Neutral Citation Number: [2021] EWHC 1756 (Admin)

Case No: CO/971/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2021

Before:

MR JUSTICE CHAMBERLAIN

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Between:

WESTERN SAHARA CAMPAIGN UK **Claimant**

- and –

(1) SECRETARY OF STATE FOR INTERNATIONAL TRADE

(2) HER MAJESTY'S TREASURY **Defendant**

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Victoria Wakefield QC and Conor McCarthy (instructed by **Leigh Day Solicitors**) for the **Claimant**
Sir James Eadie QC and Paul Luckhurst (instructed by **Government Legal Department**) for the **Defendants**

Hearing date: 17 June 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction and outline of the claim

1 The Claimant is an independent voluntary organisation which campaigns on matters of public interest concerning Western Sahara, a territory over which Morocco asserts sovereignty. The Claimant contends that, under international law, Morocco has no right to exercise sovereignty over Western Sahara or to exploit its resources unless acting with the consent of the people of that territory and for their exclusive benefit; and that it owes duties as an occupying power, which have not been fulfilled.

2 The Claimant seeks relief relating to two instruments made by the Treasury under s. 9 of the Taxation (Cross-border) Trade Act 2018 ("the 2018 Act"), which confers power to "give effect" to international arrangements between the UK and another country or territory setting preferential tariffs for goods originating in the country or territory. By s. 9(3), this power is exercisable only on the recommendation of the Secretary of State.

3 When exercising the s. 9 power, s. 28 of the 2018 Act applies. This requires the Treasury and the Secretary of State to "have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function".

4 The instruments in question in these proceedings are the Customs (Tariff Quotas) (EU Exit) Regulations 2020 (SI 2020/1432) and the Customs Tariff (Preferential Trade Arrangements) (EU Exit) Regulations 2020 (SI 2020/1457), together referred to as "the 2020 Regulations". These brought into force the *Morocco Preferential Tariff, version 1.0* ("the Tariff") and the *Morocco Origin Reference Document, version 1.0* ("the Reference Document"), both dated 7 December 2020, with effect from 11pm on 31 December 2020.

5 The 2020 Regulations purport to give effect to the UK-Morocco Association Agreement, concluded on 26 October 2019 ("the UKMAA"), one of a series of "short form" trade agreements designed to replicate EU association agreements from which the UK ceased to benefit at the end of the transition period following Brexit. It incorporates by reference, *mutatis mutandis*, the provisions of the EU-Morocco Association Agreement ("EUMAA").

6 The UKMAA and EUMAA provide for preferential tariff treatment for certain products originating in Morocco. They expressly apply to products originating in Western Sahara and subject to Moroccan customs controls. So do the Tariff and Reference Document.

7 In essence, the Claimant's case is as follows:

(a) The UKMAA must be read in accordance with established principles governing the interpretation of treaties. This means that, despite its express terms, it must be read as not applying to products originating in Western Sahara (at least for the time being, until Morocco complies with its obligations as an occupying power). The relevant interpretive principles include Article 53 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law *(jus cogens)*. The principle of self-determination is such a norm. It prevents Morocco from exploiting the resources of Western Sahara except with the consent of its people and for their exclusive benefit. The arrangements in the UKMAA were not made with the consent of

the people of Western Sahara and are not for their exclusive benefit, despite the recent manifestly inadequate consultation exercise undertaken by the European Commission and the European External Action Service. Any contrary view is wrong and, to the extent that it is necessary to say so, untenable.

(b) That being so, the Tariff and Reference Document must be read as not applying to products originating in Western Sahara, because:

(i) as domestic legislation whose express purpose is to "give effect" to an international treaty, they must be interpreted in the same way as the treaty;

(ii) if they cannot be interpreted in that way, insofar as they apply to products from Western Sahara, they do not "give effect" to the treaty and are, to that extent, *ultra vires* s. 9 read with s. 28 of the 2018 Act and so void. The void provisions are severable.

(This is Ground 1.)

(c) Alternatively, the decision to make the instruments involved a justiciable misdirection as to the proper scope of the UKMAA. As a "continuity agreement", this had to be interpreted in accordance with the EUMAA which – as a matter of EU law – had to be read subject to peremptory norms of international law.

