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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY THOMAS FORGRAVE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF THE NORTHERN IRELAND (REGIONAL RATES AND ENERGY) ACT 2019**

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**Gerald Simpson QC and Richard Shields (instructed by A&L Goodbody) for the Applicant**
**Tony McGleenan QC and Paul McLaughlin QC (instructed by the Departmental Solicitor's Office) for the Respondent**

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**HUMPHREYS J**

**Introduction**

[1] The ramifications of the ill-fated Renewable Heat Incentive ('RHI') Scheme, introduced in Northern Ireland in 2012, continue to be felt. The Scheme sought, as its name suggests, to incentivise the use of renewable energy to produce heat, but instead has become a watchword for ineptitude in public administration. The fallout from the creation and operation of the Scheme was at least partially responsible for the collapse of the devolved institutions in January 2017.

[2] Shortly thereafter an independent public inquiry, chaired by Sir Patrick Coghlin, was announced which was to examine the design, governance, implementation and operation of the RHI Scheme. The inquiry reported in March 2020 and made a series of detailed findings and recommendations.

[3] In February 2017 the Department for the Economy made the Renewable Heat Incentive Scheme (Amendment) (Northern Ireland) Regulations 2017 which amended the 2012 Regulations, introducing the concepts of 'tiering' and 'capping' into the payments received by scheme members.

[4] The 2017 Regulations were the subject of an application for judicial review brought by the Renewable Heat Association Northern Ireland Limited, an organisation representing scheme members and DA, one such member. The judicial review challenge concerned the legality of these Regulations. Judgment was handed down by Colton J in December 2017 *(Re RHANI* [2017] NIQB 122), to which I will refer in due course, dismissing the application on all grounds. This is the subject of an appeal to the Court of Appeal which has been adjourned pending the outcome of the instant judicial review proceedings.

[5] Like Colton J, I commend the industry and quality of the counsel and solicitors on both sides for the manner in which this case was presented.

**Background**

[6] On 26 March 2019, with the Northern Ireland institutions still suspended, the Westminster Parliament passed the Northern Ireland (Regional Rates and Energy) Act 2019 ('the 2019 Act').

[7] The applicant seeks a declaration from the court, pursuant to section 4 of the Human Rights Act 1998, that the operative parts of the 2019 Act, namely section 3 and the Schedule, are incompatible with the rights which he enjoys pursuant to Article 1 of Protocol 1 ('A1P1') of the European Convention on Human Rights ('ECHR'). The application was dealt with by way of a 'rolled-up' hearing.

[8] The applicant is an award-winning poultry farmer who has carried on business in County Antrim for some 30 years. His farm produces in the region of one million chickens per year. He became an accredited member of the RHI Scheme on 9 March 2014 and thereafter was entitled to periodic support payments in accordance with the tariff set out in the 2012 Regulations. This involved a payment of 5.9 pence per kilowatt hour ('kWh') in respect of each 99 kWh biomass boiler for a tariff lifetime of 20 years from the date of accreditation.

[9] The tariffs provided for in the 2012 Regulations were reduced, in turn, by the 2017 Amendment Regulations (the subject matter of *Re RHANI*) and the Northern Ireland (Regional Rates and Energy) Act 2018 ('the 2018 Act'). These pieces of legislation led to a Tier 1 rate of 6.5 pence per kWh and a Tier 2 rate of 1.5 pence per kWh.

**The Grounds for Judicial Review**

[10] The 2019 Act effects further changes to the tariffs payable under the Scheme. Tier 1 is payable at the rate of 1.7 pence per kWh for the first 1314 hours and thereafter, Tier 2, is payable at the rate of 0 pence per kWh.

[11] The case is made that the entitlement to payment of the tariff in the 2012 Regulations is a possession within the meaning of A1P1 ECHR and that the 2019 Act interferes with, or deprives, the applicant of this possession in a manner which is not in the general interest and is not proportionate.

**The Legal Framework**

**(i) A1P1**

[12] A1 P1 provides:

> "*(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

**(ii) The Meaning of 'Possession'**

[13] The learned authors of Harris, O'Boyle & Warwick on *The Law of the European Convention on Human Rights* opine that the word 'possession', in this context, should not be confined to a narrow interpretation but, properly construed, encompasses a wide range of proprietorial rights:

> *"The essential characteristic of a 'possession' is the acquired economic value of the individual interest. A 'possession' embraces immoveable and moveable property and corporeal and incorporeal interests, such as company shares, deposits in bank accounts, and intellectual property. Contractual rights, including leases, and monies due under court judgments … are possessions. Pension rights are also possessions, as are other welfare benefits."*

[14] This broad view of the concept finds support in the case law, both domestically and in Strasbourg. In *Plalam SPAC v Italy* [6021/02, 18 May 2010], the European Court held an entitlement to a public subsidy enjoyed by a manufacturing company gave rise to a legitimate expectation of obtaining such subsidy and therefore fell within the A1P1 meaning of possession. In *Stec v UK* [2005] ECHR 924, the same court held that an *"assertable right, of an individual and economic nature, to social benefits"* enjoyed the ECHR protection.

