

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

Neutral Citation Number: [2024] EWHC 1810 (Admin)

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday, 26 June 2024

BEFORE:

**MRS JUSTICE LANG DBE**

BETWEEN:

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**R(Global Feedback Limited)**

Claimant

- and -

**(1) His Majesty's Treasury**  
**(2) Secretary of State for Business and Trade**

Defendants

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**VICTORIA WAKEFIELD KC and Sarah LOVE** (instructed by **Leigh Day**) appeared on behalf of the Claimant

**MALCOLM BIRDLING, RICHARD HOWELL and ADAM RILEY** (instructed by the **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)

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MS JUSTICE LANG:

1. The claimant applies for permission to apply for judicial review of the defendants' decision to make the Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Australia) (Amendment Regulations 2023) ("the 2023 regulations"). The 2023 Regulations were made jointly by the defendants on 23 February 2023 under Part one of the Taxation (Cross Border Trade) Act 2018 ("TCTA 2018"). They came into effect at midnight on 31 May 2023. They implement the UK's obligations under a free trade agreement with Australia ("the FTA") which gives preferential tariff treatment to Australian imports.
2. The claimant is a charity whose purpose is environmental protection. It specialises in addressing the environmental impact of food production.
3. The claim was issued on 22 May 2023. By an order dated 6 February 2024, Mr Justice Choudhury directed a rolled-up hearing for permission and the substantive hearing, to be listed as soon as possible after 4 March 2024. He further ordered that the claimant's applications to admit further evidence (the expert reports of Professor Behrens) ("Behrens 1" and "Behrens 2"), and for Aarhus Convention cost limits under CPR 46.24-28, should be determined at the rolled-up hearing. He also granted the claimant permission to rely upon Its Reply. His reasons for his order were that:

" Given the unfortunate delay in this matter, it is appropriate that the matter be determined with a degree of expedition. As there are issues as to the evidence to be relied upon and cost protection. The most appropriate courses for there to be a rolled-up hearing. This will ensure the matter is dealt with speedily."

4. The Judge also made case management directions which included a direction that the defendants' Summary Grounds of Resistance should stand as the Detailed Grounds of Resistance.
5. By an application dated 8 February 2024, the defendants applied to vary Mr Justice Choudhury's order, so as to make provision for the defendants to file Detailed Grounds of Resistance, and any evidence relied upon, but only once the claimant's application to rely upon expert evidence had been determined. The defendants

applied for the hearing to be listed, in line with counsel's availability, on the first available date six weeks after the filing of the Detailed Grounds of Resistance.

6. By an application dated 9 February 2024, the claimant applied to vary Mr Justice Choudhury's order, so as to make provision for the court to decide whether or not this was an Aarhus Convention claim and, if not, to determine the application for permission on the papers, so as to enable the court to consider the claimant's alternative application for a judicial review cost capping order, which is only available once permission has been granted.
7. The applications to vary Mr Justice Choudhury's order were considered by Sir Duncan Ouseley, sitting as a High Court Judge, on 21 March 2024. He referred the applications to vary to be determined at an oral hearing, which is the hearing listed before me today. The order provided that the Judge should consider the following matters at the oral hearing. First, whether or not permission should be granted or whether the claim should proceed as a rolled-up hearing. Second, if it is concluded that the claim is not an Aarhus Convention claim, whether a cost capping order should be made. In the meantime he ordered that the directions in Mr Justice Choudhury's order should be stayed.
8. Sir Duncan Ouseley also stated in his reasons that the decision on the admissibility of the claimant's expert evidence should be made prior to the substantive hearing, to enable the defendants to respond to it, if necessary.
9. Following Sir Duncan's Ouseley's order, further applications have been made by the parties, which I shall address in due course.

### **Rolled-up hearing**

10. In my view, a rolled-up hearing presents difficulties for determining the cost protection orders in this case. The parties also need to know, in advance of any hearing and before the Detailed Grounds of Defence and evidence are filed, whether and to what extent the claimant is entitled to rely on its expert evidence, as the issue of expert evidence is linked to Grounds 1 and 2.

11. I have had the benefit of oral submissions today and a large volume of written material and skeleton arguments, so I am in a more fortunate position than Mr Justice Choudhury and Sir Duncan Ouseley. Therefore, I have decided that it is appropriate for me to determine the application of permission today.