(This is Ground 2.)

8 The specific relief sought includes declarations that:

> "(a) the proper interpretation of [the UKMAA] is that it may only apply to products originating in Western Sahara if the conditions imposed by international law for the exploitation of the resources of a non-self-governing territory have been met;
>
> (b) those conditions have not been met; and
>
> (c) [the 2020 Regulations] accordingly do not apply to such goods."

9 In the alternative, the Claimant seeks a quashing order to quash the 2020 Regulations insofar as they apply to products originating in Western Sahara.

The issues for determination at the permission stage

10 On 12 May 2021, Mostyn J adjourned the question of permission to an oral hearing with a time estimate of 1 day. He indicated that the court would want to hear full argument on justiciability. The hearing took place on 17 June 2021 before me.

11 Despite Mostyn J's reference to "full argument", and although I heard much more detailed argument than would be normal at a permission hearing, the parties agreed that the issue before me was simply whether the claim was arguable. As Sir James Eadie QC put it, this meant that the Defendants needed a "knock-out blow".

12 In attempting to deliver such a blow, Sir James concentrated his attacks exclusively on steps (b) and (c) in the argument summarised at [7] above. For the purposes of permission, he accepted that step (a) was arguable. In other words, he accepted that it was arguable that, as a matter of international law, and notwithstanding its express terms, the UKMAA does not apply to products originating in Western Sahara.

13 Sir James's case is that, even so, the domestic instruments challenged are clear; the Claimant's "interpretation" would amount to rewriting them; and no domestic law principle of construction could permit that. In addition, Sir James contends that the claim is an impermissible attempt to challenge indirectly the terms of the UKMAA. He also submits that the case advanced by the Claimant necessarily involves the proposition that a foreign sovereign has violated international law and that the claim is therefore barred by the foreign act of State doctrine.

14 I have considered the Claimant's two grounds separately.

Is ground 1 arguable?

15 Ms Wakefield candidly accepts that the "interpretation" of the Tariff and Reference Document which she advances involves striking out legislative words or reading in a qualification not present on the face of those instruments. If the words were in primary legislation, I would have no difficulty in accepting that no process of interpretation could achieve that result, whatever the true meaning of the UKMAA. This is because – as a matter of domestic law – Parliament can, if it so chooses, legislate contrary to international law. The interpretive rule that legislation is to be read in accordance with international law therefore applies only where the legislation is ambiguous. The primary duty of fidelity owed by the domestic courts is to Parliament, not to international law.

16 But the instruments in question here are not primary legislation. They are secondary legislation made under a power granted by Parliament in s. 9 of the 2018 Act. Fidelity to Parliament requires the court to focus, in the first instance, on the terms of that provision. Parliament could simply have conferred a broad discretion to set preferential tariffs "having regard to" any relevant international arrangements. It did not. Instead, it conferred power on the executive to "give effect" to certain international arrangements. The true scope of those words in this context may be a matter for debate. How far from the substance of the international arrangement can the domestic instrument go before it ceases to "give effect" to it? Questions such as these were considered in the context of the differently worded implementing power in s. 2 of the European Communities Act 1972 in *Oakley Inc. v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337.

17 At this stage, however, I am only concerned with the question of arguability. It seems to me to be at least arguable that a domestic instrument which applies to products originating in territories A and B does not "give effect" to an international arrangement which applies only to products originating in territory A. Since Sir James has conceded that it is arguable that the UKMAA, properly construed, does not apply to products originating in Western Sahara, it follows that it is arguable that the domestic instruments are *ultra vires* insofar as they purport to do so.

18 Sir James argued that a domestic instrument which reproduces in precisely identical terms the material part of the international arrangement can hardly be considered *ultra vires* an enabling

power to "give effect" to the latter. I would accept that proposition, but only on the premise that the words of the domestic instrument mean the same as those of the international arrangement. If they do, it must also be arguable that the domestic instruments do not apply to products originating in Western Sahara. If, on the other hand, the words of the domestic instrument (interpreted according to domestic canons of interpretation) mean something different form the identical words of the international arrangement (interpreted according to international law principles of interpretation), the use of identical words supplies no guarantee that the legislator has in fact "given effect" to the arrangement.

