Neutral Citation Number: [2025] EWHC 296 (Admin)

Case No: AC-2024-LON-000692

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

REX **(ON THE APPLICATION OF ANGLIA RUSKIN STUDENTS' UNION)**	**Claimant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

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Oliver Conolly (instructed by **Bates Wells & Braithwaite London LLP**) for the **Claimant**
James Puzey (instructed by **His Majesty's Revenue and Customs**) for the **Defendants**

Hearing dates: 7 February 2025

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Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 12 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SAINI

Mr Justice Saini :

This judgment is in 6 main parts as follows:

I.	Overview:	paras.[1]-[6].
II.	Statutory Framework:	paras.[7]-[13].
III.	The Concession:	paras.[12]-[15].
IV.	The Café and the Decision:	paras.[16]-[18].
V.	The Grounds:	paras.[19]-[42].
VI.	Conclusion:	paras.[43]-[44].

I. Overview

1. This is a case about a bar or café called *92* which is run by the Claimant, Anglia Ruskin Students' Union ("the Union"), beneath its office at the Anglia Ruskin University campus in Chelmsford, Essex. For reasons which will become clear, I will use the neutral term "Café" rather than "bar" to refer to *92* in this judgment. The issue in the claim is whether the Café is a "bar" within the meaning of an extra-statutory concession ("the Concession"), published by the Defendants ("HMRC").

2. The Concession appears in Section 5.5 of VAT Notice 709/1 and treats supplies of catering made by student unions as exempt from VAT, but carving out from the Concession *inter alia* supplies of food and drink made in "bars". HMRC have decided that the Café is a "bar" within the carve-out, and accordingly that supplies of catering made within it do not benefit from exemption from VAT. The Union argues that on a proper construction of the Concession, the Café is not a "bar", alternatively, if it is, HMRC's policy not to exempt supplies is irrational.

3. By an Order dated 14 May 2024, Sheldon J held these contentions to be "unarguable" and refused the Union permission to apply for judicial review. The Union's oral renewal of the permission application came before me on 7 February 2024, with a 2.5 hour time estimate, preceded by 3 hours of suggested pre-reading material. I explained at the start of the hearing that my provisional understanding was that the issues principally concerned matters of construction and then application of the construction to the undisputed facts about the Café. It seemed to me that there was little point in my task being limited to deciding only whether the Union's case was "arguable" (a relatively low hurdle) for permission purposes, and (if so satisfied) to pass the matter on to another judge who would hear the same arguments in a few months' time at a substantive hearing.

4. In these circumstances, I indicated that unless there was any reason identified by Counsel (such as the need for further evidence or more detailed argument) I would treat the oral renewal as a "rolled-up" hearing, with permission and the merits being considered together. This seemed to me to be a more efficient use of judicial resources and there has already been a substantial delay since the commencement of the claim, about a year ago. Having taken instructions, Counsel helpfully agreed to my suggested course. They agreed I had before me all the material necessary for a final determination. I heard excellent oral arguments from Mr Oliver Conolly for the Union and from Mr James Puzey for HMRC, for which I am grateful.

5. At the hearing, I gave the Union permission to rely on a witness statement from Charlotte Britton-Stevens, Union Development Manager of the NUS Students' Union Charitable Services, concerning what were said to be (i) HMRC's historic constructions of the word "bar" between 2003-2011, and (ii) the adverse consequences of HMRC's current position in rendering the supply of catering (by way of hot food) uncompetitive. This evidence may or may not be disputed but for the reasons I give below I do not consider it to be relevant to the matters which arise in the claim.

6. The formal decision under challenge in this claim was made on 29 November 2023 ("the Decision"). That decision was a review which upheld an earlier decision that catering supplies made from the Café were subject to VAT at the standard rate and not exempt from VAT under the terms of the Concession. HMRC's reasons for the Decision are summarised at Section IV below.