[15] In *Re Meehan* [2018] NICA 42, the Court of Appeal found that the right to apply for compensation under a discretionary criminal injuries scheme is a possession within A1P1. In *R –v- Attorney General ex p. Countryside Alliance* [2007] UKHL 52, Lord Bingham observed:

> *"Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not."*

[16] The applicant in this case became entitled, on accreditation, to payment of the tariff under the 2012 Regulations for the 20 year period referred to in that legislation. There can be no doubt that this represented a significant economic interest which would be enforced by the courts as a matter of statutory entitlement (see the judgment of Deeny J in *Re Doran* [2017] NIQB 24). The respondent's argument that the scheme only gives rise to some 'future income' fails to recognise the immediate right to payments created upon compliance with the rules of the scheme. This entitlement falls squarely within the definition of 'possession' in A1P1. I note that my conclusion in this regard accords with that of Colton J at paragraph [213] – [217] of his judgment.

**(iii) Interference with A1P1 Rights**

[17] In *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35 the court said that there are three distinct rules.

> *"The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."*

[18] Lord Carnwath in the Supreme Court in *Cusack v Harrow LBC* [2013] UKSC 40 explained:

> *"Secondly, although not spelt out in the wording of the article, claims under any of the three rules need to be examined under four heads:*
>
> *(i) whether there was an interference with the peaceful enjoyment of 'possessions';*
>
> *(ii) whether the interference was 'in the general interest';*

*(iii) whether the interference was 'provided for by law'; and*

*(iv) proportionality of the interference*."

[19] In *R (Mott) v Environment Agency* [2018] UKSC 10, the Supreme Court explained that the distinction between deprivation and control was not central to the analysis of whether there had been a breach of A1P1 but rather the key issues were those of fair balance and proportionality. In that case the restrictions placed by the respondent on the exercise of fishing rights by the applicant resulted in a loss of some 95% of the benefit of those rights. It was held that this did not strike a fair balance, nor was it proportionate in light of the particular impact on the applicant's livelihood.

[20] The well-known four stage test for proportionality was summarised by Lord Kerr in *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32 at para [41]:

> *"They are (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"*

[21] In *Béláné Nagy v Hungary* [2016] ECHR 1114, the Grand Chamber considered the case of a woman whose entitlement to a disability pension was withdrawn and then her application for a new benefit was defeated by the fact she had not been receiving the disability pension. The court held that the applicant enjoyed a property right, based on legitimate expectation, even though at the operative date she enjoyed no actual benefit. The majority held that the refusal of the new application represented a disproportionate and excessive burden upon her. The Grand Chamber stated:

> *"Moreover, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is 'in the public interest.' Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions."* [para 113]

[22] Furthermore, it was recognised that the margin of appreciation to be afforded to national legislatures in implementing social and economic policies should be a wide one and that courts ought not to interfere with judgments relating to the public interest unless these were *"manifestly without foundation."* This was expressed to be particularly so when, for instance, the policies in question are for the protection of the public purse.

[23] Aside from the legitimate public interest, the interference in question must not impose an excessive burden on an individual. In that context:

> *"The Court reiterates that the deprivation of the entirety of a pension is likely to breach the provisions of Article 1 of Protocol no. 1 and that, conversely, a reasonable reduction to a pension or related benefits are likely not to do so."* [para 72]

**(iv) The *Bosphorus* Presumption**

[24] In *Bosphorus Airways v Ireland* [2006] 42 EHRR 1, the applicant complained that the impounding of an aircraft leased by it from Yugoslav Airlines whilst at Dublin airport constituted a breach of its A1P1 rights. The seizure of the aircraft came about as a result of Ireland's compliance with EC Regulation 990/93 which implemented UN sanctions against the then Federal Republic of Yugoslavia. It was argued that such compliance was, on its own, sufficient justification for the admitted interference with the applicant's property rights. The Grand Chamber held that, in light of the protection of fundamental rights afforded by EC law, there was a presumption that Ireland did not depart from ECHR requirements when implementing binding EC law obligations. This was described:

> *"In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.*
>
> *If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation."* [paras 155 & 156]

[25] It concluded:

> *"It cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted."* [para 166]

[26] Recently, in *O'Sullivan McCarthy Mussel Development v Ireland* [2018] (EU: 44460/16), the measure in question related to the deprivation of mussel seed fishing permits in Co Kerry. Ireland had been the subject of infringement proceedings in relation to its failure to implement obligations under EU environmental directives. The CJEU held in 2007 that Ireland was in breach. Following that judgment, the Minister for Agriculture, Food and the Marine determined that the issue of permits in the area should be temporarily suspended pending the outcome of environmental assessments. The applicants brought proceedings against the State claiming loss of profits and alleging, inter alia, breach of A1 P1 rights.