19 To put the point another way, "give effect" in s. 9 of the 2018 Act seems to focus on the "effect" of the international arrangement. It is at least arguable that what matters is whether the domestic instrument transposes *that effect* into domestic law, not whether it uses identical words – or, that giving effect is a matter of substance, not form.

20 Sir James is undoubtedly correct to say that, in general, the courts are reluctant to opine on issues of pure international law because these issues are, under our constitution, generally for the executive. For example, in *R (Al Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), the Divisional Court refused the claimant permission to challenge the Government's inaction in response to alleged breaches of international humanitarian law by Israel in Gaza in 2008 and 2009. But that case was one in which the international law issues arose outside any domestic legal context which required their resolution. There was no "domestic foothold" for the international law arguments: see [54] (Cranston J). This can be contrasted with *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1010, [2019] 1 WLR 5765, where the public law duty to comply with a policy to apply international law standards supplied a domestic foothold which enabled the court to consider the adequacy of the Government's assessment of Saudi Arabia's compliance with international humanitarian law in Yemen.

21 Here, s. 9 of the 2018 Act arguably provides the necessary domestic foothold, because it confers power to give effect to preferential tariffs only where doing so gives effect to an international arrangement. Unless the exercise of the power was intended to be unreviewable, Parliament must have intended the court to consider the effect of the international arrangement. Without doing so, it is difficult to see how the court could measure whether the domestic instrument falls within the power conferred. That arguably distinguishes this case from *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449, where at [90]-[91] Lord Reed held that the Government's view about the scope of an international obligation was non-justiciable in part because there was nothing to indicate that the view was critical to the challenged decision.

22 One issue which may have to be considered at the substantive hearing is the inter-relation between domestic principles governing the justiciability of international law and the proper scope for review by this court of the s. 9 power. It may be that, for constitutional reasons, the court ought simply to ask whether the domestic instrument gave effect to the international arrangement on a "tenable view" of the meaning of the latter: see e.g. *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, [67]-[68] (Lord Brown). But, as Ms Wakefield pointed out, Sir James did not invite me to reject as unarguable the proposition that the Government's view about the meaning of the UKMAA is untenable. So, even if tenability were the correct standard, that would not be a reason for refusing permission.

23 Finally, I have considered whether the foreign act of State doctrine is fatal to this ground of challenge. Sir James relies on the "third rule" articulated in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, at [123]. There, Lord Neuberger explained that:

> "the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts."

24 I see force in Sir James's submission that the Claimant's argument necessarily involves the proposition that Morocco, a sovereign State, has acted in an internationally wrongful manner in the conduct of its foreign affairs. It is difficult to see how the Claimant's argument could succeed without establishing that. This means that the third rule of the foreign act of State doctrine is engaged. That would be a sufficient reason to refuse permission unless it were arguable that the case fell within the one of the established exceptions. Ms Wakefield says it does, because Morocco's conduct violates peremptory norms of international law *(jus cogens)*.

25 Lord Mance's analysis at [107] provides some support for Sir James's submission that the exception applies only to *jus cogens* norms which confer individual rights: see esp. at [107(iii)]. But Lord Mance was not in the majority and the other judgments seem to me to leave open the proposition that the exception applies generally to acts which violate *jus cogens* norms: see esp. Lord Neuberger's analysis at [153]-[157] and [168] (with which Lord Wilson and Lady Hale agreed).

26 As the judgments in *Belhaj v Straw* demonstrate, the application of the act of State doctrine and its exceptions is context-specific. For the purposes of permission, it is arguable that the doctrine does not bar the Claimant's claim in this case.

27 I shall therefore grant permission on ground 1.

Is ground 2 arguable?

28 The Defendants originally suggested that ground 2 be stayed pending the outcome of Front Polisario's second challenge to the EUMAA and any appeal from it. That challenge is currently before the General Court. The arguments are likely to focus on the adequacy or otherwise of the consultation exercise undertaken by the Commission since the previous litigation. By the time of the hearing before me, however, neither side was proposing a stay. I have therefore considered the arguability of ground 2 on its merits.

