Judicial Communications Office

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COURT FINDS DEPARTMENT CAN CHANGE RHI REGULATIONS

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed an application challenging the legality of the Regulations made to change the way in which tariffs would be calculated under the RHI Scheme by providing for "tiering" which resulted in a lesser rate being paid after a defined usage and by the introduction of a "cap" on the amount of heat usage eligible for payment under the scheme. The judge concluded that the balance which the Regulations strike between the public and private interests is a fair one, and one which is within the Department's margin of judgment.

The RHI Scheme

The Scheme was introduced by the Renewable Heat Incentive Scheme ("RHI") Regulations (NI) 2012 ("the 2012 Regulations") which were made by the Department of Enterprise, Trade and Investment ("DETI") under the powers conferred on it by section 113 of the Energy Act 2011. The 2012 Regulations provided for the payment of a set tariff for a fixed period of 20 years to participants in respect of accredited biomass boiler installations. The purpose of the scheme was to encourage the use of renewable energy consumption and participants were provided with a financial incentive to convert from the use of heating installations which used fossil fuels to ones which use biomass fuels.

On 1 April 2017 the Department for the Economy ("the Department") made the RHI (Amendment) Regulations 2017 which amended the 2012 Regulations to change the way in which tariffs would be calculated by providing for "tiering" which resulted in a lesser rate being paid after a defined usage and by the introduction of a "cap" on the amount of heat usage eligible for payment under the scheme. This resulted in a reduction in the amount of tariff payable to the majority of participants in the scheme who were accredited under the 2012 Regulations.

The Applicants

The applicants challenge the legality of the Department's decision to make the 2017 Regulations. The first applicant is the Renewable Heat Association of NI, an independent organisation representing those operating within the non-domestic renewable heat industry in NI and operators of accredited RHI NI installations. The second applicant is "DA" a poultry farmer who installed two 99 kWh biomass boilers in 2013 and a further two in 2015. All four boilers were accredited by October 2015.

They were purchased with a loan from the bank. In his accreditation letters it states that his starting tariff in line with the published rates will be 6.10 p/kWh and this will be subject to change based on the retail price index adjustments. It further states that his tariff lifetime is 20 years from the date of accreditation. DA contends that this commitment could not be clearer and argues that he would not have entered into the scheme, nor would have obtained the loan from the bank had this commitment not been given.

Background to the RHI Scheme for non-domestic installations

Paragraphs [x] – [xx] of the judgment set out in detail the background to the RHI Scheme.

The Department's justification for the alteration to the 2012 Regulations

By July 2015, DETI's concerns over rising expenditure under the RHI Scheme had become acute. As a means of dealing with this the Minister announced on 8 September 2015 that DETI intended to introduce tiered tariffs and caps in respect of payments for the usage of biomass heat. This resulted in the 2015 Regulations being made on 17 November 2015. The effect of those Regulations was to align the scheme in Northern Ireland to the GB scheme for participants entering the scheme after that date and introduced tiered tariffs and a cap on usage.

Between 8 September 2015 and 17 November 2015 there was a dramatic surge in the applications for accreditation under the 2012 Regulations. The Court commented that undoubtedly some "*spike*" in applications was inevitable given the pending adverse changes for those contemplating conversion but the sheer scale of this increase has had a significant impact on the financial implications for the overall costs of the scheme. The next step taken to ameliorate the financial implications was the suspension of the scheme to new entrants by enacting further Regulations on 18 February 2016.

A series of audit and independent reports dramatically demonstrated the predicament for DETI (the Comptroller and Auditor General Audit Report (June 2016), the DETI Internal Audit Report (4 August 2016) and the PWC Report (September 2016)). The Court said:

> "These reports exposed a fundamentally flawed scheme, based on inaccurate and inadequate financial assumptions. It had been inadequately managed with a lack of oversight and review. It was delivering a rate of return to participants far in excess of the anticipated 12%. It did not have DFP approval for expenditure beyond March 2015. It was estimated that the cost of the scheme would run to £1.2bn and that £.7bn would be available from HMT which would leave £.5bn to come from the Northern Ireland budget.

