Judicial Communications Office

21 February 2023

COURT REJECTS CHALLENGE TO RHI SCHEME LEGISLATION

Summary of Judgment

The Court of Appeal[1] today dismissed two appeals relating to the operation of the Renewable Heat Incentive ("RHI") Scheme. The first appeal was brought by the Renewable Heat Association and one individual boiler owner challenging the legality of changes made by regulations which reduced the payments provided under the original scheme. The second appeal was brought by Thomas Forgrave, a boiler owner, who challenged changes to the payment structure and raised a human rights challenge based on Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR").

Introduction

The background to the establishment and modification of the RHI Scheme is set out in paras [6] – [53] of the judgment. The court summarised the decisions of Colton J and Humphreys J[2] in paras [56] – [72]. The court proceeded to deal with the matters arising on appeal under the broad headings of domestic and Convention law. There were three core legal questions:

- Were the Renewable Heat Incentive Scheme (Amendment) Regulations (NI) 2017 ("the 2017 Regulations") which changed the level of tariff for the appellants lawfully made?
- Should the appellants succeed on the basis of either procedural or substantive legitimate expectation given that the promise was made to them that the tariffs would be in place and grandfathered for 20 years?
- Should the appellants succeed in relation to their claim that the changes to the scheme by way of legislation, in the first case by regulation and in the second case by the Northern Ireland (Regional Rates and Energy) Act 2019 ("the 2019 Act"), amount to a breach of their rights under A1P1 of the ECHR, namely the right to peaceful enjoyment of property.

The domestic law issue

The first two questions set out above relate to the vires of the 2017 Regulations which were made under the Energy Act 2011 ("the 2011 Act"). The appellants argued that the 2017 Regulations retrospectively altered the law applicable to them in relation to tariffs and invoked the presumption against retrospective operation of statutes which they said equally applied to delegated legislation. Citing *Craies on Legislation* (12th edition), the court said the appellants' argument did not grapple with the difference between retroactive change[3] and retrospective change to a fixed right affecting vested

[1] The constitution of the court was Keegan LCJ, Horner LJ and Huddleston J. Keegan LCJ delivered the judgment of the court.

[2] [2017] NIQB 122 and [2021] NIQB 92

[3] "Retroactive changes change the law in relation to events which have taken place in the past. Retrospective changes alter existing rights, but only in relation to the future. The presumption against altering vested rights in the future is weaker than in relation to retroactive change … although it is weaker there remains a

rights. It said it was clear that the import of the 2017 Regulations was not to change eligibility post accreditation up to 2017 but to alter the tariff applied to those within the scheme with effect from 2017 for a one-year period which was ultimately extended by another year. The purpose of this was to conduct a review of a scheme which had been clearly costing the public purse significantly more than was anticipated.

The court adopted the legal test formulated by House of Lords[4] in a vires challenge to subordinate legislation. The questions for consideration related to the fact that the 2017 Regulations changed the entitlements of those accredited within the RHI Scheme going forward from 2017 and, significantly, did not make tariff changes prior to that date or require a repayment of monies already received or make any attempt to clawback those monies. The question was whether the 2017 Regulations were beyond the scope of the rule making power in section 113 of the 2011 Act. The test to be applied was "would the consequences of applying the statutory provision so as to effect vested interests to be so unfair that Parliament could not have intended it to be applied in this way". The court agreed that the 2011 Act provided broad and flexible powers to the Department as the rule maker which were open ended in nature:

> "To our mind the effect of these provisions is flexibility and breadth. Significantly, the provisions are without limitation. Nowhere in the 2011 Act does it expressly refer to decreasing payments or altering payments. However, we cannot think that given that this was the setting up of a scheme that such a power could be absolutely precluded. It is certainly not expressly precluded, nor do we think that the intention of the legislature was to preclude it given the breadth of the provisions."