### **Permission**

12. In deciding whether the claimant's grounds of challenge are arguable, I also have to consider (i) the claimant's application to amend the statement facts and grounds dated 19 June 2024; (ii) the admissibility of the claimant's expert evidence (Behrens 1 and 2, both in their original form and as amended; (iii) the witness statement of Dr Jeremy Kempton, dated 14 June 2024, filed by the defendant but without an application notice.
13. The claimant contends that the implementation of the FTA between the UK and Australia, which will reduce import duties on agricultural goods imported from Australia, will lead to substantial net increases in greenhouse gas emissions ("GHG") from food production, particularly cattle meat. This is because (i) production methods for beef in Australia produce a higher volume of GHG than in the UK; and (ii) Australian beef is cheaper than UK beef and so it's likely to result in increased production for and consumption in the UK market.
14. The decision making process was as follows. The Department for International Trade, ("DIT") undertook a consultation on the proposed FTA in 2018, in which environmental issues were raised. The Government's response was published in June 2020, along with the UK objectives and initial economic assessment. The DIT's Strategic Approach document recorded that "one of the recurring concerns was the effect that trading with Australia might have on climate change and global carbon emissions".
15. Negotiations between the UK and Australia commenced in June 2020 and the FTA was signed on 16 and 17 December 2021. On 16 December 2021, the DIT published the Impact Assessment ("IA") on the FTA. The aim of the IA (page 10) was "to provide Parliament and the public with a comprehensive assessment of the potential

long run impact of a negotiated agreement”. Concerns on environmental issues were made by Sustain, an organisation of which the claimant was a member.

16. Prior to ratification, the FTA went through a process of scrutiny under Part 2 of the Constitutional Reform and Governance Act 2010 (“CRAAG 2010”). Pursuant to Section 42 of the Agriculture Act 2020, before the agreement could be laid before Parliament to begin the CRAAG scrutiny process, the Secretary of State was required to first lay a report before Parliament explaining whether the FTA was compatible with domestic environmental statutory protections (“the section 42 report”). To prepare the section 42 report, the Secretary of State exercised the section 42(4) power to receive independent advice from the Trade and Agricultural Commission (“TAC”), which it provided on 13 April 2022.
17. The Secretary of State presented the section 42 report to Parliament on 6 June 2022. On 15 June 2022, the text of the FTA was formally laid before Parliament under CRAAG. CRAAG provides for a minimum of 21 sitting days to pass before the UK could ratify the agreement. This period concluded on 20 July 2022.
18. Parliamentary committees in both the House of Commons and the House of Lords recommended there should be a debate. A debate was held in the Lords on 11 July 2022, but no such debate was scheduled in the comments before the end of the CRAAG period.
19. The claimant sent a pre-action protocol letter on 28 October 2022, asking how the defendants proposed to implement the FTA, and raising concerns about environmental issues. The defendants responded to the pre-action protocol letter on 28 April 2023, after the 2023 Regulations had been made.
20. On 13 February 2023, the defendants decided to implement the FTA into domestic law by making the 2023 Regulations.

## **Statutory Framework**

21. I refer to the statutory framework as set out in the claimant's Statement of Facts and Grounds, at paragraphs 38 to 58.

22. Section 28 TCTA 2018 provides:

“28. Requirement to have regard to international obligations

(1) In exercising any function under any provision made by or under this Part

- (a) the Treasury
- (b) the Secretary of State
- (c) HMRC
- (d) The TRA
- (e) Any other public body

must have regard to international arrangements to which His Majesty's Government is a party, that are relevant to the exercise of the function.

(2) This section is not to be read as affecting the circumstances in which any obligation to have regards to such matters would otherwise have arisen.”

### **Claimant's grounds of challenge**

23. The claimant's grounds of challenge, in its Amended Statement of Facts and Grounds, may be summarised as follows.

#### **Ground 1(a)**

24. The defendants irrationally declined to assess the nature and extent of carbon leakage impact that the 2023 regulations would have in respect of cattle meat production. The reasoning in support of this conclusion was infected by serious, logical and scientific errors in that it relied on a comparison of two materially different assessments of the relative emissions intensities of UK and Australian-produced cattle meat.

#### **Ground 1(b)**

25. The defendants' decision not to conduct an impact assessment of carbon leakage derived from cattle meat production was further irrational, in that it was made in breach of the duty of adequate inquiry. The assessments referred to in ground 1(a) were conducted without consideration of which sources of UK-produced beef would be displaced by Australian-produced beef under the FTA (or which sources of Australian-produced beef would take their place). The decision to use these assessments could not rationally have been made without consideration and investigation of this issue.