> Obviously these figures, if correct, would have huge implications for the Northern Ireland budget."

There was also an issue as to whether or not the scheme as operated under the 2012 Regulations was in compliance with the Executive's State Aid obligations.

This state of affairs caused huge public controversy which resulted in a major political crisis. The Deputy First Minister resigned on 9 January 2017 and the Executive and Assembly subsequently collapsed.

It was in this context that the 2017 Regulations were made and ultimately affirmed by the Assembly.

The Applicants' Challenge

The applicants challenge the 2017 Regulations on the following grounds:

- They are ultra vires the Energy Act 2011;
- They are an unlawful interference with the applicants' property and contractual rights both at common law and under Article 1, Protocol 1 of the ECHR;
- They have breached the substantive legitimate expectation enjoyed by the applicants to periodic payments at a tariff fixed at the date of accreditation for a period of 20 years;
- They have breached the legitimate expectation of consultation under the legitimate expectation that a regulatory assessment would be carried out before the implementation of the Regulations;
- They are in breach of the NI Assembly Standing Order 43 and ultra vires; and
- They are Wednesbury unreasonable/irrational.

The Vires Issue

The applicants contend that the 2017 Regulations are ultra vires the enabling Energy Act 2011 on the basis that unless the contrary intention appears, an enactment (and delegated legislation) is presumed not to be intended to have a retrospective operation. They relied on the principles set out in the *Friends of the Earth* case[1] which involved consideration of a scheme introduced in England and Wales which provided for the payment of a feed-in tariff ("FIT") to enable electricity supply companies to make payments to small scale producers of low carbon electricity. The legislation introducing the scheme (section 41 of the Energy Act 2008) is similar to section 113 of the Energy Act 2011 which introduced RHI.

[1] *R (On the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28

The dispute in the Friends of the Earth case arose when the Secretary of State initiated a consultation process with a view to introducing modifications to the scheme which would reduce tariffs in respect of installations which were already accredited so that from 1 April 2012 onwards they would only receive the new reduced tariff for the remainder of the 25 year period. The rationale behind the proposed modification was that the adoption of solar PV equipment had been unexpectedly successful and the tariffs for solar PVs were threatening the extent to which the FIT scheme could be afforded.

The Court of Appeal in E&W concluded that there was no power in section 41 of the Energy Act 2008 to introduce a modification which reduced the rate fixed by reference to an installation becoming eligible prior to the modification. The applicants contend that the principles set out in the Friends of the Earth case should be applied to circumstances in the RHI case.

Mr Justice Colton commented that both cases involve a statute enabling the establishment of a scheme which provided payments as incentives for the use of a particular form of energy. Both schemes set out criteria in respect of eligibility and accreditation and provided for a fixed tariff for a fixed period of time from a fixed date of eligibility. One was created by way of a combination of rules and modification to licences (FIT) and the other by way of statutory Regulations (RHI). The effect of both was the same and created a clear entitlement to individuals. The judge said that in both cases an attempt was made to introduce new rules which would have the effect of reducing the applicable tariff from a certain date for the remaining tariff period. The Court of Appeal in E&W took the view that such changes, by taking away a pre-existing right to fixed payments over a specified period of time, amounted to a retrospective alteration of the scheme and if there were to be a power to do this one would expect it to be clearly shown.

The applicants say that section 113 of the Energy Act 2011 provides no power to the Department to vary the tariffs set out in the 2012 Regulations and thereby no power to make the 2017 Regulations. The Department countered this by arguing that a proper analysis of the case law indicates that the true principle is based upon an assessment of "fairness" and that the court must determine whether any retrospective effect of the 2017 Regulations would operate with such unfairness to individuals that Parliament could not have intended that effect.

Mr Justice Colton said there is nothing in section 113 which limits the power of the Department as to how it is to make provision about the making of or the calculation of payments under the RHI scheme or any temporal constraints. He said the rule making power at issue in this case is a broad one and in respect of the calculation of payments is unqualified: "It is a broad and flexible provision". The judge said he did not consider he was bound to come to the same conclusion as the Court of Appeal in E&W in the Friends of the Earth case:

> "In looking at the question of fairness I consider that I should assess the consequences of the retrospective effect of the Regulations. In my view an assessment of the fairness of the Regulations involves a consideration of the context and circumstances in which they were made and the consequences for those affected."