The appellants' argued that the 2017 Regulations offended against those already accredited and who had a guarantee for 20 years at the same tariff. The court said this was clearly not a case where there is a retroactive change from the date when the law was enacted but was an interference with pre-existing or vested rights in that a fixed tariff was promised. Noting there is in law a presumption against interference with such vested rights the court added:

> "However, in this case the Department was faced with a crisis in relation to a significant overspend in a scheme which had been incorrectly set up by government in Northern Ireland and threatened the public purse. It is hard to conceive of more critical or striking circumstances which required action. … These were truly exceptional circumstances and as such we think that a lawful course was followed. That may not be the outcome in every case of this nature but it is in this case."

The court did not consider that the scheme was so unfair as to be ultra vires for the following reasons:

- The primary effect of the 2017 Regulations is prospective;
- In the absence of change, the 2012 tariffs would have presented a grave threat to the Northern Ireland block grant for years to come;

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presumption against the alteration of existing vested rights, that is, those rights which, once acquired, fairness demands should not be altered."

[4] *Wilson v First Country Trust (No.2)* [2003] UKHL 40

- The 2012 tariffs were based upon significantly inaccurate assumptions about almost all aspects of the tariff. The average user was receiving £12,250 approximately per annum, per boiler, representing a rate of return on capital investment of 54.8%;
- Operators with higher usage levels achieved even higher rates of return on capital which amounted to gross overcompensation, well in excess of the 12% permitted by the State Aid authorisation;
- The 2012 Regulations set a duration of 12 months only which, over the course of a 20 year life span of the scheme, was not an excessive period and the regulations were to facilitate a review of the scheme;
- By the time of the 2017 tariff changes being introduced the majority of participants had already received support payments in excess of their initial investment.

The court commented:

> "Accordingly, we do not discern, applying the test of fairness, that the change occasioned by the 2017 Regulations was beyond the broad rule making powers conferred by the Energy Act 2011 on the Department. We reach this conclusion having found that section 113 of the 2011 Act is broad and flexible. Such a course is not specifically precluded and, given the language used and the context, we cannot think that Parliament would have precluded such a course. In addition, we are influenced by the fact that this was an interim transitory measure until a permanent solution was found."

Accordingly, the court did not consider that the change brought by the 2017 Regulations was retroactive. Rather, it makes a retrospective change for the future and is therefore "retrospective on a prospective basis". The court said the context of the scheme is key when looking at the vires of the legislation:

> "This RHI scheme was to incentivise the use of renewable heat sources within a reasonable budget, not to overcompensate businesses or to otherwise support businesses. The 2017 Regulations resulted in a return of approximately 21% which is greater than the EU State Aid stated aim but fair, we consider, given that the original rate of return under the 2012 Regulations was over 50% plainly due to the miscalculation of the fuel costs which founded part of the basis for the tariff. In any event we think the issue has become overshadowed given subsequent events. The original case was taken as an emergency in 2017. The second case was taken as an emergency in 2019. We understand why. However, events have moved on and notwithstanding the appellant's valid sense of grievance we are now past the hiatus and adjudicating upon this case against a different contextual backdrop. The 2019 Act ultimately determined the final shape of the scheme and is a primary piece of legislation which to our mind should now be the focus of this case."

The court also referred to section 81 of the Northern Ireland Act 1998 in the alternative.

The court then considered the arguments on substantive legitimate expectation and procedural legitimate expectation. It was clear that a legitimate expectation was established in that boiler owners were to be guaranteed a fixed tariff for 20 years, however, this case came down to justification and whether the justification for the change is lawful. The justification given by the Department was financial and based on "a significant and startling failure of government to see that

the scheme was based on false premises which have been well explained in the public inquiry report".

The court said the frustration of a substantive legitimate expectation is to be balanced with the public interest in providing proper financial relief rather than overcompensation for a scheme that was fundamentally flawed. The 2017 Regulations brought the scheme more into line with the authorised percentage gain rather than the more inflated figures that emerged from the evidence. The court noted that is all that should be done in a judicial review in relation to financial calculations as this is not a court which deals with evidence in a forensic way and, indeed, has heard no evidence on that point.