29 Ground 2 relies on the same principles of international law as ground 1, but the Claimant advances it as a distinct ground for review which can succeed even if ground 1 fails. Under ground 2, the international law principles are relied upon in the first instance to construe the EUMAA (step 1). The argument is then that the UKMAA should be construed in accordance with the EUMAA (step 2). There are difficulties with both steps.

30 As to step 1, the Claimant places reliance on the decisions of the European Court of Justice in *Council v Front Polisario* ECLI:EU:C:2016:973 [2017] 2 CMLR 28 and *R (Western Sahara Campaign UK) v HM Revenue and Customs* ECLI:EU:C:2018:118 [2018] 3 CMLR 15. I can

see how those cases might be deployed in support of the argument summarised at [7(a)] above, though of course the counter-argument will be that things have changed since those cases.

31 But if, having considered all the Claimant's international law arguments, the court concludes under ground 1 that the Government was correct (or, if this is the test, reached a tenable view) when it read the UKMAA in accordance with its express terms, it would surely reach the same conclusion about the EUMAA. After all, the same international law arguments relied upon by the Claimant to "read down" the UKMAA are also relied upon to "read down" the EUMAA.

32 By the same token, if the court concludes that the argument summarised at [7(a)] above is not justiciable under ground 1, it is difficult to see how it could reach any different conclusion under ground 2. If it is impermissible for the court to consider the proper interpretation of an international treaty to which the UK is party, the same much surely apply *a fortiori* to a treaty to which the UK is not (any longer) party.

33 In any event, step 2 of the Claimant's argument is not sound. The treaty to which the domestic instruments purport to give effect is the UKMAA, not the EUMAA. Given that the same interpretive principles of international law apply to each, it seems very likely that the two have the same meaning. If not, that could only be because of some idiosyncratic rule of EU law relevant to interpretation or justiciability, or to the treaty-making powers of the EU institutions, which the English courts would not ordinarily apply. If there is such a rule, I cannot see why it would be appropriate to apply it to a treaty entered into by the UK to which the EU is not party. The fact that the UKMAA incorporates by reference, *mutatis mutandis*, the terms of the EUMAA does not, in my judgment, mean that it also incorporates every interpretive rule of EU law even if such a rule is not part of either English or international law.

34 In short, ground 2 is only relevant if ground 1 fails. But in that eventuality, there is no logical room for it.

35 I shall therefore refuse permission on ground 2.

Conclusion on permission

36 For these reasons, permission to apply for judicial review is granted on ground 1 but refused on ground 2.

Cost-capping order

37 The Claimant applies for a cost-capping order. The Defendants are neutral on the question whether, in principle, such an order should be made. Section 88(6) of the Criminal Justice and Courts Act 2015 ("the 2015 Act") permits the making of a costs-capping order only if the court is satisfied that (a) the proceedings are public interest proceedings, (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review, and (c) it would be reasonable for the applicant to do so.

38 These are, in my judgment, public interest proceedings. If the Claimant is correct, the Defendants are acting unlawfully by according preferential tariff treatment to goods originating in Western Sahara and in doing so are facilitating the exploitation of the resources that territory contrary to international law. The potential impact of this exploitation on the people of the territory is described in the witness statement of Mr John Gurr, filed on behalf

of the Claimant. That impact includes the depletion of natural resources in such a manner as to cause irreparable damage and pollution causing damage to human health. The issue is therefore one of general public importance within s. 88(7)(a) of the 2015 Act.

39 It may be that the direct impact of UK tariffs on the exploitation of the resources of Western Sahara is small, but the public interest in resolution of the issues in this claim goes wider than that, because, if the Claimant is right to say that the issue is justiciable, those issues engage the UK's compliance with international law. Even if the Claimant is wrong about the justiciability of the claim, there is a powerful public interest in the resolution of the issues in the claim, because the principles to be applied when considering a challenge to the exercise of the power conferred by s. 9 of the 2018 Act are likely to be of relevance in other cases. The proceedings therefore satisfy the requirements of s. 88(7)(b) and (c), taking into account the matters identified in s. 88(8).

40 The second witness statement of John Gurr establishes that the financial conditions in s. 88(6)(b) and (c) are satisfied.

