RENEWABLE HEAT INCENTIVE INQUIRY

RHI Inquiry
1st Floor, Waterfront Plaza
8 Laganbank Road
BELFAST BT1 3LY

T: 028 9040 8833
E: general@rhiinquiry.org
W: www.rhiinquiry.org

Decision of the Chairman of the RHI Inquiry in relation to applications made on the 24, 25 and 28 July 2017 for core participant status

1. This decision relates to applications for core participant status received by the RHI Inquiry from various civil servants who, at one time or another, were involved with the RHI Scheme. For convenience and efficiency I am dealing with all of the applications in this single decision.

2. The present applications come from:

    a. A series of individuals who are described to the Inquiry as "Team 1". "Team 1" includes the following individuals: Fiona Hepper, Joanne McCutcheon, Alison Clydesdale, Peter Hutchinson, and David Thomson; ("Application 1")

    b. A further series of individuals who, with others, are understood by the Inquiry to be referred to as "Team 2". "Team 2" for the purposes of this application, includes the following individuals: Chris Stewart, Stuart Wightman, and Seamus Hughes ("Application 2")

3. In order to reach a decision on the applications, I have considered all of the relevant information and representations in relation to the applicants. Where I considered further information or clarification was necessary I sought and obtained it. I also considered whether, before reaching a decision, I needed to have oral representations on behalf of the applicants. I am satisfied that I do not.

4. In reaching this decision the matters I have taken into account include:

    a. The Inquiry's Terms of Reference;

    b. The Inquiries Act 2005 ('the 2005 Act');

c. The Inquiry Rules 2006 [SI 2006 No. 1838] ('the 2006 Rules') and The Inquiries (Scotland) Rules 2007 [SI 2007 No. 560] ('the Scottish Rules'). However, since no equivalent legislation has been implemented within this jurisdiction for a number of years, as I have indicated in the Procedural Protocol, my approach has been and will be restricted to having regard to the principles and procedures set out in the provisions of the GB and Scottish rules.

d. The Inquiry's Protocols; and,

e. The public statements that I, as Chairman of the Inquiry, have made explaining the procedures of the Inquiry.

5. I have also specifically considered all the matters set out in the various exchanges of correspondence there have been between the legal representatives of the applicants and the Inquiry. The fact this decision does not rehearse every aspect of the matters raised in the correspondence does not mean that I have not taken all the points into consideration in reaching my decision.

6. I have reminded myself that, pursuant to section 17 of the 2005 Act, the procedure and conduct of the Inquiry are to be such as I may direct, subject to my duty to act with fairness and with regard to the need to avoid unnecessary cost.

7. I regard this statutory provision as giving me a broad discretion to take a flexible approach to procedures so as to ensure fairness to all those with whom the RHI Inquiry interacts in a manner consistent with my overriding duty to further the Inquiry Terms of Reference in a fair, efficient and cost-effective manner.

8. It is in that context that I come to consider whether the applicants should be core participants before the Inquiry. This issue is again a matter for my broad discretion.

9. Rule 5 of the 2006 Rules, which deals with the question of core participants, does not prescribe a set of hurdles to be overcome after which someone is entitled to be a core participant before a public inquiry. Rather it details matters which an inquiry chairman must take into account when exercising his or her discretion to designate, but it is not an exhaustive list of the factors that may be taken into account and there is no general duty imposed upon a chair to designate as a core participant every applicant who might be said to comply with the Rule 5 criteria.

10. I have also reminded myself of the decision of the English Divisional Court in the case of *R (Decoulas) v Leveson Inquiry & others* [2011] EWHC 3214 (Admin). Lord Justice Moses, giving the judgment of the Court, was examining the decision of Lord Justice Leveson, the Chairman of the Leveson Inquiry, to refuse to designate a particular individual as a core participant before that inquiry. The individual, Ms. Decoulas, had claimed that she met criteria (a) and/or (b) of Rule 5(2) of the Inquiry Rules 2006. Lord Justice Leveson decided that she did not and refused to make her a core participant. In reviewing that decision the Divisional Court said this about the context of the Rule 5 discretion:

> *"5. It is important to appreciate the reasons why a discretion is given to the Chairman to designate even if he is satisfied, which he was not in the instant case, that the requirements of 5(2) are satisfied. The purpose of the Inquiry is not to vindicate individuals' sufferings or claims they may have due to mistreatment by the press, but rather for all of us as citizens concerned at the relations between the press, institutions and the public. Thus, even if Miss Decoulos had been considered to be one who had a significant interest in an important aspect of the matters to which the Inquiry relates, in order to achieve finality, in order to achieve conclusions and solutions, it is open to the Chairman to rule that a person satisfying that requirement should not be a core participant. That is the legal background of the decision."*

11. I agree with the import of paragraph 5 of the above judgment: that just because someone may fall within one or more of the three matters that a Chairman is obliged to consider when exercising the discretion to designate, it does not mean that the individual has to be so designated. As Moses LJ observed earlier at paragraph 3 of the judgement the power to designate contained in Rule 5 (1) is "...a power granting a discretion."

