No. CO/3206/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2369 (Admin)

Royal Courts of Justice

Thursday, 22 April 2021

Before:

THE HONOURABLE MRS JUSTICE THORNTON DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
FRIENDS OF THE EARTH LIMITED — Claimant

- and -

(1) SECRETARY OF STATE FOR INTERNATIONAL TRADE
(2) EXPORT CREDIT DEPARTMENT (UK EXPORT FINANCE)
(3) HER MAJESTY'S TREASURY — Respondents

- and -

(1) TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA
(2) MOZ LNGI FINANCING COMPANY LTD — Interested Parties

MS J. SIMOR QC, MS K. HOOK and MS A. DAVIES (instructed by Leigh Day Solicitors) appeared on behalf of the Claimant.

MR R. HONEY QC and MR T. CLEAVER (instructed by the Government Legal Department) appeared on behalf of the Defendants.

MR A. HEPPINSTALL QC (instructed by Latham & Watkins) appeared on behalf of the Interested Parties.

J U D G M E N T

MRS JUSTICE THORNTON:

1 This is a renewed application for permission to apply for judicial review, permission having been refused on the papers by Lang J. The Claimant seeks to challenge the decisions of the First and Second Defendants taken under the Export and Investment Guarantees Act 1991, that UK Export Finance would provide up to $1.15 billion export finance to the second interested party as part of the financing for the development of offshore deepwater gas production facilities in North Mozambique. The decision is said to amount to one of the largest single financing packages ever offered by a UK credit agency to a foreign fossil fuel project.

2 The two grounds advanced before me are:

i. Ground 1 is that, in exercising their power under s.1 and s.4 of the Export and Investment Guarantees Act 1991 to grant funding for the project, the Defendants proceeded on the legally and/or factually erroneous basis that the project was consistent with the United Kingdom's commitments under the Paris Agreement and/or assisted Mozambique to achieve its commitments under the Paris Agreement. Further, or in the alternative, the Defendants failed to ask themselves the right questions and/or failed to carry out essential analysis in order properly to determine whether the decision aligned with the United Kingdom and Mozambique's commitments under the Paris Agreement. I refer to this ground as "the climate ground".

ii. Ground 2 is that the decision was unreasonable, having regard to its implications for biodiversity and human rights. I refer to this as "the biodiversity and human rights ground".

3 My decision is that I grant permission on Ground 1, the climate ground, but I refuse permission on Ground 2, the biodiversity and human rights ground. My reasons, in brief, are as follows.

Ground 1: the climate ground

4 Amidst the technical complexity of the claim, two overarching issues arise for the court to determine: firstly, the court's approach to the Paris Agreement, an international agreement; secondly, the extent and contours of the court's deference to judgments made during the decision making, as, for example, in the judgment that the project will give Mozambique a bridge to a low-carbon economy or the decision not to quantify Scope 3 emissions. As to the first issue, the Defendants contend that the Paris Agreement is a multifaceted, high-level agreement which simply does not lend itself to supplying a body of rules to guide decision making on individual projects or the sort of numerical emissions analysis relied on by the claimant. The Claimant contends otherwise.

5 In addition, the parties disagree as to the extent to which the court may decide this issue for itself. Both sides rely on different case law, including *R (on the application of Corner House Research & Ors) v Director of The Serious Fraud Office* [2008] UKHL 60 (30 July 2008), *R v Secretary of State for the Home Department, Ex Parte Launder* [1997] UKHL 20 (21 May 1997), *R v Director of Public Prosecutions, Ex Parte Kebeline & Ors* [1999] UKHL 43 (28 October 1999) and *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 (18 October 2017). Having listened to the submissions on the case law, I am satisfied that there is an arguable issue in this respect. In turn, the outcome of this legal analysis may depend on greater clarity as to the extent to

which the Defendants considered the award of finance to be contingent on compliance with the Paris Agreement, an issue of evidence that emerged during the hearing.