Mr Justice Colton said the starting point in the consideration of fairness was that the 2012 Regulations created clear and specific entitlements to those who were accredited under the scheme:

> "They were not relying on Government policies or ministerial statements but on unambiguous statutory Regulations. Thus there are strong private interests created under the 2012 Regulations. In addition to the private interests arising there is also a strong public interest in ensuring that citizens can rely on Government commitments given through statutory Regulations. This is particularly so when citizens acting on reliance on the Regulations incur capital expenditure on heating installations. The rights granted under the 2012 Regulations could only be altered in the most exceptional circumstances and would require special justification.
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> The task for the court was to consider whether or not such exceptional circumstances exist and whether or not the Department can establish sufficient special justification. If it can, the 2017 Regulations are not ultra vires the enabling statute. In such circumstances the 2017 Regulations would not operate in a manner which is so unfair that it could not have been intended by Parliament."

The judge said the applicants' case is not based solely on the vires argument, but also on arguments based on Article 1 Protocol 1 ECHR rights, breaches of substantive and procedural legitimate expectation and "Wednesbury unreasonableness".

Article 1 Protocol 1 ECHR

The applicants say the 2017 Regulations constitute a breach of their rights under Article 1 Protocol 1 ("A1 P1") of the ECHR[2]. A1 P1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that 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 Department disputes the argument on the basis that "a mere prospective loss of future income is not a possession".

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[2] Only DA can claim such a breach as the RHANI is not the owner of any accredited installation and therefore has no A1 P1 rights.

The Court said there can be no doubt that DA is entitled to a payment at a pre-determined rate under the 2012 Regulations. This payment is contingent upon him fulfilling certain conditions. The judge did not accept that the "possession" which DA enjoys under the scheme is the boilers that he has installed but said that it is the payments to which he is entitled under the 2012 Regulations:

> "The determining issue is not whether the payments will be received in the future but whether the 2012 Regulations create an entitlement to the payments. Whilst the legal basis of that entitlement is not contractual in the legal sense, there is no doubt that the applicant would have been in a position to seek a declaration that he was entitled to a payment under the 2012 Regulations if that payment were withheld in breach of the Regulations. He enjoys an identifiable and assertive right to payment under the 2012 Regulations and the right to that payment is, in my view, a possession within the meaning of A1 P1."

The judge further held that there is no doubt that there has been an interference with DA's possessions and that this is in the nature of a control rather than a deprivation of that possession:

> "His right to payment has not been completely extinguished. He will continue to receive payments in respect of his usage of heat but those payments have been controlled by the use of a tiering mechanism and a capping mechanism. The 2012 scheme has been amended, not abolished or suspended and that amendment is on an interim basis for one year."

Substantive Legitimate Expectation

The applicants contend that under the 2012 Regulations they enjoyed a legitimate expectation that those accredited under the 2012 Scheme will continue to receive the payments set out in the Regulations for a 20 year period, subject to compliance with their obligations under the Regulations[3]. Mr Justice Colton set out the principles governing legitimate expectation and concluded that DA did enjoy a legitimate expectation that was clear, unambiguous and devoid of relevant conditions. This expectation is based on the Regulations themselves which are underlined by the clear and express terms in the written correspondence issued to accredited participants in the Scheme. The "grandfathering" principle was central to the scheme and the fact that statutory regulations are instruments which are subject to change does not deprive the commitment to DA of the requisite unconditional nature.

In assessing the nature of the expectation, the judge took into account that the court is dealing with a commitment expressed in statutory regulations which carry a

[3] Again, only DA.

greater weight than a government policy, promise or practice. He said that as a basic constitutional starting point the public is entitled to expect that government regulations are lawful.