II. The Statutory Framework

VAT treatment of catering

7. When food and drink is sold outside the context of catering, such as in a supermarket, the items sold are either subject to VAT (the default position under s 4 of the Value Added Tax Act ("VATA") or zero-rated (s 30 VATA), and Group 1, Schedule 8). Group 1(b) provides that anything in the "*general items*" list (Items 1-4) will be zero-rated, unless they fall under the list of "*excepted items*" (Items 1-7), and do not fall under the list of "*items overriding the exceptions*" (Items 1-6). For example, Item 1 of "*general items*" is "*food of a kind for human consumption*". (The word "*food*" includes "*drink*": note (1)). Excepted item number 3 is "*beverages chargeable with alcohol duty under Part 2 of Finance (No 2) Act 2023 and preparations thereof*". It follows that alcoholic drinks are taken out of zero-rating and are chargeable to VAT.

8. Another carve-out from zero-rating is Group 1(a), which excludes "*a supply in the course of catering.*" Accordingly, any food served to a customer in the course of catering is subject to VAT. There is invariably full VAT on restaurant purchases. Note (3) defines "catering" as follows:

> "(3) A supply of anything in the course of catering includes—(a) any supply of it for consumption on the premises on which it is supplied; and (b) any supply of hot food for consumption off those premises."

9. This is supplemented by Notes (3A) to (3D). The statutory definition of catering is detailed and prescriptive.

VAT treatment of education

10. The supply of education is exempt from VAT if made by an "*eligible body*" (s 31 VATA; Items 1(a), Group 6, Pt II, Schedule 9 VATA). The supply of goods and services "*closely related to*" such supplies are also exempt (Item 4, Group 6, Part II, Schedule 9 VATA).

11. The following matters are common ground:

(1) The definition of an "*eligible body*" includes universities but does not include student unions.

(2) As a matter of law, the supply of catering to students by an eligible body is "closely related" to the supply of education by that eligible body, and is therefore exempt from VAT.

(3) Supplies by universities of alcohol to students do not benefit from the exemption as a matter of law, because such supplies are not closely connected to the supply of education.

III. The Concession

12. Student unions often provide catering alongside universities. Since March 2002, HMRC has operated a published concession extending the exemption granted to supplies of catering made by universities to student unions.

13. Before turning to the particular terms of the Concession in issue in the present claim, I refer to the following part of Notice 709/1 which explains the context: (my underlining)

> "**2.6 Schools, universities, colleges, etc**
>
> Certain supplies of education, training and research are exempt from VAT. Where an educational institution provides exempt education to its own pupils and students, then the supply of catering they make is also exempt. If the supply of education is non-business, as in the case of a local authority school, free school or academy school, the supply of catering will also be non-business, provided it is made at, or below, cost…Whichever treatment is appropriate it applies to anything provided by way of catering. This includes food supplied at mealtimes and break times from the refectory, canteen or other similar outlet but not items purchased from a university campus shop, as they are not provided by way of catering. Food and drink supplied at or below cost from a tuck shop run by the school itself takes on the same liability as the education. You cannot normally deduct input tax incurred on costs that relate to exempt supplies. Further information can be found in Notice 706 Partial Exemption. You must account for VAT on supplies of catering to staff and visitors (except visiting students). If you are a student union, supplying catering both on behalf, and with the agreement, of the parent institution, you will need to read section 5.5".

14. Section 5.5 is the part of Notice 709/1 in which the section of the Concession in issue in this claim appears. It provides (I have inserted my own sub-paragraphs):

> **"5.5 Catering provided by student unions in universities and other higher education establishments**
>
> [1] If you're a student union and you're supplying catering (including hot takeaway food) to students both on behalf, and

> with the agreement, of the parent institution, as a concession you can treat your supplies in the same way as the parent institution itself. This means that you can treat your supplies as exempt when made by unions at universities, and other institutions supplying exempt education, and outside the scope of VAT when supplied at further education and sixth form colleges.
>
> [2] This means that most supplies of food and drink made by the union, where the food is sold for consumption in the course of catering will be exempt (read sections 2 and 3 of this guidance). For example, food and drink sold from canteens, refectories and other catering outlets (excluding bars), plus food and drink sold from vending machines situated in canteens and similar areas.
>
> [3] But it does not cover food and drink sold from campus shops, bars, tuck shops, other similar outlets and certain vending machines (read paragraph 2.4 of this guidance). The concession does not cover any other goods or services supplied by the student unions."

