Neutral Citation: [2017] NIQB 19 | *Ref:* **DEE10182**

Judgment: approved by the Court for handing down | *Delivered:* **27/01/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

2017 No. 6543/01

IN THE MATTER OF AN APPLICATION BY MICHAEL DORAN AND ANOTHER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR THE ECONOMY AND THE MINSTER FOR THE ECONOMY IN CONNECTION WITH THE RENEWABLE HEAT INCENTIVE SCHEME

DEENY J

[1] This is an application by Michael Doran and another for leave to apply for judicial review of the decision of the Minister for the Economy and that Department to release into the public domain the names, addresses and other personal data of or information concerning recipients of funding under the non-domestic Renewable Heat Incentive Scheme. The applicants seek an order of certiorari to quash that decision, a declaration that the decision is unlawful and an injunction prohibiting release of the information, at first, on an interim basis until the plenary hearing of the application.

[2] The application was brought to my attention on Saturday 21 January. As the Minister's intention was to publish this information on Wednesday 25 January I directed a hearing of the leave application on an expedited basis on Tuesday 24 January. Mr Gerald Simpson QC appeared with Mr Richard Shields for the applicants. Dr Tony McGleenan QC appeared with Mr Paul McLaughlin for the respondents. The court is obliged to counsel for their helpful submissions.

[3] A preliminary application of Mr Simpson was on behalf of the second applicant. The first applicant Mr Doran is the Chairman of the Renewable Heat Association for Northern Ireland. This was formed on 9 January 2017 to represent the interests and views of the non-domestic renewable heat industry in Northern Ireland. Mr Doran has experience in the renewable energy field and is, he avers in his affidavit, managing director of a not for profit company operating in that

sector, but is not himself a recipient of grant aid. The second applicant is such a recipient. In his affidavit he expresses apprehension for himself and his family if his name and address are disclosed to the public. Mr Simpson asked therefore that he be anonymised for these proceedings as to do otherwise would be to deprive him of the very remedy he seeks from the court. Counsel for the respondents did not oppose this application at this time although he desired that the issue be kept under review. I therefore allowed the application of this applicant regarding anonymity at this stage. He is to be referred to as D.A. hereafter until further order of the court.

[4] I initially received an affidavit in draft from him under initials but I declined to accept that. I have now received a sworn affidavit from the applicant in his own name in support of his application, although that affidavit should not be disclosed in its original form without further order of the court.

[5] It is not in dispute that the Renewable Heat Incentive Scheme has proven very controversial. Since the leave hearing before me on 24 January it has been announced that the Right Honourable Sir Patrick Coghlin is to chair a public inquiry into various aspects of the introduction and operation of the scheme in Northern Ireland.

[6] In a statement of 18 January 2017 the Economy Minister, Mr Simon Hamilton MLA said:

> "I believe that it is absolutely imperative that there is complete openness and transparency around the RHI scheme and particularly in respect of the naming of businesses benefiting from the scheme. It has always been my intention to publish this information. However I have equally always been mindful that I can only do so in accordance with my legal obligations."

[7] I pause there to point out that the Association which Mr Doran chairs appears from an exhibit to his affidavit to consist of individual persons and not limited companies or limited liability partnerships or other corporate bodies. Neither the interim order which I made on 24 January nor the order I am now asked to make have anything to say against the disclosure of the names of corporate businesses in receipt of public funds under this Scheme. Article 8 of the European Convention on Human Rights does not apply to them; nor do the Principles set out at Schedule 1 of the Data Protection Act 1998 as these relate to personal data i.e. data relating to "living individuals"; see section 1 of the Act.

[8] Mr Simpson QC cited my own judgment in *Francis Tiernan's Application* [2016] NIQB 10 at [8] as to the test I should apply in considering an application for leave to bring judicial review proceedings:

> "I bear in mind the applicant's submission taken from paragraph [14] In *Re Campbell* [2013] NIQB 32, citing *Re Morrow and Campbell's Application* [2001] NICA 261 (QBD):
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> > 'On an application for leave to apply for judicial review an applicant faces a modest hurdle. He need only raise an arguable case; or, as it is sometimes put, a case which is worthy of further investigation.'
>
> I also bear in mind the repeated dicta of Kerr J, as he then was, when responsible for judicial review in this jurisdiction, that there is no point in granting leave for a full judicial review hearing unless there is a reasonable prospect of a useful benefit arising from the same for the applicant or the administration of justice."

[9] That is the test I shall apply.

[10] As this is only at the leave stage I shall address Mr Simpson's submissions and those of Dr McGleenan in short form.

[11] The first contention is that putting this personal information in the public domain would be a breach of the Article 8 rights of the individual recipients who are members of the Association to respect for their private and family life. This is based in part on the affidavit of D.A. suggesting that the controversy about this scheme is likely to lead to public hostility if he and others are named as recipients of tariff payments under it.

[12] Dr McGleenan firstly pointed out that Mr Doran himself could not rely on ECHR as he was not a recipient. I accept that and do not grant leave under Article 8 for Mr Doran in any personal capacity.

[13] The respondents' argument was that a recipient of public funding does not have a reasonable expectation of privacy and so Article 8 does not apply. Counsel relies on *Re JR38* [2016] AC 1131; [2015] UKSC 42 but the facts are very different. There are two issues here: whether Article 8 is engaged at all and if it is whether the Minister's decision is a proportionate one that is necessary for one of the purposes set out in Article 8(2) of the European Convention on Human Rights. As to the first aspect recipients of social security benefits are recipients of public funds but it would not be customary to publish lists of their names and addresses. It seems to me that it is at least arguable that Article 8 is engaged. I cannot decide proportionality without having the benefit of a replying affidavit on behalf of the Department. It may well

be that the Minister is perfectly entitled to publish the identities of these recipients but it does seem to me a matter that justifies further investigation.

[14] Secondly, the applicants contend that the placing of the information in the public domain would be in breach of privacy policies which were part of the contractual documents that the second applicant and others entered into. It is not currently disputed that these are in the nature of binding legal agreements. The recipients, such as the second applicant, expended substantial sums of money in buying boilers and carrying out other works to qualify them to receive the tariff, which amounts in law to consideration. What is controversial is the amount of the tariff, the absence of a cap on the amounts that could be claimed unlike England and Wales and, perhaps, the marked difference in tariffs between boilers under 100 kilowatts, which the second applicant has, and larger potentially more efficient boilers.

[15] The privacy policy for domestic recipients of RHI payments exhibited in DA's affidavit expressly stated that one of the uses that might be made of information was "to maintain a register of scheme participants". It would be normal enough for such a register to be open to the public. That policy was apparently prepared by the Department itself which managed the domestic scheme. Rather surprisingly, the non-domestic privacy policy, which was managed and drafted by Ofgem on behalf of the Department, is in quite different terms. There is no reference to a register. Mr Simpson contends that this policy does not permit disclosure of the names of the participants. This will require further consideration. I do note that at page 33 of the exhibits to the affidavit of D.A. one finds in the privacy policy the following sentence. "Details of an accredited installation, including its location, technology type, installation capacity, accreditation date and payments received will be freely available to the general public." (Emphasis added) Mr Simpson relies on a statement by the Permanent Secretary to the Department to the relevant Committee of the Assembly that location has been taken so far in very broad terms. The Department itself only proposed to give the first two letters and two digits of the postcode of any recipient in the information it was proposing to disclose. But it may be that quite precise disclosure of location is permitted.

[16] Suffice it to say that whether names can be disclosed and the amount of location that can be disclosed both seem to me to a degree uncertain at this stage and to warrant a full hearing.

[17] Dr McGleenan points out that even if there was a legitimate expectation of privacy government can change its mind, for good reason, and resile from an earlier indication. That is quite correct but would obviously require examination by the court. In any event the contention here, which I cannot determine without consideration of all the actual contractual documents of, at least, the second applicant and perhaps others, is that this is not only a question of substantive legitimate expectation but a contractual provision, by which government is legally

bound like any other party. It is therefore appropriate to grant leave under this heading also; Mr Simpson's contentions are arguable.

[18] The third heading argued for is breach of the Data Protection Act 1998. The Department sought to address that issue by writing to recipients saying the Minister was intending to disclose their names and inviting their consent. It is submitted on the Minister's behalf that enough was done. Again that may well be right but the provisions of the Act are complex although they centre to a considerable extent on whether or not it is "necessary" to disclose personal information. I do not see that I can properly assess the necessity of doing so in the light of the relevant criteria at this stage. Again I make it clear that in granting leave, as I do, it does not mean that the ultimate decision will be in favour of the recipients. It may well be that this is lawful within the meaning of the 1998 Act but further consideration is required.

[19] The applicants further contend that the Minister is in breach of the Ministerial Code under the Northern Ireland Act 1998. It is contended that Section 20(4) as amended requires the Executive Committee to consider "significant or controversial matters that are clearly outside the scope of the agreed programme …" It is common case that the latter would apply here but it is contended on behalf of the Minister that this is essentially an administrative decision for him and that while it is outside the scope of the agreed programme it is not "significant or controversial" within the meaning of the Act, a phrase which is a term of art submits counsel. It is contended that the Minister has not breached the Ministerial Code, or if he has that it is nevertheless not a ground on which the court should intervene. In any event the Executive Committee is not sitting and has not sat for some time which may be a relevant consideration to take into account before any relief could be granted under this head. Nevertheless, I think it is just arguable that it is contrary to these provisions and I grant leave under this heading. Whether any legal remedy would follow if there is a breach is a matter to be addressed.

[20] The applicants go on to contend, that the decision is Wednesbury unreasonable, at ground (g), i.e. that it is a wholly irrational decision by the Minister. I reject that contention. This may be an entirely proper decision by the Minister in the interests of transparency and openness. I see no grounds for describing it as irrational.

[21] Similarly I do not consider it as right to describe it as being taken in breach of the rules of natural justice. This was essentially an administrative not a quasi-judicial decision and no authorities have been advanced for the proposition that the Minister was obliged to give each of these recipients of public funding a hearing before he made the decision. I refuse leave on that ground.

[22] The wider nature of Wednesbury unreasonableness i.e. taking into account considerations which are irrelevant or failing to take into account relevant considerations seems a weak ground at present here. The Minister says he did take

into account the responses of recipients. But as a hearing is going to have to take place in any event I will allow the applicants leave on that basis also.

[23] With regard to the continuance of an interim injunction I will hear any fresh submissions on behalf of the parties. I will accede to the Minister's request through counsel for an expedited hearing of this matter. I do so as I am informed that his exercise of the powers of a Minister run only until the Assembly elections called by the Secretary of State before 2 March 2017. To delay a decision beyond that date would be unfair to the Minister.