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CASE AND COMMENT

DEFERENCE AND DUALISM ARE NOT FRIENDS OF THE EARTH

FRIENDS of the Earth brought an action for judicial review against the decision of the Secretary of State for Trade and Industry to approve a $1.15 billion investment from UK Export Finance (UKEF) in a liquefied natural gas project in Mozambique (*R. (Friends of the Earth Ltd.) v The Secretary of State for International Trade/UK Export Finance* [2023] EWCA Civ 14, [2023] 1 W.L.R. 2293). The investment was conditional on the creation of 2,000 UK jobs related to the project. Friends of the Earth argued that the investment breached the Paris Agreement of 12 December 2015 and that the Secretary of State had failed to comply with the duty, established in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] A.C. 1014 (*Tameside*), to carry out a sufficient inquiry before taking such a decision. The claim failed on both counts: the Government need only form a tenable view of what the Paris Agreement requires, and the *Tameside* duty was complied with. However, the conclusions of the court raise questions about the proper constitutional role of the courts, appearing to defer too greatly to the executive.

Friends of the Earth argued that once a question concerning an unincorporated treaty is justiciable, then an English court must determine the correctness of a government claim that it is acting compatibly with that treaty; and there was no rational basis for concluding that the project aligned with the UK's obligations under the unincorporated Paris Agreement as set out in UKEF's final Climate Change Report. They drew on English precedent (*R v. Secretary of State for the Home Department, ex p. Launder* [1997] 1 W.L.R. 839, 866–68 and *R v Director of Public Prosecutios, ex p. Kebilene* [2000] 2 A.C. 326, 341–42, 367, 375–76), and what they considered to be a mandatory requirement in Article 31(1) of the Vienna Convention on the Law of

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Treaties (VCLT) to provide a good faith interpretation of the treaty (at [48]). The respondents contended that courts were limited to reviewing the tenability of the decision maker's view of the UK's obligations under the Agreement and the compatibility of its funding decision with that Agreement: more intensive scrutiny would undermine the principle of dualism.

Although the Court of Appeal found the applicant's arguments to be "compelling in one sense" (but without explaining precisely why), it concluded that they nevertheless "ignore[d] constitutional norms and [sought] to turn a series of exceptions into a general rule" (at [49]). For the court, this was not a question of justiciability as such; but rather, a straightforward application of the constitutional principle of dualism: "the court cannot and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance" (at [40]). The decision whether funding the project was consistent with the UK's obligations under the Paris Agreement must therefore be judged by whether the decision maker's view of what the treaty required was tenable. There were "huge complexities" in ascertaining whether the project would increase carbon dioxide emissions and on how to balance its effect on the environment with "efforts to eradicate poverty" (art. 2(1)), and the respondents "were being advised that the project could, in some scenarios, align with the UK's obligations under the Paris Agreement" (at [56]). This led the court to conclude that not only was the decision maker's interpretation of what the Agreement required tenable, but also the decision itself was not irrational.

On the "correctness" vs "tenability" approaches to reviewing government interpretations of unincorporated treaties, the court noted that the precedents on which Friends of the Earth relied were treated in *R (Corner House Research) v. Serious Fraud Office* [2009] 1 A.C. 756 as exceptions to the general rule as opposed to being part of the rule itself. Thus, in exceptional cases, courts may interpret unincorporated international treaties when there was no live dispute between the parties (*Launder*) and because there was a body of international jurisprudence that could be applied by the court (*Kebilene*). Since the respondents considered compliance with the Paris Agreement as one of several factors and there was no guidance on how the Agreement should be interpreted, the present case was not the same. As for the VCLT, this provides rules on treaty interpretation in general terms; it does not answer the substantive question of *what interpretation* must be given to the treaty terms in question (at [50]). Finally, it would be "problematic and unworkable" for a court to construe unincorporated treaties every time the Government referred to them (at [40]). On the contrary, it must be open to the executive to say, without challenge, that it wants to comply with a treaty where there are different views on what it might mean precisely and that

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it "thinks on balance and in good faith that a particular decision is compliant, even if it later changes its policy or is shown to have been wrong in the view that it took" (at [50]).

In one sense, the court's reasoning is uncontroversial and follows logically from the principle of dualism: if a treaty is not part of English law, then it cannot be relied upon to review the correctness of government decision-making. Government decision-making should therefore be assessed by reference to English law, which is the preserve of Parliament and the courts, and to hold otherwise would undermine parliamentary sovereignty and the constitutional role of courts. At the same time, it is difficult to escape the sense that the principle of dualism plays a crucial role in frustrating government accountability and undermining separation of powers and the rule of law (see generally D. Dyzenhaus, J. Bomhoff and T. Poole, *The Double-facing Constitution* (Cambridge 2020)). For example, it is one thing to defer to the executive on how it achieves climate change targets, but quite another to defer on the question of what those targets are in a legal instrument. Moreover, although the UK's obligations under the Paris Agreement were one of several factors taken into account by the decision maker, they were clearly important and not immaterial.