Procedural Legitimate Expectation

The applicants contend that they had procedural legitimate expectations in respect of the 2017 Regulations, namely an expectation to consultation and an expectation of a regulatory impact assessment (again only DA). Mr Justice Colton said the enabling statute did not create any statutory duty on the Department to consult prior to the making of regulations and if such a duty existed it did so under common law principles. He noted that there is no general common law duty to consult persons who may be affected by a measure before it is adopted however a duty will exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The judge said that any duty to consult at common law is therefore generated upon considerations of fairness:

> "In the court's view the rights of DA under the 2012 Regulations, together with the practice of prior consultation for the 2012 Regulations, were sufficient to found an expectation of consultation. The nature of the interference was such that fairness required a process of consultation. There was much that potential consultees would have said about the new regulations."

The judge was not persuaded that consultation as a matter of law would have required a regulatory impact assessment as the Executive had approve urgent action by the Department and the Regulations were supported by a business case which considered the impact of a range of options on both participants and the wider economy. He considered there has been substantive compliance with any requirements to assess regulatory impact.

Standing Order 43 of the NI Assembly Standing Orders

The applicants contend that the 2017 Regulations are in breach of Standing Order 43 of the NI Assembly Standing Orders and are therefore unlawful and ultra vires. The judge said that the history in relation to the approval of the 2017 Regulations suggested that there had been substantive compliance with the requirements of Standing Order 43:

"The Regulations were passed by the Assembly by affirmative resolution in full knowledge of the compressed timescale for consideration, the retrospective effect of the Regulations and the potential effect of A1 P1 entitlements. I do not consider that this ground would justify impugning the 2017 Regulations or granting any relief to the applicants."

Financial Evidence

The Court said it was essential to examine some of the financial issues in dispute between the parties. The financial evidence focussed on a number of discrete issues:

- The likely cost to the NI budget of the RHI Scheme in the absence of the 2017 Regulations;
- The likely rate of return for the effected participants under the 2012 Regulations in the absence of the 2017 Regulations;
- The financial impact of the 2017 Regulations on the effected participants under the 2012 Regulations.

The Court also noted the impact on the HM Treasury ("HMT") grant for the Scheme. The judge said the alarm bells only arose in relation to the 2012 Regulations when it became apparent that the HMT grant would be insufficient to meet demand under the Scheme and that continuation of the 2012 Scheme without amendment would result in a demand on the NI budget.

The Court heard detailed financial evidence from both parties. The starting point for the Department at the time when the 2017 Regulations were implemented was that the overall cost of the Scheme would be £1.2bn, the total HMT grant over the period would be £0.7bn and therefore the net cost to the NI budget would be £0.5bn or £500m. The applicants disputed this figure and argued that the overall cost would be in the region of £161m. The judge referred to factors in dispute such as the costs associated with inflation, attrition due to plant failure and removal of plant found to be in breach of the Scheme. He said the Department was right to be prudent in setting out the potential cost of the Scheme:

> "It may well be that the obvious lack of management and oversight in the initial years of the scheme has led to an overly cautious approach. The now estimated figure of £0.7bn is probably a "*worst case scenario*". However, even allowing for some adjustments there can be little doubt that the continuation of the scheme in the absence of the 2017 Regulations will have a major impact on the Northern Ireland budget.

The parties also disputed the impact of the Scheme on economic activity in NI. The judge said the reason put forward by the Department for justifying the changes in the 2017 Regulations was that the 2012 tariffs were so generous that they were plainly being used to support and sub vent private businesses as opposed to the intended purpose of providing financial support to promote the use of renewable sources of energy. The Department said this had resulted in huge "over compensation" and meant that the Scheme was in effect in breach of the State Aid Regulations and the purpose for which it was intended. The judge said it is

undoubtedly the case that many businesses who are participants in the 2012 Scheme have planned out and, in many cases, expanded their businesses on the basis that a certain level of income is guaranteed. The question was whether or not the Department was entitled to take steps to correct this.

Mr Justice Colton referred to a number of reports which calculated different average rates of return under the 2012 and 2017 Regulations. These varied from an average rate of return of 54.8% under the 2012 Regulations and 21.1% under the 2017 Regulations to 77.6% under the 2012 Regulations and 21.4 under the 2017 Regulations. He said it was not necessary for the court to come to final conclusions on these disputes and come up with actual figures:

> "On the basis of the material presented to me I am satisfied that absent the 2017 Regulations participants in the Scheme will obtain a rate of return well in excess of the 12% that was anticipated when the Scheme was established."

