

MEMORANDUM
R (Finch) v Surrey County Council & others [2024] UKSC 20

Key

- Numbers in square brackets and in bold at references to the paragraphs of the judgment
- Where text is in speech marks, then that is a direct quote from the judgment

Result

The council's decision to grant planning permission for this project to extract and produce petroleum was **unlawful**, because: (i) the Environmental Impact Assessment (EIA) for the project failed to assess the effect on climate of the combustion of the oil to be produced; and (ii) the reasons for failing to undertake that assessment were flawed **[174]**.

Importance of public consultation

Key to the Court's finding was that, for the EIA regime to function effectively, and for decisions to approve projects with likely significant environmental effects to be made lawfully, those decisions must be subject to "public debate" and made with "full knowledge of the environmental cost" **[3]**.

In that vein, the Court held that public participation is essential to increasing the democratic legitimacy of decisions which effect the environment and contributing to public awareness of environmental issues. Doing so is likely to lead to decisions that give greater priority to the environment. After all, "you can only care about what you know about" **[21]**.

The public has the right to know whether there are any measures which could be taken to reduce the environmental effects of a project, and by extension this needs to be taken into account by the decision-maker; otherwise, the "EIA process would not fulfil its essential purpose of ensuring that decisions likely to affect the environment are made on the basis of full information if the fact that significant adverse effects are unavoidable were treated as a reason not to identify and assess them" **[105]**. That right is important to enable the public to understand the likelihood of measures capable of avoiding or reducing an environmental impact, and – crucially – to be able to comment on that **[109]**.

Linked to this, the Court's view was that, regardless of the potential scale of an environmental impact or how it might influence a decision to grant planning permission or not, "it remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences" **[152]**.

That is particularly the case for decisions relating to climate change, because they will often be made within a political arena with competing economic, social and environmental considerations. However, quite apart from reducing the need for "comprehensive and high-quality information about the likely significant environmental effects of a project", this political context enhances the importance of such information. This did not happen in this present case; the climate change effect should have been properly assessed, so that public debate could take place on an informed basis, but it was not. That was a key democratic function of the EIA process, but it was not fulfilled in this case **[153-154]**.

The Court's role

It is the Court's role to interpret the law, by establishing the meaning and legal effect of legislation; if a decision-maker bases a decision on an incorrect understanding of the law, then they will have made an error of law, and the decision will be unlawful **[55]**.

Defining the effect of a project

Crucially, the Court's logic was that, in these circumstances, there must be only a single answer as to whether the climate effect of the combustion of the oil to be produced was an effect of the project; otherwise, the legal regime would operate in a way that would generate inconsistent results in respect of whether direct or indirect greenhouse gas (GHG) emissions should be included in an EIA **[59-60]**.

In this case, there was no uncertainty that the extracted oil would be combusted and release GHG emissions into the atmosphere; "extracting the oil from the ground guarantees that it will be refined and burnt as fuel" **[79-80]**. The refining of the oil was a "process that it inevitably undergoes on the pathway from extraction to combustion" **[123]**. Therefore, the intermediate process of refinery did not alter the intended use of the oil and was not a valid reason to exclude assessment of the GHG impact of the combustion emissions **[118, 126]**. Even if it was, there was no guarantee that the refining process would be subject to its own EIA **[125]**.

By analogy, coal does not require a refining process before it is burnt as fuel, so it would be irrational to distinguish between combustion emissions from different fossil fuels; they must be treated the same **[124]**.

The Court concluded that the combustion emissions of the oil produced by the project is a quintessential indirect effect of the project, much like the extracting of materials to build a new road, because they will inevitably occur at sources beyond the well site **[90]** and that fact was not a valid reason to exclude assessment of those emissions **[102]**. Indeed, applying something akin to a 'polluter pays' principle, the Court concluded that those GHG emissions are actually in the control of the developer, because "if no oil is extracted, no combustion emissions will occur" **[103]**.

The council's errors in its decision-making process

The council's fundamental mistake was to accept an environmental assessment from the developer which contained no information about the global warming potential of the oil that would be produced by the proposed well site **[34]**. As a result, "the scope of the assessment self-evidently did not comply with the legal requirement to assess both direct and indirect effects of the proposed development" **[101]**.

There was "no basis on which the council could reasonably decide that it was unnecessary to assess the combustion emissions" **[139]**.

Other control regimes

Even if it can be assumed that other control regimes might reduce or even avoid an environmental impact, the Court found that a planning authority is nonetheless required to identify and assess that impact; the alternative would mean the planning system would be operating under a legal misapprehension **[108]**.

It is wrong to limit the requirements of the EIA regime by reference to UK policy and legislation designed to control GHG emissions and regulate petroleum production; such matters are relevant to the merits of a particular decision to approve development, but are "irrelevant to the proper interpretation of the EIA Directive" **[151]**.

At any rate, in this case, it is clear that – if the project proceeds – those combustion emissions would be unavoidable, and so there is no pollution control regime that could be relied on to prevent or reduce them **[110]**.

Contextualising the climate impact

Comparing the direct GHG emissions of a project (i.e. operational emissions or scope 1 emissions) against the UK's carbon budget, in order to say those emissions would have a "negligible" climate impact, is a misleading exercise, because it is only by including the combustion emissions (i.e. downstream emissions or scope 3) that the true climate impact of a project can be assessed **[82]**.

Local v. National

It is wrong for the planning system to operate in a way that would mean that a local planning authority could ignore the adverse effects on climate of a proposed project; just as beneficial indirect effects should be taken into account (e.g. 'green' energy) so should the adverse effects be a material planning consideration. This principle is not changed by the planning authority simultaneously having regard to national policy **[150]**.

Local v. Global

The Court correctly found that "there is no principle that, if environmental harm is exported, it may be ignored" **[93]** and that it is wrong to treat the impact on climate from GHG emissions as local to the places where the combustion occurs **[96]**. By reference to IPCC scientific evidence, the Court remarked that "Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt", so that "wherever GHG emissions occur, they contribute to global warming" **[97]**. The Court's view was that "the effect of the combustion emissions on climate does not depend on where they occur" and so it was not a valid excuse for the developer to say that it did not know where in the world the GHG emissions would occur when refusing to assess their environmental impact **[114]**.

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