15. The arguments on construction have been concentrated on how sub-paragraph [2] above applies in the case of the Café. I turn to the Café and the Decision.

IV. <u>The Café and the Decision</u>

16. In the evidence before me there are photographs of the Café as well as the Union's advertising material on a website for the Café. The following facts would appear to be uncontroversial. It describes itself as a bar and café. The food menu is entitled "*Bar 92 Menu*". It is advertised as "*your place to go for Burgers and Beers, Coffees and Cocktails*". The product sales report shows draught beers as well as spirits and wine. The photographs show a typical bar area and counter, with approximately 8 beer taps as well as bottle fridges, spirits bottles and optics. Around the large room there are also tables at which students are sitting and eating.

17. The Decision, dated 29 November 2023, sets out the matter in dispute, namely whether the catering supplies made by the Café are standard rated or not. It summarised the correspondence, the law and HMRC's guidance on the Concession. It then explained what evidence had been considered including how the Union advertised the premises, its appearance and set up according to photographs supplied, the website entry and till reports showing sales of draught beers, lager, spirits and wine. It noted that the bar area, food server and seating area are all part of the same space or area.

18. The HMRC reviewer's conclusion in the Decision was:

> "For the reasons outlined above I consider that the premises concerned, Café 92, constitutes a bar and therefore, the catering exemption does not apply in this case. As a result, the supplies of catering are standard rated."

V. The Grounds

19. For the Union, Mr Conolly in his well-structured and concise submissions made essentially three points which I will address together as **Ground 1**. His primary submission was that the term "bar" as used in the Concession, when properly construed, means a place which does not supply catering. He argued that because the Café makes supplies of catering it cannot be a bar and thus those supplies are not excluded from exemption under the terms of the Concession. Mr Conolly further advanced two alternative constructions of the Concession to the effect that a bar is somewhere that either predominantly (1st alternative) or mainly (2nd alternative) serves alcoholic drinks and thus because the Café's sales are mainly food, not alcohol or other cold drinks, its supplies of catering come within the terms of the exemption. In the written arguments, Mr Conolly developed a number of new definitions of the different approaches which he said might be taken to be the meaning of "bar" and he called these "*the Licensing Definition*" and "*the Look and Feel Definition*". He also submitted that HMRC had not been consistent and had flitted between these definitions in their approach.

20. Mr Conolly also argued, as a secondary case, that if HMRC are right in their construction, then "*its policy*", i.e. Section 5.5 of the Concession, is irrational. He relied upon a comparison with a university in an analogous position. I will call this **Ground 2.**

21. For HMRC, Mr Puzey, in his persuasive submissions, argued that the term "bar" in the Concession is simply used in its ordinary, everyday sense, i.e. as somewhere one can buy and enjoy alcoholic and other drinks. He said that on that basis, together with the other factual matters referred to in the Decision, the Café is a bar. Hence, its supplies of catering are excluded from exemption under the terms of the Concession. As to irrationality, he submitted that the terms of the Concession reflect a rational policy given the Union is not making supplies of education and so its catering is not "closely" related to such supplies.

Ground 1: construction and application

22. Although Mr Conolly argued that HMRC's alleged error could be classed under a number of public law complaints, in my judgment Ground 1 comes down to a construction and rationality issue. First, HMRC had to construe the term "bar" in a correct way and if it was construed incorrectly that would be an error of law which would mean the decision on exemption would fall to be quashed. Second, once the construction was correctly adopted, HMRC had to apply that to the facts and reach a rational conclusion. Again, an irrational conclusion would be a public law error.

23. There was a large amount of evidential material before me from the Union as to historical approaches to the predecessor of the Concession, and to the Concession itself that were claimed to have been taken by HMRC; as well as evidence of how other educational institutions have been considered under the Concession (related to claims of alleged inconsistency). As I said to Counsel at the hearing, I do not consider such material to be relevant to the issues before me. Equally, I do not find it helpful to adopt further definitions of what "bar" might mean.