The judge also came to the conclusion that the 2017 Regulations are likely to have the effect of aligning the Scheme in accordance with the 12% figure that was initially anticipated. He said that notwithstanding this assessment it was essential that the contents of the various reports are considered in the review which the Department is required to undertake concerning the on-going implementation of the 2017 Regulations.

State Aid Approval

In granting approval the Commission noted that the UK authorities would hold the first review of the Scheme in 2014 with further reviews periodically after that so as to ensure that overcompensation was going to be prevented. It noted that when incentive levels are modified in future reviews, the revised levels would only apply to new installations entering the Scheme and that this "grandfathering" principle was intended to provide investors with certainty.

The essence of the Department's case is that the original 2012 Scheme is incompatible with the approval granted. This argument was premised on the basis that the approval was conditional on it not providing overcompensation to participants and in particular on the intention to deliver a 12% return on capital expenditure under the scheme.

Mr Justice Colton said that a central issue in this debate is whether or not the actual outworking of the 2012 Regulations is in compliance with the conditions on which approval was given. The undoubted focus on the 12% return and the requirement to avoid overcompensation are not so much conditions of the approval but rather a confirmation, in the Commission's view, that the proposed regulations complied

with these requirements. In essence the Commission has made the same error as the Department.

The judge said there is no doubt that in approving the scheme the Commission intended to permit only tariff payments for production of "*useful heat*" and such as were to deliver a discounted cost of heat over the relevant period of 12% on the capital. The 12% return and the requirement to avoid overcompensation was clearly central to the approval. The difficulty is that having identified the objectives the Commission went on to actually approve the scheme:

> "The passing of the 2017 Regulations, with the approval of the Commission, means that any enforcement proceedings by the Commission have been averted. The difficult issue for the court is whether or not if the 2012 Regulations were to continue without the amended 2017 Regulations would the State be in breach of the State Aid regulations and susceptible to an investigations and enforcement procedure by the Commission?"

Mr Justice Colton commented that in this regard the role of a national court is problematic. It is the Commission which has exclusive competence to determine whether any aid measure is compatible with the internal market. National courts do not have jurisdiction to rule on a State Aid's compatibility with the internal market - that supervision falls within the exclusive competence of the Commission. However the national courts are competent to adopt interim measures in order to prevent the distortion of competition stemming from the grant of an aid in contravention of the standstill obligation.

> "Neither the court nor the Department can determine what the Commission's view would be on whether or not the aid provided under the 2012 Regulations is in accordance with the initial approval decision and is compatible with the internal market. I do accept however that there is an evidential basis for the Department's belief that the continuation of the 2012 Regulations had the potential to expose the State and individuals to an inquiry or enforcement proceedings by the Commission. Therefore it was in my view entitled to take this into account in deciding to make the 2017 Regulations. The fact that the Commission, on further notification, approved the 2017 Regulations suggests that this view may well be shared by the Commission."

Conclusion

Mr Justice Colton said that for all the factual and legal complexity surrounding this application the case resolves into an assessment of the requirements of fairness. At

issue is the clash between the private interests of the applicants and the public interest asserted by the Department.

The **vires** argument turns on whether the 2017 Regulations are so unfair that Parliament could not have intended that the Department had the power to make them. The A1 P1 and legitimate expectation arguments turn on the strength of the general interest asserted by the Department and the proportionality of the steps taken to assert that interest by interfering with the rights of the beneficiaries under the 2012 Scheme

> "The starting point is that there is a strong presumption in both the public interest and in relation to the private interest of the beneficiaries that the rights granted under the 2012 Scheme should be upheld. I have also made it clear that DA's rights under A1 P1 are engaged and that he had a legitimate expectation that his rights under the 2012 Regulations be protected in law. The Department can only justify what I have found to be that interference with these rights in exceptional circumstances and where special justification can be shown."

Has the Department satisfied this high threshold?

