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ADMINISTRATIVE LAW PRINCIPLES IN CONTEXT: ENVIRONMENTAL ASSESSMENT GOES UP IN FLAMES

A MASSIVE reduction in the combustion of fossil fuels will be required if the UK is to meet its target of "net zero" carbon emissions by 2050. At a global scale, reliance on fossil fuels will need to be greatly reduced if irreversible impacts on the environment are to be avoided. It is against this background that the Supreme Court has had to answer the following question: in circumstances where there is an obligation to consider the environmental effects of a development proposal for the extraction of fossil fuels, must the climate impacts of the eventual combustion of those fossil fuels be assessed?

In the challenge culminating in *R. (Finch) v Surrey County Council* [2024] UKSC 20, [2024] P.T.S.R. 988, the High Court had initially decided that a local planning authority was prohibited from considering such impacts, finding that they were legally irrelevant: [2020] EWHC (Admin) 3566, [2021] P.T.S.R. 1160. The Court of Appeal subsequently held that a planning decision maker could decide, in an exercise of its judgment, that the carbon emissions of burning fossil fuels were an effect of their extraction, but it was not obliged to do so: [2022] EWCA Civ 187, [2022] P.T.S.R. 958. Providing a yet different answer, by a bare majority the Supreme Court held that Surrey County Council had indeed been required to consider such impacts. The grant of planning permission for the extraction of hydrocarbons, made without assessing such impacts, was therefore unlawful. Not only is the Supreme Court's decision one of the most significant on domestic environmental law in recent years; it also provides food for thought regarding core questions of administrative law.

Horse Hill Developments Ltd. applied to the Council for planning permission to extract hydrocarbons at a site. The estimated potential output was approximately 3.3 million tonnes of crude oil (at [31]). This proposed development fell within the scope of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, such that an assessment of the environmental effects of the development was required before planning permission could be granted.

The Council decided that it was not necessary for the effects of the eventual burning of the oil extracted from the site to be considered in the environmental assessment. This was despite the fact that it was inevitable that the oil extracted would be burned and give rise to greenhouse gas emissions (at [45]).

Lord Leggatt, with whom Lord Kitchin and Lady Rose agreed, held that the decision was based on a misinterpretation of the environmental impact assessment regime. Because the 2017 Regulations were intended to implement the European Directive 2011/92/EU of the European

Parliament and of the Council, the court's primary focus was on the interpretation of the directive (at [11]).

However, before turning to the meaning of the EU environmental legislation, Lord Leggatt had to address a question of administrative law: what was the appropriate role for a court in these circumstances? The phrase which fell for scrutiny was "the effects of the project", and the specific issue was whether the climate change impacts of the inevitable combustion of the oil were indeed such effects. The Supreme Court had to decide whether this was a question of law for the court, or whether it was a question of judgment for the decision maker, subject to only limited public law controls. The scope of the court's task in this regard has proved a tricky and contentious one for many years.

Lord Leggatt noted that "[i]nterpreting the law, by establishing the meaning and legal effect of legislation, is the court's role" (at [55]). This should be uncontroversial, and echoes Lord Reid's comments in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, 1030 that "construction is always a matter of law for the court". However, difficulties arise in terms of determining when the court's role of interpreting ends, and the decision maker's task begins. Lord Leggatt suggests that a question of interpretation is one which identifies "the criteria to be applied in deciding whether the facts of any individual case fall within its scope" (at [56]). However, this will require determination as to whether the criteria lead to only one answer. If so, the court will decide whether the decision maker has reached that correct answer. If the criteria are vague, or imprecise, such that different answers might be reached, then the court will apply a reasonableness standard. In drawing this distinction, Lord Leggatt drew upon the reasoning of Lord Mustill in *R. v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd.* [1993] 1 W.L.R. 23.

Lord Leggatt proposed an approach to deciding whether a legislative phrase is a vague one, such that the court will not substitute its judgment, but rather apply a reasonableness test. He held that a test will be vague for these purposes, if "there will be cases in which the question whether the term applies has no answer on which reasonable people who understand the meaning of the term could all be expected to agree". Although not cited, this is essentially the approach which has previously been proposed by Timothy Endicott ((1998) 114 L.Q.R. 292). According to Lord Leggatt, a legislative test which requires the exercise of "value judgment" will fall within this category (at [58]).

In considering whether the meaning of "the effects of a project" had only one right answer, Lord Leggatt took into account the consequences of a finding that it did not, including the importance of environmental information in debate concerning the climate, and the significance of consistency between different planning authorities as to what impacts to

consider (at [60]). Therefore, whilst the approach which he proposes would seem to be value-neutral, it is doubtful whether this is truly the case. This should perhaps not surprise us: it is over a decade since Lord Carnwath accepted that pragmatic concerns may affect whether a point constitutes a question of law or not (*R. (Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 A.C. 48).

Such pragmatism would seem to be warranted, at least in the particular context of *Finch*. A court cannot be expected to be blind to the background of the decision it is taking. There is no longer a reasonable basis for doubting that the world is in a situation of climate crisis, and that substantial changes to human behaviour will be required in order to avoid the worst of the effects. This is not something which the court should have to ignore when deciding what are the "effects" of a project within the environmental impact assessment regime. It is also worth noting the consequences of something constituting such an effect. The environmental impact assessment regime requires certain information to be taken into account by decision-makers. Nothing more: an application which is subject to such assessment does not need to be turned down on the basis of what an assessment says. The provisions seek to ensure that a decision is taken on a properly-informed basis (at [3]). The burden upon applicants having to provide this information would seem to be fairly modest: indeed, the Council had been able to estimate the amount of CO_2 emissions which would result from the proposed extraction (at some 10.6 million tonnes) (at [81]).

The majority's analysis was based not solely on pragmatic views regarding the potential advantages of making the impacts of the eventual burning of the hydrocarbons part of the environmental information. As would be expected, the Supreme Court engaged in a detailed analysis of the European legislation. At this stage, it is worth noting Lord Sales' dissent. He agreed with the decision of the High Court, to the effect that the local planning authority was prohibited from taking into account the climate impacts of combustion of the oil proposed to be extracted. Lord Sales reached this conclusion partly on the basis of the wording and legislative history of the Directive. But he also put considerable weight on the fact that the environmental information would be taken into account by a local planning authority (at [253]). He considered that it would be inappropriate for a local, rather than national, body to reach decisions about responsibility for emissions resulting from the combustion of oil, which may take place abroad. This reasoning is doubtful, once we consider that the planning legislation entrusts such decisions to local planning authorities in the first instance, but the Secretary of State can call in the decision to be made by herself, if she thinks appropriate (Town and Country Planning Act 1990, s. 77).

As an aspect of environmental law, the decision in *Finch* means that decision-makers considering applications for the extraction of fossil fuels will be better informed about the consequences of doing so. The decision of the majority to this effect should be welcomed. In relation to administrative law, the decision reminds us that courts are not going to shut their eyes to the context, when considering whether to intervene. They are right not to do so.

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