### **Ground 1I**

26. The defendants' decision not to conduct an impact assessment of carbon leakage derived from cattle meat production was taken without knowledge by the defendants, in particular the Ministers, of material facts as set out under grounds 1(a) and 1(b).

### **Ground 1(d)**

27. The defendants' decision not to conduct an impact assessment of carbon leakage derived from cattle meat production was unlawful in that the reasoning in support of this conclusion was the result of a process, the outcome of which had been predetermined. The claimant no longer relied on the allegation in the pleadings that the circumstances gave rise to an appearance of predetermination of the decision to make the 2023 regulations.

### **Ground 2**

28. The defendants irrationally concluded that it was not possible to conduct an impact assessment of carbon leakage derived from cattle and dairy production because of the variable nature of source data. This was flawed because the defendants had available to them robust and reliable data from the UN's Global Livestock Environmental Assessment model, ("GLEAM"), the very purpose of which is to facilitate assessments such as this.

### **Ground 3**



29. The claimant submits that, by section 28 TCTA 2018, existing international agreements that are “relevant” were mandatory considerations for the defendants when making the decisions.
30. The UK is a signatory to the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement made under it.
31. Article 4(1)F of the UNFCCC is an international law agreement by which the UK is required to take climate change into account when making decisions. It states:

“1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances shall:

...

(f) take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example, impact assessments, formulated and determined nationally with a view to minimising adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.”

32. The Paris Agreement commits the UK along with other signatories to its global temperature goals. Article 2(1)(a) provides:

“1. This Agreement, in enhancing the implementation of the Convention [the UNFCCC], including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;”

Article 4(1) provides further detail on the temperature goals:

“1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions

thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”

33. The claimant submits that the defendants misdirected themselves as to the scope of the duty imposed by Article 4(1)(f) of the UNFCCC by concluding it did not require them to account for increased greenhouse gas emissions from greater production of goods in Australia destined for consumers of the UK. Having recognised the relevance of the Paris agreement, which is an integral part of the overarching framework convention (the UNFCCC), the defendants were legally required to direct themselves correctly as to the scope of the obligations taken into account.
34. Section 28 TCTA 2018 was considered in the case of *Western Sahara Campaign UK the Secretary of State for International Trade* where Cockerill J held, at [146], that the plain language requires a focused exercise and limits the necessary consideration to international arrangements which are relevant to the exercise of the particular power.

### **The defendants’ response**

35. The defendants’ response to these grounds of challenge may be summarised as follows.

### **Grounds 1 and 2**

36. The 2023 Regulations are tax legislation on a subject of political controversy, which affects the UK's economic policy and its international relations. Therefore, the court should apply a low intensity of review and accord the defendants a broad margin of appreciation.
37. Applying the Tameside duty, it was a matter for the defendants to decide on the manner and intensity of their inquiries, subject only to the requirement to act rationally. The defendant's approach cannot be characterised as irrational. When preparing the IA, the DIT recognised that beef can be produced from dedicated beef and dairy herds. The Poore and Nemecek database includes entries for emissions

intensities for meat from dedicated beef herds in Australia and the UK. It also includes entries for cattle meat from UK dairy herds, but there are no similar figure for Australia. The IA concluded that the Poore and Nemecek database estimated lower differences in emissions than the UNFAO's STAT and GLEAM databases, and that the data on emissions from different sources were not readily comparable. This was a reasonable approach which was not obviously wrong.

38. While the question of carbon leakage was addressed qualitatively, the DIT did not seek to produce a full quantification of carbon leakage for valid reasons. However, the IA did address the displacement of production emissions, which is the issue upon which the claimant has focused. An experimental quantification was an increase of 0.1 per cent of Australian production emissions.
39. In any event, even if there were public law errors in the IA, those errors were not arguably material to the decision to make the 2023 Regulations and did not invalidate the regulations. Alternatively, permission should be refused under section 31(3D) of the Senior Courts Act 1981 because it is highly unlikely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred.
40. Ground 1I alleges that the matters underlying footnote 91 was so obviously material that they needed to be drawn to the attention of the ministers who made the 2023 Regulations. However, there was no legal obligation on the part of Ministers to delve into such matters. Ministers were entitled to rely on officials to carry out such investigations on their behalf and summarise the results.
41. Ground 1(d) alleges that the IA was vitiated by corporate predetermination, based on what the relevant officials understood to be acceptable. There was no basis for the allegation that officials or Ministers approached matters with a closed mind.
42. On ground 2, use of the GLEAM model was not obligatory, and was not the only legitimate means by which emissions intensities could be compared. It was open to the defendant to use other sources of data such as the Poore and Nemecek database.

