minute on 30 June 2020 and the clearance of the necessary legal documents on 1 July 2020.

FoE issued an application for permission to apply for judicial review of the Decision in September 2020 and permission to apply was granted by Mrs Justice Thornton in April 2021.⁸

The court’s decision

The claim was for judicial review which is a mechanism to correct unlawful conduct on the part of public authorities. The judgment is clear that the merits of UKEF’s Decision were not a matter for the court, the court was concerned only with the lawfulness of the Decision.

Key to the question of lawfulness is the duty of a public body to carry out sufficient enquiry prior to making its decision. In his judgment, Lord Justice Stuart-Smith adopted the question of Lord Diplock, ‘[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?’⁹

He noted that the main point underpinning FoE’s claim was that the CCR did not adequately address and quantify the GHG emissions that would be generated by the Project and was, therefore, inadequate to the extent that UKEF’s Decision was vitiated by a failure to have proper regard to the climate change impacts of the Project.¹⁰

⁶ *ibid* para 79.

⁷ *ibid* para 82.

⁸ *R (on the application of Friends of the Earth Limited) v The Secretary of State for International Trade / Export Credit Guarantee Department (UK Export Finance) / Her Majesty’s Treasury v Total E&P Mozambique Area 1 Limitada / Moz Lngl Financing Company Limited* [2021] EWHC 2369 (Admin).

⁹ *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065.

¹⁰ Judgment para 161.

⁴ *ibid* para 68.

⁵ *ibid* para 77.

In dismissing the claim, he held the following:

- That the scope of the defendant's duty to inform themselves was defined and circumscribed by the nature of the decision they had to take;¹¹
- The Decision was not whether the Project should go ahead and, therefore, would have no material impact on emissions generated by the Project which was to be developed in any event;¹²
- The Decision was multi-faceted, requiring a range of judgments to be made across a wide spectrum of policy areas involving questions of political policy, economic and scientific judgment. The decision-makers' judgment about what information was required in order to make their decision is entitled to a wide margin of appreciation and a relatively low intensity of enquiry and review;¹³
- There was no legal or policy obligation to quantify Scope 3 emissions. Nor was quantification of Scope 3 emissions necessary for the purposes of the Decision;¹⁴
- It was implicit, obvious and accepted that the development of a major LNG field would lead to very high levels of emissions. Quantification of GHG emissions (if it could be achieved) would not advance arguments in relation to the decision that the defendants had to take. UKEF was entitled to decide that, although it chose to include consideration of climate change impacts and the Paris Agreement alongside other factors in making its decision, it was not obliged to give them greater prominence or weight or to obtain further and more technical information than it did;¹⁵
- The CCR did not set out or purport to provide a comprehensive calculation and assessment of the Project's Scope 3 emissions. It was not obliged to, not least because (a) the defendants' decision would have no impact on emissions; (b) Scope 3 emissions (and how they could be accommodated in carbon budgets) would be the responsibility of purchasing countries in the light of the use to which the LNG was put; (c) UKEF was entitled to accept advice that the variables affecting future use and generation of Scope 3 emissions would render any calculations too uncertain to be of value; and (d) the defendants could rationally take the Decision without having quantified estimates of Scope 3 emissions;¹⁶ and

- UKEF's approach to whether the Project was in alignment with Mozambique's stated climate policies involved recognition of the conflicting aims and aspirations of the Paris Agreement and an evaluative balancing exercise.¹⁷ It was entitled to form the view that the support for the Project that was in contemplation was in accordance with Mozambique's obligations under the Paris Agreement as properly understood and that view was at least tenable.¹⁸

Mrs Justice Thornton respectfully disagreed with Lord Justice Stuart-Smith's analysis.

She concluded that:

- UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions and that UKEF's judgment that a high-level qualitative review of the impact was sufficient was unreasonable;¹⁹
- There is well-established methodology for quantifying the full emissions impact of a project and that UKEF was given clear advice by its own experts that the failure to quantify the Scope 3 emissions undermined the credibility of its climate assessment;²⁰
- UKEF had set out to produce a climate impact assessment that would 'fully acknowledge', 'fully consider' and 'evidence' the climate change risks presented by the project so that they could be 'coherently presented to the ultimate decision makers, alongside the other project considerations' but that the climate assessment did not, however, include a calculation of the Scope 3 emissions;²¹
- That, accordingly, UKEF failed to make reasonable and legally adequate enquiries in relation to a key consideration in the decision making (namely climate risks);²² and
- That the failure to quantify the Scope 3 emissions, and the other flaws in the CCR meant that there was no rational basis by which to demonstrate that funding for the Project is consistent with Article 2(1)(c) of the Paris Agreement and a pathway to low greenhouse gas emissions.²³

11 *ibid* para 236.

12 *ibid*.

13 *ibid*.

14 *ibid* para 237.

15 *ibid*.

16 *ibid* para 238.

17 *ibid* para 231.

18 *ibid* para 240.

19 *ibid* para 331.

20 *ibid* para 333.

21 *ibid* paras 332 and 333.

22 *ibid* para 333.

23 *ibid* para 335.

Comment

This is not the first time that decisions by public authorities have been challenged through judicial review on climate grounds, for example the recent challenge to the Oil and Gas Authority's Strategy was dismissed in January of this year.²⁴ However, it is the first challenge to be made on the basis of a public authority's alleged failure to properly consider the implications of the Paris Agreement and, therefore, has potential global implication particularly for export credit agencies. Given the split decision of the court and the forthcoming appeal, the matter will no doubt be followed closely by participants in the energy sector for guidance as to the legal implications of the Paris Agreement on fossil fuel projects.

²⁴ *Cox & Others, R (on the application of) v The Oil and Gas Authority & Others* [2022] EWHC 75 (Admin).