24. Our training means that as lawyers and judges we cannot resist seeking to further define words which appear in written documents and to then present our self-generated definitions as terms of art. That temptation should be resisted. As explained in HMRC v Dolphin Drilling Limited [2024] EWCA Civ 1 at [41], the meanings of words are to be found not so much in dictionary definitions but rather in how those words are ordinarily used which is illustrated through examples. That is the approach I will adopt.

25. The terms of Section 5.5 of the PN 709/1 amount to an extra statutory concession by HMRC conferred upon student unions. The meaning and interpretation of it is a matter of law for me, and I then have to consider whether HMRC have correctly applied the legal meaning on the facts concerning the Café. Absent some form of classic legitimate expectation case based on representations, I am not assisted in this task by evidence of how HMRC personnel may have interpreted or described it in the past. In short, if as a matter of language and on the particular facts, the Café is a "bar" according to the terms of the Concession, when properly construed, the claim will fail. How other unions were treated is not relevant.

26. The Union's primary case is that the word "bar" in the Concession means a place that does not supply catering. I do not accept this. There is nothing within the Concession to suggest that "bar" means anything other than what it normally means in day to day language. A "bar" is simply somewhere where one can obtain drinks, both alcoholic and non-alcoholic, and food (more commonly the case now than in the past). I agree with Mr Puzey that the suggestion that a bar, as that word is used in the Concession, cannot supply catering makes little sense. The Concession's second sub-paragraph says, in terms:

> "This means that most supplies of food and drink made by the union, where the food is sold for consumption in the course of catering will be exempt (read sections 2 and 3 of this guidance). For example, food and drink sold from canteens, refectories and other catering outlets (excluding bars), plus food and drink sold from vending machines situated in canteens and similar areas."
> (My underlined emphasis).

27. In my judgment, this sub-paragraph makes clear that it is concerned with supplies *in the course of* catering. But for the Concession, supplies of catering by student unions would be standard rated. It could hardly be clearer that "bar" as used here is identified as somewhere that provides catering, but which is not covered by the Concession.

28. In his arguments, Mr Conolly pointed to the historic wording of the third paragraph of the Concession as it was in force between 2002 and 2011. He submitted that supported his primary case that "bars", by definition, do not make supplies of catering:

> "…[the concession] does not cover food and drink sold from campus shops, bars, tuck shops, other similar outlets and certain vending machines (read paragraph 2.4 of this guidance) because they are not considered supplies that are made in the course of catering."

29. The wording of that paragraph since 2011 has been as follows:

> "But it does not cover food and drink sold from campus shops, bars, tuck shops, other similar outlets and certain vending machines (read paragraph 2.4 of this guidance)."

30. However, the third sub-paragraph of the Concession, in either version, is simply stating the general position that where there are supplies of *food and drink* which are not made in the course of catering those are not to be treated as exempt under this Concession because those would be either standard rated or zero-rated according to the normal VAT rules on food contained in Schedule 8 Group 1. This does not undermine the explicit position set out in the second sub-paragraph of the Concession (since 2011) that supplies of catering may be made from a bar, but they are not covered by it.

31. In my judgment, the ordinary sophisticated taxpayer would read the whole of the Concession and understand it in its entirety, according to its plain words, rather than applying the strained construction that a bar is, by definition, somewhere that does not provide catering.

32. Turning to the substance of the case, in my judgment, the Union's case is in reality a merits-based challenge to HMRC's conclusion that on the facts the Café is a bar. It is self-evidently not the case that a bar cannot supply catering or can only make supplies of catering up to a certain percentage of sales in order to remain as a bar. There is nothing in the wording of Section 5.5 that would suggest that to the ordinary sophisticated taxpayer.