The judge cited a judgment of the UK Supreme Court[4] which considered the issue of interference in cases involving A1 P1. It posed four questions which the judge said would enable to court to determine the issued between the parties in this case. He said that in considering the **public or general interest** he took into account that there is in itself a public interest in ensuring that members of the public are entitled to rely on government regulations and are entitled to organise their affairs on that basis. It was for this reason that he considered there is a high burden on the Department to justify the change, which the judge described as the need for a "special justification".

Mr Justice Colton also recognised that in assessing the public interest the Department enjoys a margin of appreciation. He said the Regulations were ultimately approved by the Assembly and therefore carry "substantial democratic legitimacy". The Regulations reflect the Assembly's assessment of the public interest in a matter of both financial and political importance in NI. The judge said he had subjected the public interest arguments to a high level of scrutiny.

Mr Justice Colton came to the conclusion that the interference was "*in the general interest*" in that it sought to pursue the following legitimate aims:

- ensuring that the RHI Scheme was in accordance with the UK's obligations under the Renewable Heat Directive;

[4] *Cusack v London Borough of Harrow* [2003] UKSC 40

- ensuring that the scheme operated in a manner consistent with the objectives of the scheme;
- ensuring that the scheme operated in a manner consistent with State Aid approval; and
- protection of the Northern Ireland budget.

He fully agreed with the opinion of the Comptroller and Auditor General set out in his June 2016 report that there was an unacceptably high rate of return for businesses taking advantage of a non-domestic scheme in Northern Ireland:

> "The 2017 Regulations seek to address the critical mistakes which led to that rate of return. This objective was central to the design of the scheme and was announced prior to its inception at the time of the public consultation. It also formed the basis upon which the European Commission approved the scheme. The tariff changes are being introduced at a time when, on average, participants have already received support payments in excess of their initial capital investment."

The judge said he was also satisfied that the continuation of the 2012 Scheme, absent the 2017 Regulations, will have severe consequences for the Northern Ireland budget which I have found to be close to the anticipated £0.7bn put forward by the respondent, albeit with some caveats and adjustments. He accepted that there is an obvious and significant public interest in ensuring that expenditure on the scheme remains within HMT budgets. He also considered that the interference was "*provided for by law*" on the basis that the Department was entitled to make the regulations under Section 113 of the Energy Act 2011 subject to public law considerations and the issue of fairness.

Mr Justice Colton said that in essence the issue of justification turns on the question of **proportionality** and again citing the UKSC case he noted that this can be expanded into the question of *whether the interference with the applicants' right to peaceful enjoyment of their possessions struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on them.*

The judge noted that the Regulations are prospective and do not purport to recoup payments already made. They will still provide an average return in excess of the anticipated 12% rate of return, notwithstanding the fact that most operators will already have received more than their original outlay. The judge also noted that the 2017 Regulations are an interim measure only and any future revisions will be based upon a review which will involve further public consultation, legislative scrutiny and Commission approval.

Mr Justice Colton said it was also important to consider the circumstances of DA. He noted that DA has relied on the 2012 Regulations which expressly provided a guaranteed fixed payment for a period of 20 years in respect of heat used by an accredited installation, subject to certain conditions which are not at play in this application. A fundamental feature of the regulations was the "*grandfathering*" of the payments. This principle was a feature of all the material considered by the Department in making the regulations and was reinforced by the relevant Minister for example in encouraging lending institutions to take account of the certainty of the payments in considering applications for funding for relevant installations.

Acting on the Regulations DA incurred significant capital expenditure in purchasing and installing renewable heat installations in order to obtain accreditation. He obtained significant bank loans and expended savings in support of his capital investment. In addition he incurred significant costs associated with fuel, servicing, loan interest, insurance and other outgoings. He has invested in significant operational infrastructure in his business which was predicated on his anticipation that he would receive the payments for a 20 year period. The effect of the 2017 Regulations will be to significantly reduce the payments to which he was entitled under the scheme for at least a one year period.