Accordingly, the court rejected the substantive legitimate expectation argument on the basis of a lawful justification. The court added that it was important to note that the action taken to address the weaknesses of the RHI Scheme and to address budgetary pressures was approved by the Executive and is within its power. It did not consider that there is any freestanding common law obligation of consultation in this case as fairness did not require it, and, in any event, it was in the public domain that there were issues in relation to this scheme: "The arguments made on the basis of legitimate expectation therefore fail."

The Convention Case

A1P1 provides that 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. The court considered the argument based on A1P1 gained most traction and could rightly be raised both in the 2017 Regulations case and in the 2019 Act case and potentially by other small and medium boiler owners (in the case of the 2019 Act the only relief that could be granted was based on a Convention argument as the 2019 Act was an Act of Parliament).

The first jurisdictional question was whether either of the individual appellants who claimed breach of Convention rights enjoy a possession. It was argued that a prospective loss of future income is not a possession. The key consideration came down to an issue of fair balance and proportionality. The court outlined the test to be applied in reaching this determination in paras [116] – [134]. It said that when the law is applied to these appeals the focus is firmly upon whether a fair balance has been struck as it has been accepted that the public interest element is satisfied by the need to protect public funds in the context of a scheme which overran and jeopardised fiscal stability in Northern Ireland.

The court must therefore ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden. The purpose of the proportionality test is to establish how and to what extent the appellant was affected. It was accepted that all appellants in this case were acting in good faith and were genuine. A court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.

The court then turned to the facts of the two cases in this appeal. In the first appeal concerning the effect of the 2017 Regulations, the individual circumstances are that they were time limited for one year. Notwithstanding a deprivation or control on the tariff there was still benefit obtained from the tariff. Therefore, the court found that a fair balance was struck in agreement with the trial judge. The

court agreed with Colton J where he said that the figures demonstrated that without the 2017 Regulations, the appellant would receive payments way beyond what was anticipated for this scheme and this clearly constituted 'overcompensation.' It said this was a clear and compelling analysis which provided an answer to the first case regarding the 2017 Regulations.

The second appeal, brought against the 2019 Act, was less straightforward as that Act represented a much more significant reduction which applied to Mr Forgrave and a cadre of other small and medium biomass boiler owners. Mr Forgrave claimed that he was going to run on a loss of £118,000 per year. The key question, which the court said was difficult to answer at present, was "in a scheme which was guaranteed and grandfathered for 20 years, how can a fair balance be struck without consideration of the long-term financial implications for boiler owners?" The court referred to conflicting evidence, which is untested, highlighted the unsuitability of judicial review for assessments of this nature. The experts on each side remain divided and therefore the only course a court can take is to accept the expert evidence filed on behalf of the respondents who did not have the onus of proof. The court saw no reason to interfere with the judgment at first instance in the individual circumstances of this case presented at a point in time.

The court said there was now no valid reason why choices cannot be made by the Department. A1P1 is clearly engaged in these cases. There is an interference with this Convention right. The interference is for a legitimate aim to protect public money. The only issue that remains is whether a fair balance is struck in an individual case:

> "[174] We trust that as clarity has now been provided on the legal issues, renewed focus will now be applied to settling a proper permanent solution for boiler owners who acted in good faith. To our mind this should be over the next number of months rather than years. We would have hoped that a consensual solution could be reached on revised tariffs/compensation. If there is prevarication, we understand that further litigation may be the only option although we would hope that it will not come to that.

Conclusion

The court concluded by recognising the position small and medium mass boiler owners have been left in by virtue of a botched scheme. It said it has sympathy for those who have been adversely affected by the mistakes that have been made and who have probably lost faith in government. However, it said it must answer the legal questions which require it to consider not just individual interests but the wider public interest. The court dismissed the appeals finding that:

- The 2017 Regulations were lawfully made and so the vires challenge fails;
- The challenge based on procedural and substantive legitimate challenge based on domestic law principle also fails; and
- The A1P1 challenge brought by Mr Forgrave to the 2019 Act is dismissed.

Finally, the court added that A1P1 compliance may have to be reconsidered in future depending on circumstances or if there is a delay with progression of the revised scheme.

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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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