### **Ground 3**

43. The defendants directed themselves that, under the Paris Agreement, it was for Australia, not the UK, to address any increased GHG emission from the greater production of goods in Australia, even where the goods might be imported into the UK. The claimant's case is that the Ministers should have taken into account Article 4(1)(f) of the UNFCCC, which requires climate considerations to be taken into account and extends to production emissions generated overseas.
44. The defendants submit that there was no domestic law obligation to take Article 4(1)(f) of the UNFCCC into account. In particular, section 28(1) TCTA 2018 did not require consideration of Article 4(1)(f) of the UNFCCC or the Paris Agreement.
45. In any event, the UK had already considered and committed to addressing climate change under the UNFCCC in the FTA. The defendant also considered the Paris agreement. The defendants were not required to consider the likely level of GHG emissions in Australia as opposed to the UK.
46. The defendants submit that, even if there was an error of law in their approach, it was immaterial as they did consider the impact of the FTA on production emissions in Australia. Section 31(3D) of the Senior Court Act 1989 applies

### **Consideration of the grounds**

47. The claimant relies in particular upon the section of the IA headed "carbon leakage risk" (pages 47 to 49). The claimant describes carbon leakage as occurring where a shift in the production of goods from one jurisdiction to another results in sustained increase in GHG emissions intensity, higher than would have arisen had the production of those goods not moved jurisdiction. The IA describes it more fully at page 47 as follows:

“The displacement of GHG production emissions because of differing climate rules and policies across jurisdictions, is known as 'carbon leakage'. Carbon leak leakage can be said to occur if all the following conditions are satisfied:

- Climate mitigation policies differ across jurisdictions.

- Emissions shift to a region with lower climate mitigation obligations and,
- Shifts in production to a firm in a different jurisdiction lead to a sustained increase in emissions intensity higher than it would have been had production not moved.”

48. Despite the claimant's short description of carbon leakage, I do not consider that its case is limited to production emissions. It is arguable that carbon leakage as described in the IA may occur as a result of the FTA and the 2023 Regulations.

49. The IA went on to say at pages 47 to 48:

“By enabling greater market access, an FTA could facilitate high levels of trade in sectors where climate litigation policies differ between the UK and Australia. Therefore, the above conditions for carbon leakage could be met following liberalisation if production shifts from the UK to Australia, due to an increase in more GHG intensive imports from Australia. However, the extent to which rising emissions may be attributable to carbon leakage relevant to increased economic output (scale effect) is uncertain.

The modelling suggests that one area which might see increasing Australian imports and some shift in relative production levels is cattle meat. Differences may also exist in the GHG mitigation policies in force in this sector. However, data on emissions intensity in cattle meat production tend to vary according to the source [Footnote 91] and depending on whether only emissions from within the boundaries of the farm are considered (such as methane from cattle and electric usage) or if additional emissions from factors such as land use change are also included.

Furthermore, relative climate mitigation policies between the UK and Australia are unlikely to remain constant over the period in which the FTA is implemented and beyond. For example, if the gap in carbon pricing between both countries were to materially increase, this could increase the risks of carbon leakage over time, as the relative GHG intensity of production would be altered, and products can be traded barrier free.

It should be noted however, the pathway for emissions remains highly uncertain and will depend on how the UK and Australia's policy positions develop over the coming decades as well as external factors such as technological change.”

50. Footnote 91 (referred to in the extract above) expanded on the contention that data “tends to vary according to the source”, explaining that:

"The Food and Agricultural Organisation of the United Nations (FAO STAT database and the Global Livestock Environmental Assessment Model database) finds very high emissions intensities in Australia whilst Poore and Nemecek (2018) estimate lower differences."

51. In their pre-action protocol response letter of 28 April 2023, the defendants indicated that the second defendant had regard to the IA when making the 2023 regulations stating:

"In taking that decision, the Minister had regard to the DIT's impact assessment published on 16 December 2021...