In considering the public or general interest the judge took into account that there is in itself a public interest in ensuring that members of the public are entitled to rely on government regulations and are entitled to organise their affairs on that basis. It is for this reason that he considered there is a high burden on the respondent to justify the change which I have described as the need for a "*special justification*". He recognised that in assessing the public interest the Department enjoys a margin of appreciation. These Regulations were ultimately approved by the Assembly and therefore carry "*substantial democratic legitimacy*". The Regulations reflect the Assembly's assessment of the public interest in a matter of both financial and political importance in Northern Ireland.

Leaving aside the effect of the Regulations on the average participant the judge also took into account the impact upon DA personally. To date he has already received payments amount to £226,589 against capital costs of £111,000 in his application form. On the basis of the methodology underpinning the scheme this has already resulted in a 204.1% payment as a percentage of capital spend. If he continues to receive payments on the original basis then he has estimated that he will receive a total of £2,549,276. Under the old tariff he would continue to receive an annual payment of £117,443 as opposed to an annual payment of £49,617 which on the respondent's figures is well in excess of the annual payment for a 12% rate of return being £32,259. These figures demonstrate that the second applicant in this case, absent the 2017 Regulations, will receive payments way beyond what was anticipated for this scheme. They clearly constitute "*overcompensation*". The reduced figures payable are much closer to the original intention of the scheme. Even on his

own figures which have been the subject matter of much dispute and analysis the 2017 Regulations will deliver a full return of capital and a rate of return of 11.3%.

Mr Justice Colton noted that he had already determined that the interference under the 2017 Regulations constitutes a control of DA's possessions rather than a deprivation. In those circumstances the issue of compensation is not decisive. In so far as it is relevant the test remains whether the interference is proportionate. Having regard to the particular circumstances of DA, he said he did not consider that a failure to provide him compensation as a consequence of the 2017 Regulations renders the interference unlawful. This is underlined by the overall purpose of the regulations and the fact that they are an interim measure. Should the issue of compensation be raised in the future consultation exercise to be conducted when reviewing the 2017 Regulations it can be given full consideration by the Department.

In terms of the legitimate expectation to consultation the judge considered that the departure was justified in this case. The circumstances of extreme political urgency and practical impossibility created a unique imperative on the respondent to act before the dissolution of the Assembly. He said he was also influenced by the fact that full consultation will take place in the course of the Department's review of the scheme.

In conducting the ultimate balancing test between the demands of the general interests of the public and the requirements of the protection of the individual's fundamental rights Mr Justice Colton said he was particularly influenced by his conclusion that the tariffs are being used to subsidise and support businesses rather than bridging the gap between the cost of converting heating systems which is their real purpose. He did not consider that the Regulations impose a disproportionate or excessive burden on the persons affected given the actual impact on the individuals of the 2017 Regulations. He said he took a similar view in relation to the particular circumstances of DA who has already benefited beyond what was anticipated in the original scheme and who will continue to receive payments under the 2017 Regulations in accordance with those objectives.

The judge did not consider that the Regulations represent an abuse of power. He said he had come to the conclusion that there is a compelling public interest justifying the interference with the rights of the affected persons under the 2012 Regulations and that the 2017 Regulations strike the requisite fair balance between the public interest and the individual rights of the affected persons. He recognised that the introduction and operation of the RHI Scheme has had a damaging effect on public confidence in good administration in this jurisdiction. There is a compelling public interest in permitting the Department to correct the obvious errors and flaws in the scheme it introduced. The judge also accepted that in doing so there is a risk that this may reduce the public's confidence in relying on future guidelines and policies promulgated by Government Departments, but the circumstances of this case are exceptional.

Turning to the specific issues raised in the case Mr Justice Colton concluded that the 2017 Regulations are not so unfair that Parliament could not have intended that the Department did not have the power to make the 2017 Regulations. He therefore concluded that the regulations are not ultra vires and that the interference by the Department with DA's A1 P1 rights and substantive and procedural legitimate expectations are justified. The judge also concluded that the 2017 Regulations are not in breach of the Northern Ireland Assembly Standing Order 43 and said that even if they were he would not grant any relief on that point. It follows therefore that the regulations are neither *"Wednesbury unreasonable"* or irrational.

Mr Justice Colton 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 (www.judiciary-ni.gov.uk).

ENDS

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