41 This means that the criteria for a costs capping order are met. The Claimant has proposed that its costs be capped at £18,000 plus VAT (£21,600 inclusive of VAT). The Defendants do not oppose that figure. In my judgment it is appropriate, given the financial information in Mr Gurr's second witness statement.

42 The only point on which the Defendants have raised issue is the figure proposed for the reciprocal cap on the costs claimable by the Claimant from the Defendants in the event that the claim succeeds. The Claimant says it should be £80,000 plus VAT (£96,000 including VAT).

43 The principles to be applied are these:

(a) Where a costs capping order is granted limiting the costs liability of a claimant in the event the claim fails, the court *must* impose a reciprocal cap limiting the liability of the other party: s. 89(2) of the 2015 Act.

(b) However, as the Secretary of State for the Home Department recently conceded before the Court of Appeal, there is no requirement that the reciprocal cap should be set at the same level as the cap on the costs liability of the claimant: *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, [2020] QB 929, [138]. This reflects the law prior to the 2015 Act. For example, in *R (Buglife) v Thurrock Thames Gateway Corp.* [2008] EWCA Civ 1209, [2009] Env LR 18, Sir Anthony Clarke MR, giving the judgment of the court, said this at [26]:

> "We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case."

(c) In the past, the reciprocal cap has in some cases been set substantially higher than the cap on the claimant's liability, in order to allow for the recovery of a success fee or uplift in cases where the claimant's representatives were acting on a conditional fee basis: see

e.g. *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin).

(d) Since the abolition of success fees, a disparity between the cap on the claimant's liability and the reciprocal cap can no longer be justified on that ground: see e.g. the discussion of the issue by Nicol J in *R (Detention Action) v First-tier Tribunal*, CO/558/2015, 12 June 2015.

(e) However, Cranston J's statement of principle at [28] of his judgment in *Medical Justice* remains good: "there is a strong public interest in ensuring that costs orders permit the proper funding of solicitors who take public interest cases and who take the risk of losing".

(f) This must be read subject to the caveat that a claimant who benefits from a cap limiting its costs liability cannot expect itself to recover costs at commercial rates. The reciprocal cap should never allow a claimant to recover at more than "a reasonable, modest rate": *R (Western Sahara Campaign UK) v HM Revenue and Customs* [2015] EWHC 1798 (Admin), [44]. This reflects Lord Phillips CJ's statement in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2006] 1 WLR 2600, [76], that the reciprocal cap should limit the claimant's recoverable costs to "a reasonably modest amount" covering "solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest".

(g) In setting the reciprocal cap, it is necessary to bear in mind that in judicial review a claimant's costs can generally be expected to be higher than a defendant's (assuming representation of equivalent seniority). This is because the preparatory work of collating the evidence supporting a claim and of formulating the submissions to advance it is usually (though not always) more time-consuming than the work of producing responsive submissions and evidence. In addition, claimants generally do not have the advantage of counsel charging Treasury rates (an arrangement which is possible only because of the volume of work offered by the Government as client).

(h) The rules governing cases which engage the provisions of the Aarhus Convention reflect these points in setting the cap for the liability of a non-individual claimant at £10,000 but the cap on costs recoverable against from defendant at £35,000: see CPR 45.43. This does not indicate that a ratio of 2:7 is appropriate in every case, but it provides an indication that it may often be appropriate to set the reciprocal cap at a higher level than the cap on the claimant's liability.

44 In this case, the Defendants submit that the Claimant has already incurred substantial and, they say, excessive costs. In my judgment, it is not necessary or appropriate to assess the reasonableness of the Claimant's costs to date at this stage of the proceedings. The assessment of costs would ordinarily be undertaken at the end of the case. If it turns out that costs have been unreasonably incurred, they will not be allowed. The reciprocal cap will apply *after* any assessment. The exercise of setting the reciprocal cap depends on how much of its reasonable costs the Claimant should be able to recover, charging on a reasonably modest basis. That involves applying the principles set out above. In my judgment, the appropriate figure is £60,000 plus VAT (£72,000 inclusive of VAT). I note in this regard that the permission hearing before me took almost a full day and that, since circulation of this judgment in draft, the parties have agreed that the time estimate for the substantive hearing is 3 days.