12. This analysis is strengthened by the Divisional Court's approach to Ms. Decoulas' particular circumstances as articulated in paragraph 9 of the judgment:

> *9. There may well be something in her [Ms. Decoulas'] complaint that she has as much a part to play as others who have been granted core participant status. It is true that the trigger for the Inquiry was allegations of wrongdoing in relation to hacking and 'blagging' and so forth, but it is plain within the terms of Part 1 that one has been defamed would fall within the different features of Part 1 which the Inquiry propose to consider. But even if she is right that she might have been granted core participant status rather than someone else, even if she is right that there are too many core participants, that is miles away from establishing a ground in law which would justify this court in interfering. It is not enough just to say: "Well if he/she was granted that status so should I." It is not enough to say: "I have better grounds than others being granted core participant status." Even if that were established, that would not found a basis in law for interfering and so, whilst I have sympathy for everything that Miss Decoulos has said today, I wish to stress to her that the only basis upon which this court can interfere is on the basis of an error of law such as, for example, a breach of the requirement of fairness within the rules or a decision which is outwith the bounds of reasonable conclusion.*

13. During the first preliminary hearing of the Inquiry on the 27 April 2017 I explained the approach that this Inquiry is taking to the question of who should be core participants before it. I said:

> *"At present, on the basis of the evidence available to date and subject to any future applications, my intention is to designate the following departments and organisations*

as core participants on the basis that, between them, they appear to have been generally involved across, or to have some knowledge of, all of the matters to be investigated by the Inquiry in accordance with the Terms of Reference throughout the currency of the Scheme"

14. I remain of the view, given the task required of the Inquiry by its Terms of Reference, that this is, generally speaking, the correct approach, and is consistent with my overriding duty to further the Inquiry Terms of Reference in a fair, efficient and cost-effective manner.

15. However, at the Inquiry's preliminary hearing on the 27 April 2017 I also went on to explain, in keeping with the flexible approach this Inquiry is adopting to its procedures, that the Inquiry would be giving enhanced participatory rights to certain individuals:

"As I have already alluded to, individual witnesses appearing before the Inquiry in relation to certain aspects of its investigation, but whom it would not be appropriate to designate as core participants in relation to the proceedings of the Inquiry as a whole, may also apply for certain enhanced participatory rights. These enhanced rights could include the right to have a lawyer designated as that witness's legal representative and to attend hearings on relevant days in that capacity; in addition to the right all witnesses will have of access to material which the Inquiry considers relevant to the issues they need to address. This enhanced status might well be appropriate for individuals who may be likely to face criticism from the Inquiry by reason of significant actions or omissions but whose contribution or responsibility, albeit important, was not continuous throughout the life of the RHI Scheme, unlike that of the bodies mentioned earlier."

16. I note that in fact the Inquiry has given enhanced participatory rights to all of the individuals whose applications for core participant status I am determining in this decision.

17. The Inquiry recognises that its investigation has, amongst other things, the potential to result in explicit or significant criticism of individuals who were involved with the RHI Scheme. The Inquiry also takes extremely seriously its duty to be fair to those who are caught up in its investigation. It is for this reason that the Inquiry put arrangements in place from an early stage so as to ensure that those providing witness statements to the Inquiry had access to the material available to them at the time they worked on the RHI Scheme. It is also for this reason that the Inquiry has designed and implemented the concept of enhanced participatory rights for individuals such as the applicants. The steps taken include, but are not limited to, ensuring they have access to relevant and necessary material and legal representation before the Inquiry. All of the applicants are aware that the bundle of enhanced rights to which they are entitled may, in due course, be reviewed and, if appropriate, increased consistent with fairness and the efficient and cost-effective management of the Inquiry.

18. For the purposes of this decision I take into account that all the applicants may say they could satisfy each of the considerations in paragraph 2 of Rule 5 of the 2006 Rules. However, the fact that they may or may not satisfy each of the considerations is not the determining factor as to whether someone is designated as a core participant. Rather it is a matter for my broad discretion in all the circumstances pertaining to this particular Inquiry.

19. I note the suggestion contained in Application 2 that there may be certain civil servants who, because they work within a department which has been given core participant status, they might have a "*possible* advantage" over the applicants unless they too are given core participant status. This language may be founded upon an unfortunate misunderstanding of the Inquiry process. There is no *lis*, and no parties or sides who might enjoy theoretical advantages over the other; there is an Inquiry investigation, and that Inquiry investigation is being, and will continue to be, conducted so as to ensure that each individual or organisation before the Inquiry is treated fairly. I note Leveson LJ's remarks in the course of his ruling in

September 2011 when he said "...although different considerations and potential rights might arise, I do not consider there to be a bright line between the consideration that I will give to the evidence and arguments of those who are designated as core participants and those who are not."

20. I am satisfied, bearing in mind that the Inquiry has taken, and will continue to take, steps to ensure fairness for the applicants before the Inquiry, that it is not necessary for the applicants to be designated as core participants before this Inquiry.

The Right Honourable Sir Patrick Coghlin

Chairman of the RHI Inquiry

14 September 2017