33. Like Sheldon J, I have formed the view that the Union's claim is predicated on a narrow reading of the Decision. The Decision was not made solely on the basis that a bar is a place where you can buy and drink alcoholic and other drinks. Read properly, the Decision included the physical set up of the space where food and drinks were served and consumed, as well as material from the Café's own advertising.

34. Given that I accept Mr Puzey's submissions as to construction and application on the undisputed surrounding facts, the alternative constructions advanced on behalf of the Union do not arise. I will however briefly address Mr Conolly's submissions in this regard.

35. Under the first alternative construction of the Concession, he proposed a test of "predominant supply" under which it would be necessary to examine the turnover of the premises to determine whether it predominantly supplies alcohol (Meaning 1), or alcohol and cold non-alcoholic drinks (Meaning 2) or predominantly non-alcoholic cold drinks ("*a dry bar*") (Meaning 3). The Union proposed that the test of predominance could be based on an 80:20 split between drinks and other supplies. As I understood his case, Mr Conolly's second alternative construction was identical save that instead of a test of predominance the criterion would be whether the supply of alcohol, etc. is the *main* supply, i.e. more than 50%.

36. In my judgment, HMRC's position that bars are not defined according to the relative proportions of the food and drink sales that they generate, is correct. It is obvious that such proportions can and do vary over time at a particular premises due to factors such as business strategy, public demand, seasonal variations, time of day, price and competition in the local area. The Union's approach is unworkable and artificial.

37. In conclusion on Ground 1, I accept HMRC's case. It interprets "bar" as being the closest to its ordinary use in everyday life. It is somewhere where one can buy and drink alcoholic and other drinks, as well as food. The Café meets that definition on the facts including the physical features and accurate self-advertising of the Café as a "bar". The definition of "bar" contended for by the Union as somewhere that does not supply catering or, alternatively, very much by way of catering, does not engage with the everyday reality of how that term is used and applied whereby bars ordinarily provide catering services.

38. For completeness, as part of his case on construction, I have not overlooked Mr Conolly invocation of the principle of "fiscal neutrality", comparing the Café to what he said was a like establishment run by a university. But "fiscal neutrality" is not a free-standing principle of construction which means that in the tax context words lose their ordinary meaning. In any event, the comparison Mr Conolly seeks to make does not work. The supplies of catering by universities are exempt as a matter of law because they are "closely related" to the supply of education by an "eligible body". It is agreed that student unions are not eligible bodies. Their supplies of catering are treated as exempt by the Concession and are analogous to supplies of catering made by other non-eligible bodies.

39. I refuse permission to apply for judicial review on Ground 1.

Ground 2: irrationality and differential treatment

40. I can address this ground more briefly. It overlaps in some respects with the fiscal neutrality point to which I have made reference above.

41. The complaint is not that on the facts (and assuming a correct construction of "bar" has been adopted), HMRC's conclusion is perverse. Rather, the complaint is a different form of irrationality argument based on difference of treatment. As to the law, and as a matter of general principle, a difference of treatment by a public authority between two entities which are in materially identical positions can sound as an error in public law. The difference may be a mark of irrationality or the employment of an irrelevant consideration which has wrongly motivated the public body in applying differential treatment. The crucial starting point is for a complainant to show it is in a materially identical position to the comparator. The facts are all important.

42. Student unions are not eligible bodies, and their supplies of catering would not be exempt under the strict terms of VAT legislation. Mr Conolly's reliance on the educational context of a university to justify a different treatment for catering supplied in establishments such as the Café is misplaced because such café-bars and bars are in fact undertaking taxable business in the same way as other café-bars and bars in the vicinity that provide catering supplies. That they do not benefit from the "educational context" of the university is rational because as a matter of law their supplies are not closely related to the supply of education by an eligible body. I reject Ground 2 as being unarguable.

VI. Conclusion

43. Although I have refused the Union permission to apply for judicial review, I will grant permission for this judgment to be cited. That is because I have heard full argument (on the same basis as at a substantive hearing) and have addressed the submissions at perhaps greater length than in a permission decision.

44. Sheldon J's costs order following his refusal of permission will remain in place. I invite written submissions as to the costs of the hearing.