6 As to the second overarching issue, the extent and contours of the court's deference to judgments made during the decision making, the Defendants make a number of pertinent points to the effect that the decision is typical of the technical predictive assessments and multifaceted political and expert-based judgments as to which a judicial review court must afford appropriate deference. But the rhetorical question that then arises is, "What does appropriate deference look like in a case of this nature?" In part, this may depend on the outcome of the first issue – the proper approach to the Paris Agreement – however, at present, the parties appear to position themselves at the opposite ends of the deference spectrum. The Claimant appears to expect the court to simply roll up its sleeves and get on with the job of marking UK Export Finance's homework with apparently little deference. Conversely, the Defendants appear to suggest that the court take the Climate Change Review report largely at face value.

7 The court will need to fashion a roadmap for consideration of the complex and technical issues arising, given the particular nature of this case. At permission stage, however, the question for me is whether the defendants have landed a knockout blow, and I am not persuaded that they have. Accordingly, permission is granted on Ground 1.

Ground 2: the biodiversity and human rights ground

8 It is well established that the threshold for an irrationality challenge is a high one. This ground was not pursued by Ms Simor QC with any particular vigour before me. Mr Honey QC took me through the ESHR report, which he explained had been compiled with the assistance of independent consultants following visits to the area and to stakeholders by the UK Export Finance Environmental and Social Risk Management Team. He pointed me to a lengthy list of key documents reviewed during the production of the report and explained that relevant policy allows for support for projects that are not currently in line with relevant standards on the basis of a judgment about the prospects of meeting standards. On this basis, I am not persuaded that Ground 2 is arguable and permission is refused on this ground.

L A T E R

9 The Claimant seeks costs protection on the basis that the claim is an Aarhus Convention claim. The Defendants dispute this on the basis, firstly, that the claim is not directed at provisions of national law relating to the environment but at international law – the Paris Agreement – and, secondly, the decision is a finance decision. To suggest, as the defendants do, that the claim is directed at international law is to subtly mischaracterise it. The issue before the court is not whether the defendant should have acted compatibly with international law in circumstances where they chose not to do so, but whether the defendants, having apparently decided to comply with the commitments made by the UK in signing and ratifying the Paris Agreement, properly directed themselves to the law, including whether they took account of essential relevant considerations and did not proceed on the basis of errors of fact.

10 In *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539 (27 November 2014), Sullivan LJ rejected an argument that Aarhus protection should not extend to a claim based on planning policy because the claimant was not challenging an act or omission which, in the words of Art.9(3) of the Convention, "contravened a provision of national law relating to the environment". He did so on the basis that signatories to the

Aarhus Convention had agreed to give effect to Art.9 within the framework of national legislation and national legislation may address the issue of environmental protection in different ways. Relevant in the case of *Venn*, the UK planning system has made provisions for environmental protection in planning policies which decision-makers are required by statute to take account of. It would, he said:

> *"... deprive Article 9(3) of much of its force if a distinction was drawn between the policies which contain the environmental protection and the law which does not relate to the environment."*

11 Whilst the legal structure in the present case is obviously different, in my view, the broad point of principle in Sullivan LJ's analysis in *Venn* that environmental protection may be addressed in different ways in national legislation applies here. In the present case, the first defendant has a broad statutory power under the Export and Investment Guarantees Act to make funding decisions. Its powers are exercised and performed through UK Export Finance. Section 13 of the Act provides for an Export Guarantees Advisory Council, the function of which, I am told, is to advise the Secretary of State in respect of any matter relating to the exercise of her functions under the Act. I am also told that that body was specifically requested by the defendant to provide specialised advice in relation to climate change. Before providing funding, UK Export Finance assesses risks and impacts by way of an Environmental, Social and Human Rights Review and Climate Change Review. It has a policy on environmental due diligence and monitoring which states that it will take account of "relevant government policies" in relation to environmental impacts and "comply with relevant international agreements".