It may be accepted that the executive has the constitutional responsibility to conduct international relations, but in this case the court is being asked to interpret a *legal* instrument. International law is treated as law in English courts, and courts are presumed to know its content (a decision of a domestic court also counts as subsequent practice for the interpretation of the treaty: VCLT, art. 31(3)(b)). The difficulty is how to give the executive space to make decisions involving multiple factors and complex, perhaps unpredictable, consequences, while ensuring that it remains accountable for carrying out the UK's international legal obligations. None of this is to say that courts must always find that incorrect interpretations of unincorporated treaties by decision-makers will be irrational, but only that the court must be able to offer an interpretation of a treaty when it can do so (i.e. it is justiciable) and where compliance with such treaty obligations was a key part of the decision maker's motivation. As Lord Sumption stated in *Benkharbouche*, "[i]f it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer" (*Benkharbouche v Embassy of the Republic of Sudan* [2017] 3 W.L.R. 977, at [35]).

In *Friends of the Earth*, the apparent reticence of the court to provide an interpretation is made even more striking because it does say what Article 2(1)(c) of the Agreement does *not* require the UK to do. It is also unclear that it is even tenable to suggest that the project will not breach Scope 3 emission targets; it is only contestable as to whether it might reduce Scope 1 and 2 emissions. Admittedly, in this respect, the court was stuck between a rock

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and a hard place: it would be accused of circumventing dualism by offering an interpretation and it is criticised for not holding the Government to account for not so doing. Yet it is also hard to see that it will always be necessary to defer to the executive on the meaning of a legal instrument because it is international in nature, especially when domestic courts may be the only institutions realistically able to hold governments to account for compliance with their international legal obligations, and when the issue at hand is as compelling as climate change. Against this, is a perhaps uncomfortable truth that, while in formal terms England and Wales take a dualist approach to the reception of international law, the reality is that monism and dualism are opposite ends of a spectrum, and international law and English law are enmeshed in ways that are sometimes elided by a rigid focus on formal doctrines.

Turning to the *Tameside* duty, it is well established that a sufficient inquiry must be undertaken prior to making a decision. What is less settled is whether the way in which the *Wednesbury* (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*) [1948] 1 K.B. 223) test determines whether the *Tameside* duty has been fulfilled varies in intensity as it does when the rationality of the outcome of a decision is assessed. The Divisional Court split on this issue. Stuart-Smith L.J. did not recognise this distinction. Thornton J. disagreed, stating that "the intensity of the review and the breadth of the margin of discretion are conceptually distinct. The court may closely scrutinise the reasoning for a decision yet still consider it is proper to accord the decision maker a broad margin of discretion". In other words, the factors that influence granting a wide margin of discretion when assessing substantive outcomes do not also mean that a wide margin of appreciation should be granted when assessing the *Tameside* duty.

The Court of Appeal concluded that the *Tameside* duty had been fulfilled as it was long known that the Scope 3 emissions exceeded Scope 1 and 2 emissions, and that the project would go ahead even without UK investment. In these circumstances, the failure to carry out a more detailed assessment of Scope 3 emissions was not unreasonable. In doing so, it missed the opportunity to decide whether the factors which determine substantive deference also determine deference owed when determining the *Tameside* duty. The court merely mentioned that "[t]here is a wider margin of appreciation in decision-making involving the application of scientific knowledge or expertise", relying on *R. (Mott) v Environmental Agency* [2016] EWCA Civ 564 (upheld in the Supreme Court: [2018] UKSC 10).

With respect, this is an over-generalisation of the decision of the Court of Appeal in *Mott*. It also ignores the statements of Beatson L.J. that, in cases involving expertise and predictive knowledge, courts need to be provided with sufficient explanations from experts to determine whether a decision includes an error of law or an abuse of discretion. If courts need to have

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sufficient evidence when applying *Wednesbury*, surely decision-makers also need to carry out sufficient inquiries to ensure their decisions are rational? This implies that the *Tameside* duty applies more, and not less, stringently when applied to decisions that are more political than technical. As with the court's approach to the interpretation of treaties, the interpretation of the *Tameside* duty appears to be too deferential, especially in the context of ensuring the right decisions are made when it comes to issues as important as climate change.

ANDREW SANGER AND ALISON L. YOUNG

Address for Correspondence: Corpus Christi College, Cambridge, CB2 1RH, UK. Email: as662@cam.ac.uk
Address for Correspondence:Robinson College, Cambridge, CB3 9AN, UK. Email: aly23@cam.ac.uk

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