[27] The defendant's position was that the measures were taken in order to comply with the State's obligations under EU law and it therefore fell within the *Bosphorus* principle. The ECtHR held that there was an interference with the applicants' right to peaceful enjoyment of possessions but that the protection of the environment was a legitimate general interest objective of considerable weight.

[28] The first question for the court to determine was whether the *Bosphorus* presumption applied. It stated the principle:

> *"The application of the presumption of equivalent protection in the legal system of the EU is subject to two conditions. The first is that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law, which the Court has recognised as affording equivalent protection to that provided by the Convention."* [para 110]

[29] In the circumstances, the court held that whilst Ireland had to comply with the Directives and the CJEU judgment, it was not wholly deprived of a 'margin of manoeuvre' in that there remained some scope for negotiation with the Commission, as was illustrated by subsequent successful implementation of interim measures. The *Bosphorus* presumption did not therefore apply.

[30] The court then considered whether the interference achieved a fair balance between the general interest and the individual's fundamental rights. It ultimately held that there was no violation of A1P1 since the interference did not constitute an

individual and excessive burden for the applicants. It was persuaded to that conclusion by the weight of the objectives being pursued by the State *"in achieving full and general compliance with the obligations under EU environmental law"* [para 130].

[31] In *The Salmon Net Fishing Association of Scotland* [2020] CSOH 11, a group of salmon fishermen challenged a compensation scheme set up to assist those adversely affected by a prohibition on the retention of salmon caught in coastal waters. This had come about as a result of infraction proceedings brought against the UK by the Commission arising out of the failure to implement the Habitats Directive. It was not argued that this was a case of the operation of the *Bosphorus* presumption but that the compliance with obligations under EU law was a matter of legitimate general interest of considerable weight.

**(v) The Relevance of Conduct**

[32] The relevance of the conduct of public authorities to the A1 P1 proportionality issue was considered in *Moskal v Poland* [2010] 50 EHRR 22:

> *"As stated above, in the context of property rights, particular importance must be attached to the principle of good governance. It is desirable that public authorities act with utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. In the instant case, the Court considers that having discovered their mistake the authorities failed in their duty to act in good time and in an appropriate and consistent manner.*
>
> *The Court, being mindful of the importance of social justice, considers that, as a general principle, public authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence. Holding otherwise would be contrary to the doctrine of unjust enrichment. It would also be unfair to other individuals contributing to the social security fund, in particular those denied a benefit because they failed to meet the statutory requirements. Lastly, it would amount to sanctioning an inappropriate allocation of scarce public resources, which in itself would be contrary to the public interest. Notwithstanding these important considerations, the Court must, nonetheless, observe that the above general principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit. If a mistake has been caused by the authorities themselves, without any fault of a third party, a different proportionality approach must be taken in determining whether the burden borne by an applicant was excessive."* [paras 72 & 73]

[33] In *NKM v Hungary* [2016] 62 EHRR 33, the ECHR commented:

> *"In order to assess the conformity of the state's conduct with the requirements of art. 1 of Protocol no. 1, the Court must conduct an overall examination of the various interests at issue … taking into account all relevant circumstances, including the conduct of the parties to the proceedings, the means employed by the state and the implementation of those means. Where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner."* [para 62]

**The Applicant's Circumstances**

[34] The applicant became accredited under the RHI Scheme in March 2014. Prior to this time he had six chicken sheds on his farm which were heated using liquid propane gas ('LPG'). These were replaced by six 99 kW biomass boilers and, following expansion of the farm business, a further four boilers of this size were added in 2015. The applicant says that, in total, he invested £508,000 in biomass boilers, boiler houses, installation works and associated costs. The evidence reveals that he funded these works through bank loans with annual loan repayments of £68,000 per annum. In 2021, the applicant restructured his bank debt, due to decreased cash flow, to repay £36,000 per year over a longer term. When one considers maintenance, repair, fuel and running costs, the applicant says that he has outgoings of approximately £14,000 per boiler per annum.

[35] The figures put forward by the applicant have been the subject of considerable scrutiny. The respondent relies on the figures provided by the applicant to Ofgem, the appointed administrator of the scheme, which puts the total cost of the 10 boilers at £347,331. The respondent stresses that any cost over and above that figure which includes the installation of indirect hot water systems in the applicant's sheds is not recognised as covered by the RHI Scheme.

[36] The respondent also points out that the applicant, as an independent contractor supplying Moy Park, was entitled to financial support under that company's Additional House Payment scheme.

[37] Furthermore, the respondent has doubted the figures put forward by the applicant in relation to annual outgoings. Reliance is placed on the Ricardo report which found the average cost of maintaining and servicing a small to medium sized biomass boiler was £735 per annum.

[38] It is stressed that the RHI Scheme was only ever intended to incentivise the move away from fossil fuel heat generation by subsidising the additional costs associated with renewable energy. Had the applicant continued to use his LPG

boilers, he would have been incurring maintenance, repair and servicing costs in any event.

[39] The respondent has set out in evidence the payments actually made to the applicant on foot of the RHI Scheme up to 3 May 2021. The total payments in respect of the 10 boilers amounted to £1,111,940. If one deducts the Ofgem figure for costs, the net amount received by the applicant is £764,609. If the figure of £508,000 is deducted the net received comes to £603,940.

[40] The respondent's estimated projections of payments suggest that the applicant would have received a total amount of £7,950,000 had the 2012 tariffs remained in place for the lifespan of the scheme, or £3,597,000 on the basis of the 2017 Regulations. The applicant disputes these projections and claims the sums are significantly overstated.

[41] The applicant maintains that he made investment decisions and incurred considerable expenditure on foot of the principle of a guaranteed lifetime tariff. Had he been aware of the risk of retrospective change, he would either not have joined the scheme at all or made quite different commercial decisions. In particular, he makes the point that he did not subscribe to a particular 'rate of return' on capital investment but rather to a scheme with guaranteed periodic payments.

[42] The applicant's evidence is that the 2019 tariff regime will cause severe harm to his business. He states:

> *"A rate of return is of no consequence if I am unable to pay my bills as they fall due…a projected 20 year rate of return does not equate to having the cash flow needed to meet short term bank commitments."* [para 28, 3rd affidavit]

**The RHI Scheme**

[43] The applicant's understanding of the RHI Scheme at the time of accreditation was that the payments made under the 2012 Regulations were guaranteed and 'grandfathered.' It is his clear evidence that he relied upon representations made, and the incentives offered, in order to move away from LPG to a renewable energy source.

[44] Under the terms of the 2012 Regulations, the applicant was entitled to a tariff payment of 5.9p/kWh which led to an annual payment, per boiler of £26,000 before tax. The 2017 Regulations introduced a payment of 6.5p/kWh for the first 1314 hours, then 1.5 p/kWh up to a maximum of 400,000 kWhth with no payment in respect of any additional kWh thereafter. This, on the applicant's analysis, led to a reduced annual payment of £13,000 per boiler, less than the annual running cost.

[45] The legislation under challenge, the 2019 Act, reduced the tariff further to 1.7 p/kWh for the first 1314 operating hours and 0p/kWh thereafter. At the time of swearing of his first affidavit, the applicant projected that this would give an annual payment per boiler of £2,200, creating a total annual shortfall of £118,000. This is said to give rise to a risk of insolvency for the applicant's business.

[46] The 2012 scheme had at its origin a report from Cambridge Economic Policy Associates Limited ('CEPA') dated 28 June 2011 which was commissioned for the purpose of identifying options for an RHI Scheme in Northern Ireland. The report led to a consultation process and an addendum CEPA report in February 2012. The chosen option was a subsidy scheme whereby business owners would receive a subsidy to incentivise the switch to renewable heat. This mirrored the scheme in Great Britain but it was proposed that tiering was not necessary in Northern Ireland.

[47] Much time and money has been expended in analysing how this deeply flawed scheme came to be on the statute book. This judgment is not the place to rehearse the detailed analysis of the RHI Inquiry but, given the applicant's reliance on the conduct of public authorities as being relevant to the A1P1 proportionality approach, it will be necessary to consider some of the history.

[48] Even a cursory reading of the second CEPA report of February 2012 reveals a fundamental flaw. The proposed tariff payable in respect of biomass boilers up to 100 kW was 5.9 p/kWh and the cost of wood pellets to a small or medium commercial enterprise was 3.37 p/kWh. If the subsidy exceeded the cost of fuel, then the more pellets one burned, the more money was generated. This later led to the use of the pejorative phrase 'cash for ash' but it should be noted that businesses like poultry farming required the fairly constant use of heat.

[49] The Department prepared a business case in April 2012 recommending the adoption of a subsidy scheme with no tiering. It asserted, quite wrongly:

> *"Tiering is not included in the NI scheme because in each instance the subsidy rate is lower than the incremental fuel cost"*

[50] The business case recognised the risk of an incorrect subsidy being set, whether too high or too low, and it was claimed that such risk would be monitored and managed as part of the risk register. It was stated that the rate of return for most technologies incentivised by the scheme had been set at 12%. The document also foresaw scheduled reviews being carried out, commencing in 2014, at which time all aspects of the scheme, including the tariffs, would be reviewed, albeit this would not impact on existing installations already receiving payment. It is apparent that there was no proper risk management nor were the scheduled reviews carried out.

**State Aid**

[51] Article 107 of the Treaty on the Functioning of the European Union ('TFEU') states:

> "1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
>
> 3. The following may be considered to be compatible with the internal market:
>
> (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

[52] In December 2011 the Department notified the EU Commission of its intention to introduce the RHI Scheme in Northern Ireland and sought State Aid approval to do so. Following the second CEPA report in February 2012, the notification was revised to include the recommended tariffs. The Commission granted approval on 12 June 2012, assessed against the 2008 Community Guidelines on State Aid for Environmental Protection, finding that the scheme object was compatible with the internal market. The reasoning included the following:

(i) The primary objective of the scheme was environmental protection and contribution towards achieving the UK's renewable energy target [para 7];

(ii) The tariffs were designed to cover the difference in cost between the renewable heat alternative and a traditional fossil fuel system and only 'useful heat' was eligible for payment under the scheme which was said to eliminate any incentive for deliberately wasting heat [paras 23 & 25];

(iii) The calculation of the subsidy was based on the overall discounted cost of heat being less than the 'non-renewable counterfactual', in this case oil [paras 28 & 29];

(iv) The cost of capital used in the calculation was 12% [para 33];

(v) Revision of tariffs would only apply to new scheme entrants – the principle of 'grandfathering' would guarantee subsidy levels for existing installations [para 40];

(vi) The detailed economic model demonstrated the absence of overcompensation [para 45];

(vii) The independent consultants' report relied upon by the UK concluded the necessary rate of return to incentivise renewable heat was 8% to 22% and 12% was regarded as reasonable [para 63];

(viii) The Commission was satisfied that total tariff payments did not exceed the difference between renewable and heat production costs [para 69].

**The 2012 Regulations**

[53] The scheme was introduced on 1 November 2012 by the 2012 Regulations. These were approved by the Northern Ireland Assembly following what was described as *'considerable'* scrutiny by the Committee for Enterprise, Trade and Investment.

[54] Regulation 36 stated that periodic support payments *"shall be payable for 20 years"* and that the tariff *"shall be fixed when that installation is accredited."*

[55] Initial take up of the scheme was modest and it was not until 2015 that its popularity began to create budgetary concerns. The position was also affected by a belief that the UK Government would be paying for the cost of the scheme. Once it was appreciated that any overspend would fall upon the Northern Ireland budget, the 2015 Regulations were introduced which provided for tiering and capping for new installations. The announcement of these Regulations caused a significant 'spike' in applications for accreditation between September and November 2015.

[56] Subsequently, the scheme was suspended with effect from 29 February 2016. Again, this did not concern existing accredited scheme participants such as the applicant.

[57] In June 2016 the Comptroller and Auditor General for Northern Ireland ('CAGNI') produced a report highlighting many of the weaknesses inherent in the scheme. The simple mathematics evidenced how those using 99 kW boilers stood to gain substantially from the scheme, notably when compared to counterparts in Great Britain. The subsidies were overgenerous, there were no cost control measures, the Department failed to monitor the scheme and the risks associated with it had not been identified and addressed.

**State Aid – 2017**

[58] In March 2017 the UK Government notified the European Commission of a set of changes to the 2012 Regulations. These entailed changes to the tariff rate and the introduction of tiering and capping, designed to regulate the returns which undertakings were receiving under the scheme.

[59] The Commission concluded that the changes were compatible with the internal market.

**The 2017 Regulations**

[60] The 2017 Regulations were the first legislative step to have retrospective effect and are the subject of detailed consideration in *Re RHANI*. These changed the tariffs for pre-November 2015 installations to reflect those payable under the 2015 Regulations.

[61] The adverse impact on the Northern Ireland budget was presented as a strong driver for the 2017 Regulations. Colton J analyses the figures in some detail in his judgment – the Department provided estimates of £500M to £700M over the lifetime of the scheme. Whilst these figures were in dispute, it was not doubted that the impact would have been significant without legislative intervention.

[62] On the evidence of Richard Rodgers, the Department official responsible for the RHI taskforce, the 2017 Regulations, if maintained, would have led to a £10M overspend to the closure of the scheme in 2036. However, the 2019 tariff reforms, if they remain in place, will lead to a £390M underspend on the scheme.

**The Ricardo Energy Report**

[63] In September 2017 the Department commissioned a report from Ricardo Energy and Environment, seeking a review of the tariffs payable to small and medium sized biomass boiler owners. Its report was published in May 2018 and was able to use actual data from the operation of the scheme since 2012. It noted, in particular, that the original assumptions made in respect of capital costs and 'load factor' (i.e. the amount of time that boilers would be in use) were erroneous. The actual data revealed that capital costs were significantly lower and the load factor much higher (an average of 43% compared to an assumed 17%).

[64] In the Ricardo analysis, even if no further payments were made post April 2019, some 75% of boiler owners would achieve a rate of return of 22% or more over the 20 year period on the basis of payments made under the 2012 and 2017 Regulations.

[65] The applicant challenges much of the evidence used by, and the analysis contained in, the Ricardo report as being *'fundamentally flawed.'* It is said that the

data gathered is too limited, incorrect assumptions have been made around fuel prices and allowable costs have been miscalculated. He states that the use of oil as the counterfactual fuel was inappropriate as LPG was used in the poultry industry. All these variables, when properly assessed, would result in a different calculation of a rate of return.

[66] A judicial review court, exercising its supervisory jurisdiction, is manifestly not in a position to reconcile the different views expressed or to make a determination as to the correct approach to these calculations from an economic standpoint.

[67] However, the Department carried out an analysis of the rate of return in light of the Ricardo report. It revealed that when one takes account of the payments made to date, a scheme operator would still generate an average rate of return of 59% even on the proposed 2019 tariff reductions.

**Public Consultation**

[68] Following receipt of the Ricardo report, the Department engaged in a process of public consultation on the future of the RHI Scheme commencing in June 2018. This invited comment on eight possible options.

[69] The responses received informed a Consultation Report published on 31 January 2019. The Department analysed the various options and responses against five criteria, namely:

(i) Affordability;

(ii) Rate of return;

(iii) Impact on scheme participants;

(iv) Supporting the generation of renewable heat;

(v) Operability.

[70] On this basis, the Department concluded that it ought to implement the 'hybrid tariff' identified in the Ricardo report. This involved the retention by all operators of past payments with the payment of future tariffs which, it was estimated, would deliver an overall rate of return of 19%.

**State Aid 2019**

[71] The Department then engaged with the EU Commission on the question of State Aid approval for this emerging scheme. A pre-notification of the options was sent in November 2018 which identified the Department's preferred option. In an

email dated 30 November 2018 the Commission advised that there was *"insufficient evidence at this stage"* to approve a rate of return higher than 12%. The issue of enforcement action to recoup past payments was also raised.

[72] The minutes of a meeting dated 11 December 2018 reveal that EU officials made it clear that it would be impossible for the Commission to approve an amended scheme which delivered a rate of return of 19%.

[73] The position of the Commission, as set out in correspondence dated 25 January 2019, was that the previous decisions of 2012 and 2017 provided cover for a rate of return of the scheme of 12% for the average benefitting project. It is stated:

> *"Unless the UK authorities wish to seek authorisation for increasing the level of aid average projects receive, or for granting new aid under the scheme in a different form to that approved in the 2012 decision, it does not appear that a new notification nor new decision is required. We note that at this stage it is unclear what basis there would be for authorising a higher rate of return than 12% given all required investments have already taken place."*

[74] It was made clear that this was a preliminary and not a formal view of the Commission.

[75] As a result of this indication, the Department considered that the only option which would deliver a future rate of return of 12% was the Ricardo 'base tariff', but this included a negative Tier 2 tariff which involved the recoupment of monies paid to scheme operators. An alternative proposal was developed which set the Tier 2 tariff at nil (rather than a negative figure) and set the tariff at a mid-point between the Ricardo base and hybrid tariffs.

**The 2019 Act**

[76] The Department's variant proposal ultimately was approved by the Permanent Secretary and a request made, in the absence of a functioning Northern Ireland Executive, to the Secretary of State to introduce a Bill in Parliament to give effect to the new proposed tariffs.

[77] The Secretary of State signed a certificate, pursuant to section 19 of the Human Rights Act 1998, certifying that in her opinion that legislation was compatible with the ECHR.

[78] The Bill was introduced on 28 February 2019 and had passed all House of Commons stages by 6 March 2019. The passage through the Lords was complete by 19 March and Royal Assent obtained on 26 March. The Act came into force on 1 April 2019.

[79] The Act introduces new tariffs for the RHI Scheme (section 3 and the Schedule) and also makes provision for a voluntary buy out scheme to be established by the Department (section 4). To date, no such arrangements have been put in place.

[80] Outwith the statutory requirements, the Department also committed to the establishment of a Hardship Unit.

[81] Concerns were raised by the Chair of the Northern Ireland Affairs Committee (NIAC) in Westminster about the haste with which the 2019 Act was passed and the consequent lack of legislative scrutiny. As a result, it instigated an inquiry which made the following recommendations in June 2019:

> "(i) The Department should revisit the 2019 tariffs to determine if they should include:
>
> (a) Parity with the Great Britain or Republic of Ireland schemes;
>
> (b) Counterfactuals in different circumstances, rather than just kerosene;
>
> (c) Consideration of participants' investment decisions;
>
> (ii) The Department should consider the cost calculations for the Republic of Ireland scheme;
>
> (iii) The use of a buy-out scheme;
>
> (iv) A hardship unit should be progressed and ways assessed to assist those suffering hardship."

**The Cornwall Report**

[82] Following the NIAC recommendations, another review was carried out by Cornwall Insight. Its report was published in February 2020. Its key recommendations were:

(i) Oil should remain the relevant counterfactual fuel;

(ii) The Department should review and revise upwards the Tier 1 tariffs;

(iii) The Tier 2 tariffs should remain unchanged at 0p/kWh.

**The Buglass Report**

[83] At the same time, the Department received the report from Buglass Energy Advisory in relation to the issue of hardship. It concluded that many of the scheme operators had suffered economic hardship as a result of the reduced cash flow following tariff reductions. It considered some of the possible remedies available, including a further review of tariffs or the use of a buy out scheme, without recommending any particular solution.

**New Decade New Approach**

[84] In January 2020 the Northern Ireland Executive published the 'New Decade, New Approach' document which states unequivocally that the RHI Scheme *"will be closed down and replaced by a scheme that effectively cuts carbon emissions."*

[85] Another public consultation exercise took place, commencing in February 2021, which put forward four potential options:

(i) The status quo;

(ii) The status quo with reviewed tariffs;

(iii) Scheme closure with no further payment; or

(iv) Scheme closure with compensation to current participants.

[86] The vast majority of respondents expressed a preference for option (ii). At this time, no legislative proposals have been forthcoming in relation to the future of the scheme.

**Does the *Bosphorus* Presumption Apply?**

[87] The respondent asserts that the *Bosphorus* presumption applies in light of the Commission's stated position on the question of State Aid and compatibility with the internal market. It is recognised that national courts do not have jurisdiction to rule on the compatibility of a measure involving State Aid with the internal market – see, for example, *Diamosia Epicheirisi v European Commission* [C590/14].

[88] However, the key question to consider, in light of *O'Sullivan McCarthy*, is whether the impugned interference came about as a result of "*strict international legal obligation"* for the respondent. The authorities speak of *"the exclusion of any margin of manoeuvre."* On an analysis the position adopted by the Commission on the question of State Aid and the 2019 amended scheme, the following points emerge:

(i) The view expressed in January 2019 was preliminary only;

(ii) The view expressed was that any scheme which maintained an average rate of return of 12% was already covered by the existing decisions;

(iii) It would be a matter for the UK Government to seek authorisation for some alternative scheme which delivered a higher average rate of return;

(iv) In the event, no such authorisation was sought.

[89] This cannot therefore be classified as an instance of *"strict international legal obligation."* It is a far cry from adherence to an EC Regulation mandating the seizure of aircraft. The UK did clearly have a margin of manoeuvre in that it was open to it, at any time, to seek the authorisation from the Commission in relation to an amended scheme. The prevailing circumstances here were more akin to those in *O'Sullivan McCarthy* where the State retained an ability to negotiate, discuss and seek to introduce alternative measures. For these reasons, this is not a case where the *Bosphorus* presumption in favour of compatibility applies.

[90] It is necessary therefore to consider whether the interference with the applicant's property rights is in pursuit of a legitimate general interest and, if so, whether such interference is proportionate.

**The Respondent's Objectives**

[91] In bringing forward the 2019 Act, the respondent contends that it is pursuing four legitimate objectives in the general interest:

(i) The protection of the Northern Ireland budget;

(ii) The public interest in ensuring value for money in public expenditure;

(iii) The decision making constraints arising from the EU Commission's State Aid approvals; and

(iv) Contribution to the achievement of the UK's obligations under the Renewable Energy Directive.

[92] I propose to address each of these in turn.

**(i) The Protection of the Northern Ireland Budget**

[93] There can be no doubt that the original 2012 scheme placed a significant strain on the Northern Ireland budget. Left unchecked, the respondent says it would have cost something of the order of £500M. Whilst many of these projections are subject to challenge the essential conclusion, that of a massive potential overspend, is clear.

[94] The applicant's case is that the respondent has failed to recognise that the tariffs introduced by the 2017 Regulations already brought the RHI Scheme within budgetary limits. The figures projected on foot of the 2019 tariffs give rise to a £390M underspend. This is supported by the fact that some £22M of Treasury funding in respect of the RHI Scheme was returned unspent at the end of the tax year 31 March 2020.

[95] The applicant says that the failures on the part of the Department to carry out reviews and to introduce 'degression' (i.e. the stepped reductions in tariff for new scheme entrants) directly contributed to the threat to the Northern Ireland budget and this must have a bearing on the A1P1 analysis.

**(ii) Value for Money in Public Expenditure**

[96] It is stressed on behalf of the respondent that the 2019 Act was the product of independent expert advice, analysis of actual scheme data relating to use and the costs experienced by operators, existing budgetary pressures and public consultation.

[97] The respondent says that there must be a strong public interest in correcting the errors of the original scheme, in preventing overcompensation and in discouraging a culture of 'cash for ash.' It should be stressed that there is no doubt that the applicant has been, and remains, a good faith participant in the RHI Scheme.

**(iii) The State Aid Obligations**

[98] Even where the *Bosphorus* presumption does not apply, the respondent contends that compliance with international obligations constitutes the pursuit of a legitimate aim. It says that in light of the strong opinions expressed by EU officials in respect of any scheme which would deliver a rate of return in excess of 12%, there was a clear and significant public interest in maintaining compliance with State Aid obligations.

**(iv) The Renewable Energy Directive Obligations**

[99] The respondent accepts that this Directive does not mandate the introduction of a renewable heat incentive scheme. It says that one of the results of the introduction of the 2019 amended scheme would be to reduce the incentive to create unnecessary heat. The riposte to this from the applicant is that the 2019 Act could only serve to encourage operators to revert to the use of fossil fuels, thereby adversely affecting achievement of the Directive's goals.

[100] Each of the objectives put forward by the respondent represents a legitimate aim in the general interest. There is, of course, much scope for argument as to the best way of achieving such aims but, particularly in the field of social and economic policy, the court ought to afford a wide margin of discretion to policy makers. A

judicial review court is not in a position, either evidentially or as a matter of constitutional propriety, to gainsay the decisions made by legislators in pursuit of legitimate interests. As Lord Pentland said in *Salmon Net Fishing:*

> *"The case law makes clear that a wide margin of deference should be extended to the national authorities in circumstances such as the present, particularly where, as here, they have consulted those affected and given careful consideration to the measures complained of."*

**Proportionality and Fair Balance**

[101] Whether the impugned measure constitutes an unfair and excessive burden on the applicant is therefore the key issue to be determined. The applicant's evidence is that the 2019 amendments to the tariff render his business potentially unviable and he is unable to meet financial commitments due to lack of cash flow.

[102] The respondent does not seek to deny that there is a very substantial contrast between the payments made under the 2012 scheme and those which prevail today. However, they point to the original intention of the scheme with its notional return on capital outlay of 12% and emphasise that in a seven year period the applicant has received payments of over £1.1M in respect of a capital outlay, on his figures, of just over £500,000. This represents a return on investment of over £600,000 or if one accepts the capital expenditure figures submitted to Ofgem, over £760,000.

[103] The responsibility for the flaws in the original scheme rests firmly with the Department. It was responsible for the introduction of legislation into the Northern Ireland Assembly which was manifestly not fit for purpose. The fact that this was contributed to by the failings of consultants does not detract from that primary conclusion.

[104] The court was invited to the view, in line with *Moskal* and *NKM*, that the culpability of the public authority should lead to a different approach to the question of proportionality. However, the authorities also make clear that a State is entitled to take steps to rectify mistakes, even those which result from its own negligence. This is particularly so when the mistakes in question put public finances in jeopardy.

[105] The issue remains the same – has this applicant been subjected to an excessive burden by reason of the interference with his property rights?

[106] The national court must always recognise the margin of appreciation available to states when making and enacting policy, particularly in the economic field. The fact that the legislature could have taken a different course is not therefore determinative of this issue. In *James v UK* [1986] 8 EHRR 123:

> *"The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance." Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way."* [para 51].

[107] The following factors are to be weighed in the balance in deciding whether the interference with the applicant's right to enjoyment of his possessions strike the requisite balance:

(i) The applicant was entitled to rely upon, and did rely on, the representations that the 2012 tariffs were guaranteed and 'grandfathered';

(ii) In reliance on this he expended significant capital and incurred bank debt;

(iii) Responsibility for the flaws in the original scheme rests with the Department;

(iv) The amendments introduced by the 2019 Act do not require the applicant to repay any element of 'overcompensation';

(v) The applicant has already recovered, even on his own figures, over double his capital outlay on the biomass boilers and associated infrastructure;

(vi) The 2019 Act was the product of expert advice and public consultation, albeit that the ultimate terms of the legislation were not consulted upon;

(vii) Had the 2012 Regulations continued in existence, the applicant would have received a massive windfall;

(viii) Had the 2017 Regulations remained in force, the applicant would have received a less significant, but still considerable, windfall;

(ix) The applicant has sustained, and will sustain, an obvious loss of cash flow as a result of the 2019 Act;

(x) However, the overall purpose of the scheme was to incentivise the conversion to the use of renewables to produce heat, not to provide a source of cash flow for commercial businesses;

(xi) The original scheme was fundamentally flawed, and action was required in order to protect the public purse;

(xii) The European Commission had expressed its opinion, in strong terms, that any scheme delivering a rate of return of over 12% was unlikely to attain the requisite approval;

(xiii) The courts must recognise the margin of appreciation afforded to national legislatures.

[108] In the final analysis, I am particularly influenced by the fact that the applicant has received over £1.1M in subsidies since he was accredited for the scheme in 2014. There has been much ink spilt on the various financial issues in this case but, ultimately, the court is not in a position to, nor does it need to, decide many of these. It simply cannot be said that the applicant has been subjected to an excessive burden by reason of the interference with his economic interests under the scheme when he has received, to date a return on capital investment of between £604,000 and £764,000.

[109] The *Béláné Nagy* threshold of *"manifestly without reasonable foundation"* is a high one. It is not the role of the court to second guess economic policy – if the legislation has a reasonable foundation then the court should defer to the national legislature. This is particularly so when the legislature has had the benefit of expert analysis and public consultation in arriving at a final determination. I recognise that whilst the 2019 scheme is quite different from the 2012 original, the scheme remains in place following intervention to eliminate the flaws which were causing overcompensation. I have therefore concluded that the fair balance called for between the general interest and the interest of the individual has been achieved in this case.

**Conclusion**

[110] The applicant's challenge to the 2019 Act therefore fails. I grant leave but dismiss the application for judicial review. I order that the applicant pay the respondent's costs subject to the cap of £5,000 plus VAT as fixed by the protective costs order made herein on 4 April 2019.