12 In light of these arrangements, to draw a distinction, as the Defendants seek to do, between the Act – which does not relate to the environment – and the arrangements in place for UK Export Finance funding – which do relate to environmental protection – would, as in the *Venn* case, have the effect of depriving Art.9(3) of its broad effect, which is well understood; see to this effect the Implementation Guide. I note the recent comment by the CJEU in the *ClientEarth v EIB* (Environment - Financing of a biomass power generation plant in Galicia - Judgment) [2021] EUECJ T-9/19 (27 January 2021) case that:

> *"... it is clear from the wording and scheme of Articles 9(3) and (4) ... that all acts of public authorities which run counter to the provisions of environmental law should be open to challenge. Thus, access to justice in environmental matters should not be limited solely to acts of public authorities that have as their formal legal basis a provision of environmental law."*

13 This decision is not binding on me, and I take note of it only to the effect that it is evidence of the wider view of the broad effect of Art.9(3) set out in the Implementation Guide. It is, after all – and by way of cross-check – hard to envisage a more quintessential environmental claim than this claim. In any event, if I am wrong on this, I would grant a costs capping order under s.88 of the Criminal Justice and Courts Act 2015.

14 The claim raises issues as to the proper approach of the UK to the Paris Agreement in relation to the provision of financing for fossil fuel energy projects abroad. Whilst the number of people directly affected in the present case may not be large, the issues raised are of wider national and international significance and may arise in future finance decisions. I am told that in all likelihood the Claimant will withdraw if the costs cap is not granted. The only reason that the Claimant is said not to be more definitive about withdrawal is that there is always a possibility that other funding could be secured. I consider it would be

reasonable for the Claimant to withdraw without costs protection. It has already taken a significant amount of work and presumably costs to get to this point in the claim.

15 As for CPR compliance, two matters are raised by the Defendants in relation to the likely aggregate funding that is to be provided in the future and, secondly, my attention is drawn to a fundraising effort in a recent magazine. Having looked at this carefully and listened carefully to the submissions, I am not persuaded of any material non-compliance with the CPR.

16 Assuming for present purposes I am correct in my assessment that this is an Aarhus Convention claim, the Defendants apply to vary the costs cap from £10,000 to £35,000 pursuant to CPR 45.44(1). They refer to the almost £60,000 – although it is said by the Claimant now to be £50,000 – raised by the Claimant for the litigation and the reserves of £1.86 million and expected income of £10.5 million in 2020/2021. However, these finances must be put in context. In her witness statement on behalf of the claimant, Ms Bowden explains that the Claimant's reserves are at only £1.86 million, and it is therefore at the lowest level of its reserves policy threshold. Reserves are vital to ensure long-term sustainability of the organisation, especially in times of uncertainty and change.

17 She goes on to say that COVID-19 has brought unprecedented levels of uncertainty and concern to the economy.

> *"For the next financial year, we face a projected income fall of 10 to 20 per cent. This projected loss in income equates to approximately £1.7 million from last year and has made balancing the budget particular challenging this financial year. Accordingly, we are taking significant measures to reduce staff and operational costs. We have reduced our operating budgets by £1 million from the 2019/2020 financial year and reduced our staff costs by £0.7 million. Staff are now operating on a 20 per cent reduction in working hours with reduced salaries until the end of January 2021."*

18 She further explains that:

> *"We may need to use the remainder of our reserves to maintain future financial stability, given the exceptional financial circumstances created by the COVID-19 pandemic. The true impact of the organisation's financial situation is still unknown and may depend heavily on the decisions of government around furlough, economic conditions affecting fundraising income and other financial support policies. We need to be financially prudent and cautious and invest wisely to ensure organisational resilience."*

19 There is no challenge to Ms Bowden's analysis of the impact of COVID on the Claimant's organisation. Accordingly, I consider that I cannot be satisfied as I am required to be by CPR 45.44(2)(a) that varying the cap would not make the costs of proceedings prohibitively expensive for the Claimant. I also bear in mind as I am required to do so by CPR 45.44(3) the disparity of resources between the Claimant, an environmental NGO, and the Defendants, as well as the significance of the environmental issues in play. I note that there is no challenge to Ms Bowden's evidence that the court has previously considered £10,000 to be an appropriate cap in other cases on the basis of similar financial information.

20 Accordingly, the claimant is entitled to Aarhus costs protection or, alternatively, under s.88 of the Criminal Justice and Courts Act 2015, and I decline to vary the usual costs caps for Aarhus Convention claims.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge