Case No: AC-2023-LON-001579
CO/1863/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Neutral Citation Number: [2024] EWHC 1943 (Admin)

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 28 June 2024

BEFORE:

MRS JUSTICE LANG DBE

BETWEEN:

R(GLOBAL FEEDBACK LIMITED)

Claimant

- and -

(1) HIS MAJESTY'S TREASURY
(2) SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendants

MS V WAKEFIELD KC AND SARAH LOVE (instructed by **Leigh Day)** appeared on behalf of the Claimant
MR R HOWELL (instructed by **Government Legal Department)** appeared on behalf of the Defendants

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MRS JUSTICE LANG:

1. The claimant applies for a costs limit order under CPR 46.24 which limits the cost recoverable between parties in Aarhus convention claim. An Aarhus convention claim is defined by Rule 46.24(2)(a) as a claim "brought by one or more members of the public by judicial review or review under statute, which challenges the legality of any decision, act or remission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) or 9(3) of the ….Aarhus Convention".

2. So far as material, Article 9.3 of the Convention provides,

> "… each Party shall ensure that where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities, which contravene provisions of its national law relating to the environment."

3. The Convention's implementation guide is a relevant aid to construction: see *Venn v . Secretary of State Communities and Local Government and Others* [2015] 1 WLR 2328, at [10] – [11].

4. The Implementation Guide considers what is meant by the expression "national law relating to the environment", as follows:

> "National laws relating to the environment are neither limited to the information or public participation rights guaranteed by the convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question arelanningg laws, taxation laws, or maritime laws."

5. In *Venn*, the Court of Appeal decided that the broad description of "environmental information" in Article 2(3) was an indication of the intended ambit of the term "environmental" as it appears throughout the Convention (at [10]). In support of that proposition, the Court relied on the page 40 of the Implementation Guide, which provides:

"The clear intention of the drafters … was to craft a definition (of environmental information) that would be as broad in scope as possible, the fact that should be taken into account in its interpretation."

6. In *R Lewis v Welsh Ministers* [2022] EWHC 450 (Admin), it was asserted by the interested party that the claim was not an Aarhus convention claim because it related to a funding decision (at [20]). Acknowledging the objective of the Convention and that broad meaning, "to be afforded to environmental matters" (at [6], [24]) the High Court held that the claim was an Aarhus Convention claim on the basis that one of the grounds was that the defendant had breached a duty under the Environment (Wales) Act 2016 (at [33], [36]). It was the nature of the claim that mattered, not the nature of the impugned decision (at [29] – [32]). The Court held (at [34]) that if the Convention is found to apply to any single ground of challenge, the cost limits apply to the entire claim.

7. Even where a provision of law has a connection with the environment, it must be sufficiently close to come with Article 9(3). In *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, the Court of Appeal considered whether a complaint in private nuisance of noise and dust from an open cast coal mine fell within Article 9(3). The Court of Appeal recognised that private nuisance form part of the UK's environmental law, but held that a complaint in nuisance only falls within Article 9(3) where it has "a close link with a particular environmental matter regulated by the Convention" and the claim would "confer significant environmental benefits" (at [17] – [22]).

8. The Aarhus Compliance Committee in ACC.C.2013/85 & 86 (United Kingdom) 29 November 2016, when considering the *Austin* case, found that the law on private nuisance is "part of the law relating to the environment" of the UK, noting that it "regularly concerns various components of the environment and aims to protect them" (at [72]). It nevertheless rejected a submission that private nuisance claims as a clause fell within Article 9(3). In drawing the delineation, the principal criterion was, "whether the nuisance complained of affected the environment" (at [73]); the significance of the claim for the public interest is relevant but not decisive.

9. In *R(ClientEarth) v The Financial Conduct Authority and Ithaca Energy PLC* [2023] EWHC 3301 (Admin), I held that a challenge to the Financial Conduct Authority's (FCAS's) approval of Ithaca's prospectus was not an Aarhus convention claim because neither section 87A of the Financial Services and Markets Act 2000 nor the Prospectus Regulation formed part of the UK's environmental law. Their subject matter was not environmental and their purpose was not to protect or regulate the environment. Any connection with the environment and the purpose of the Aarhus convention was incidental and remote. Adopting a broader approach which looks not just at the provision in issue, but also at the nature of the contravention alleged, there was not a sufficiently close connection to the environmental factors regulated by the Aarhus Convention and even if the claim succeeded, it would not have significant environmental benefits.

10. In *R(Friends of the Earth) Ltd v Secretary of State for International Trade* [2021] EWHC 2369 (Admin), Thornton J. held that a challenge to a decision under the Export and Investment Guarantees Act 1991 to provide export finance for an overseas fossil fuel project was an Aarhus Convention claim. She rejected the argument the claim was directed at international not national law (the Paris Agreement) and that it was a finance decision. The UK was a signatory to the Paris Agreement. The legal issue was whether the defendants properly took account all relevant considerations and did not proceed on the basis of errors of fact.

11. In this claim, the defendants invite me to apply the approach that I took in the FCA case. They submitted that the purpose of the TCTA 2018 is to impose and regulate customs duty by reference to the importation of goods into the UK. Neither its subject nor its purpose is to protect or otherwise regulate the environment. It does not form part of UK law relating to the environment. To the extent that there is a connection between the TCTA 2018 and the environment and the purpose of the Aarhus convention, it is too incidental and remote to come with Article 9(3) of the Convention. It is not for the court to decide whether the claim will confer significant environmental benefits: see *R(McMorn) v Natural England* [2015] EWHC 3297 (Admin), at [242] – [245].

12. I refer to my judgment on permission in this claim where I set out the relevant provisions at [21]-[22], [29]-[34]. Today Mr Howell helpfully took me through the TCTA 2018. I accept that the purpose of the TCTA 2018 is to regulate customs duty and the importation of goods, not the environment. However, arguably by section 28 TCTA 2018, the defendants were required to have regard to relevant international obligations, which included the Paris Agreement and the UNFCCC, and those obligations are directly concerned with environmental issues. The UK is a signatory to the UNFCCC and the Paris Agreement made under it. Even absent section 28, the UNFCCC and the Paris Agreement were arguably relevant considerations in public law. Thus, the defendants were under obligations in UK national law, which required them to have proper regard to their environmental obligations under international law when making the 2023 Regulations.

13. In my judgment, this is sufficient to bring the claim within the scope of Article 9(3) of the Aarhus Convention, adopting a broad purposive approach. In reaching this conclusion, I have taken into account the nature of the contravention alleged. I am not persuaded that the defendant's legal obligations only arise in respect of increased GHG emissions in the UK, not Australia, in circumstances where the defendants are, by means of the 2023 Regulations implementing the FTA, actively generating a favourable market for the importation of Australian products into the UK and the UK is a signatory to the Paris Agreement and the UNFCCC, and thus committed to minimising the effect of climate change.

14. Whilst I am not in a position to determine the extent of the environmental benefits that the claim may bring, the claimant has presented an arguable case that there is a risk of increased GHG emissions as a result of the tariff changes made by the 2023 Regulations. I consider there is a public interest in the environmental issues raised in this claim and the scope of section 28 TCTA 2018 may be relevant to other free trade agreements which are being implemented in domestic law post-Brexit. Therefore, despite the excellent submissions made by Mr Howell, I am persuaded that the claimant's application for cost limits under the Aarhus convention should be granted.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge