Judicial Communications Office

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COURT REJECTS CHALLENGE TO RHI SCHEME LEGISLATION

Summary of Judgment

Mr Justice Humphreys today dismissed a judicial review brought by a poultry farmer who had signed up to the RHI Scheme in 2014 and was challenging the changes to tariffs introduced in 2019.

The Renewable Heat Incentive Scheme ("RHI Scheme") was introduced with the primary objective of environmental protection and contribution to towards achieving the UK's renewable energy target. The EU Commission granted approval for State Aid in June 2012 and the scheme was introduced on 1 November 2012 by the RHI Scheme Regulations (NI) 2012 ("the 2012 Regulations"). The regulations provided that periodic support payments would be payable for 20 years and that the tariff would be fixed when the installation was accredited.

Thomas Forgrave ("the applicant"), became an accredited member of the RHI Scheme in March 2014. The tariffs payable to the applicant were reduced by the RHI Scheme (Amendment) Regulations (NI) 2017 ("the 2017 Regulations") which introduced the concepts of "tiering" and "capping" into the payments received by scheme members. Further changes to the tariffs were introduced by the Northern Ireland (Regional Rates and Energy) Act 2019 ("the 2019 Act") which came into force on 1 April 2019. The applicant invested £508,000 in biomass boilers, boiler houses, installation works and associated costs and funded these through bank loans. There was some dispute between the applicant and the respondent about his outgoings and projected incomes but the court outlined that under the terms of the 2012 Regulations the applicant was entitled to an annual payment of £26,000 per boiler before tax which reduced under the 2019 Act to £2,200 per boiler. The applicant contented that this gave rise to a risk of insolvency for his business.

The Applicant's case

The applicant sought a declaration that the operative parts of the 2019 Act (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 case was made that the entitlement to payment of the tariff in the 2012 Regulations was a possession within the meaning of A1P1 of ECHR and that the 2019 Act interfered with, or deprived, the applicant of this possession in a manner which was not in the general interest and not proportionate.

The court held that the payment of the tariff under the 2012 Regulations for the 20 year period referred to in that legislation would "fall squarely within the definition of "possession" in A1P1". The court then considered whether the State's interference with this possession could be justified in accordance with the four stage test of proportionality:

- Is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right;
- Are the measures which have been designed to meet it rationally connected to it;
- Are they no more than are necessary to accomplish it; and

- Do they strike a fair balance between the rights of the individual and the interests of the community?

In case-law, the courts have 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". Also, the interference in question must not impose an excessive burden on an individual.

The Respondent's Objectives

In bringing forward the 2019 Act, the respondent contended that it was pursuing four legitimate objectives in the general interest:

- The protection of the Northern Ireland budget;
- The public interest in ensuring value for money in public expenditure;
- The decision making constraints arising from the EU Commission's State Aid approvals; and
- Contribution to the achievement of the UK's obligations under the Renewable Energy Directive.

The court said there could be no doubt that the original 2012 scheme placed a significant strain on the NI budget. The applicant contended that the respondent had failed to recognise that the tariffs introduced by the 2017 Regulations already brought the RHI Scheme within budgetary limits as figures projected on foot of the 2019 tariffs gave rise to a £390m underspend. The applicant said that the failures by the respondent to carry out reviews and to introduce stepped reductions in tariffs for new scheme entrants directly contributed to the threat to the NI budget and this must have a bearing on the A1P1 analysis.

It was 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. The respondent said 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.' The respondent also contended that compliance with international obligations constituted the pursuit of a legitimate aim. It said there was a clear and significant public interest in maintaining compliance with State Aid obligations. The respondent accepted that the Renewable Energy Directive does not mandate the introduction of a renewable heat incentive scheme but that one of the results of the introduction of the 2019 amended scheme would be to reduce the incentive to create unnecessary heat.

The court commented that each of the objectives put forward by the respondent represented 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."

Proportionality and Fair Balance

The key issue to be determined, therefore, was whether the 2019 Act constitutes an unfair and excessive burden on the applicant. His evidence was 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. The respondent did not seek to deny that there is a very substantial contrast between the payments made under the 2012 scheme and those which prevail today. The respondent, however, pointed to the original intention of the scheme with its notional return on capital outlay of 12% and emphasised that in a seven year period the applicant had received payments of over £1.1m in respect of a capital outlay, on his figures, of just over £500,000 which it said represented a return on investment of over £600,000 or if one accepts the capital expenditure figures submitted to Ofgem, over £760,000. The court commented:

> "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."

The court was invited to reach the view that the culpability of the public authority should lead to a different approach to the question of proportionality. It said, however, that case-law makes 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:

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

The court weighed the following factors in deciding whether the interference with the applicant's right to enjoyment of his possessions struck the requisite balance:

- The applicant was entitled to rely upon, and did rely on, the representations that the 2012 tariffs were guaranteed and 'grandfathered';
- In reliance on this he expended significant capital and incurred bank debt;
- Responsibility for the flaws in the original scheme rests with the Department;
- The amendments introduced by the 2019 Act do not require the applicant to repay any element of 'overcompensation';
- The applicant has already recovered, even on his own figures, over double his capital outlay on the biomass boilers and associated infrastructure;
- The 2019 Act was the product of expert advice and public consultation, albeit that the ultimate terms of the legislation were not consulted upon;
- Had the 2012 Regulations continued in existence, the applicant would have received a massive windfall;
- Had the 2017 Regulations remained in force, the applicant would have received a less significant, but still considerable, windfall;
- The applicant has sustained, and will sustain, an obvious loss of cash flow as a result of the 2019 Act;

- 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;
- The original scheme was fundamentally flawed, and action was required in order to protect the public purse;
- 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;
- The courts must recognise the margin of appreciation afforded to national legislatures.

The court was 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. The … 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

The court dismissed the application for judicial review.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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