The Minister concluded that the approach in the underlying impact assessment remained sound and that it would not be proportionate to commission new modelling or to produce a new impact assessment."

52. The claimant alleges that the approach adopted in the IA was vitiated by errors, rendering the 2023 Regulations unlawful. In particular, the decision not to assess the likelihood or scale of carbon leakage that may result from the implementation of the FTA, despite the identified risk of carbon leakage, was illogical and based on a scientifically erroneous approach. It was further vitiated by failure to make relevant inquiries, failure to take material facts into account and an element of predetermination. I am persuaded that these grounds are arguable, for the reasons given by the claimant, under grounds 1 and 2.

53. The erroneous approach is explained by Professor Behrens in his two reports. In my view, his reports meet the criteria for the admission of expert evidence in judicial review claims as set out by the Divisional Court in *R (Law Society) v Lord Chancellor* [2019] EWHC 2094 (Admin), per Carr J. at [36] and [39]. Professor Behrens is sufficiently qualified to provide this expert evidence. The expert evidence is reasonably required in order for the Court to determine whether the decision under challenge was reached by a process of reasoning, which arguably involved a serious technical error which is incontrovertible. In my view, this is not, as the defendants submit, merely a matter of expert opinion on which two experts might reasonably disagree. I do not accept that the expert evidence is not reasonably required because

the data sources and other materials provided are sufficient to enable the court to determine whether or not there was a serious technical error. I am satisfied that the report is CPR Part 35 compliant. It is, of course, open to the defendants to make their criticisms of the reports at a later stage in the proceedings.

54. Behrens 1 and 2 have been extensively edited down in an attempt to meet the defendants' objections to their admissibility. In the course of the hearing, Ms Love applied to delete further paragraphs in both reports. I gave permission for the reports to be admitted in the latest iteration and the Claimant has agreed to file and serve them tomorrow. I am concerned that some useful explanatory material may have been edited out and so the original text should still be available for reference if necessary.
55. I also grant permission for the claimant to rely on Dr Hicks' witness statement which explains the extent of his involvement in Professor Behrens work.
56. I also grant the defendants' permission to rely on the witness statement of Dr Kempton, Deputy Director for Trade Policy and Operations Analysis in the Department of Business and Trade, dated 14 June 2024, which addresses points raised by the claimant concerning the preparation of the IA. No application notice was filed by the defendants, but I dispense with the requirement for an application notice on this occasion.
57. Ground 1 has been expanded in the Amended Statement of Facts and Grounds. It now includes more detail in subparagraphs (a) to (d), some of which was also pleaded in the Reply. It also includes points about the decision-making process which have only emerged during the course of the litigation, in correspondence with the defendant and in the witness statement of Dr Kempton. The claimant no longer relies upon paragraph 78W in the final sentence of paragraph 3(a)(c) of the amended draft and so a revised amended Statement of Facts and Grounds needs to be prepared. The Claimant has agreed to file and serve it tomorrow. The claimant has also amended its analysis of the errors in the IA's approach at paragraph 74 and 75 of the Amended Statement of Facts and Grounds, in support of its grounds of challenge. There are also uncontroversial updating amendments. I grant permission for all the proposed

draft amendments in the Amended Statement of Facts and Grounds. In my view, the grounds of challenge meet the relatively low arguability threshold for the grant of permission, for the reasons given by the claimant.

58. On ground 3, I consider it is at least arguable that the defendants were required to have regard to the UK's obligations under the UNFCCC when making the 2023 Regulations, as the claimant submits. Given the complexity of the issues in dispute, I cannot be satisfied that it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred, for the purposes of section 31(3D) of the Senior Courts Act 1981. I refer to the principles set out in *R (Cava Bien Limited) v Milton Keynes Council* [2021] EWHC 3003 (Admin) at [52]. The "highly likely" standard of proof sets a high hurdle and the burden of proof is on the defendant. I agree with the claimant that there is insufficient evidence to support the defendants' submissions and to satisfy the test in section 31(3D). As the Court of Appeal held in *R (Plan B) and Secretary of State for Transport* [2020] EWCA Civ 214, the Court should be cautious about straying into the forbidden territory of taking on the role of decision maker. In my view, that applies especially in decisions such as this one where an exercise of judgment is required.

59. Therefore, I grant permission on all grounds as amended.



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**This transcript has been approved by the Judge**