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Dear Seamus

NON DOMESTIC RENEWABLE HEAT INCENTIVE SCHEME

I refer to your minute of 12th June in relation to this matter.

The Renewable Heat Incentive Scheme Regulations (NI) 2012 are drafted in mandatory rather than permissive terms.

We must begin, I think, with Regulation 22 which provides for accreditation of certain installations. Under paragraph (6),

> "where an application for accreditation has, in the Department's opinion, been properly made in accordance with paragraphs (2) and (3) and the Department is satisfied that the plant is an eligible installation the Department must ....
>
> (a) accredit the eligible installation;".

The duty is not, of course, absolute. There are a number of qualifications and the duty is in any event subject to Regulations 23 and 46(3). However, the general proposition is that where there is a proper application in relation to an installation and where that installation meets the criteria for eligibility, the Department is under a duty to accredit.

Equally, under Regulation 3(2), the Department must pay participants who are owners of accredited RHI installations "periodic support payments".

Again, this duty is subject to qualifications and exceptions in relation to change of ownership and enforcement. But again the duty on the Department is clear. It cannot, therefore, suspend the operation of the Scheme without amendments to the legislation.

In principle, of course, it is open to the Department to amend the Scheme to provide for such a suspension. However, in this context there would be clear legal difficulties in doing so. Amending the legislation would constitute a clear change in policy. The Department's power to change its policy is constrained by its legal duty to act fairly.

In my view, the mandatory terms of the Scheme amount to a clear promise that where a person invests in providing an installation that meets the eligibility requirements then financial support will be provided. It seems to me, therefore, that this clear promise will give rise to a legitimate expectation at least on the part of those who have already made the investments in question.

There are broadly two types of legitimate expectation: "procedural" on the one hand and "substantive" on the other. Substantive legitimate expectations will arise where a claimant is held to have an entitlement to some substantive benefit or outcome. In other words, in the present case, if a claimant could show that he or she enjoys the substantive legitimate expectation, the Department would be precluded altogether from deciding to withhold that benefit.

In the case of Nadarajah –v- Secretary of State for the Home Department, Laws LJ said

> "a public body's promise or practice as to future conduct may only be denied and must may be departed from in circumstances where to do so if the Public Body's legal duty, or as authorised a proportionate response (of which the Court is a Judge or the last Judge" having regard to a legitimate aim pursued by the public body in the public interest. The principle of good administration requires public authorities to be held to their promise would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances".

Proportionality in this context will generally be judged

> "by the respective force of the competing interests arising in the case. Thus, where the representations relied on amount to an unambiguous promise; where there was a detrimental reliance, where the promises made to an individual or specific group; these are incidences where denial of the expectation is likely to be harder to justify as a proportionate measure".

Of course, these considerations are pointers and not rules. For the balance between on the one hand the individual's fair treatment in particular circumstances and on the other, the pursuit of other ends which constitute a proper claim on the public interest is not precisely calculable. Its measurement is not exact.

This is another way of saying that what is fair or unfair is, of course, notoriously sensitive to factual analysis. But the test applied by the Courts to determine whether the Department was entitled to change its mind would be twofold. First of all there must be a legitimate aim in the public interest. Secondly, the conduct of the Department must satisfy the principle of proportionality.

A good example of the approach of the Courts to the issue of proportionality is to be found in the case of Coughlan.

There, a severely disabled woman had been given a clear promise by the Health Authority that a residential facility would be her home for life but subsequently the Health Authority decided to close the facility. The Court of Appeal took the view that

> "This is not a case where the Health Authority would, in keeping its promise, be acting inconsistently with the statutory duty or other public law duties".

Rather, the course of action which the Authority took place was in breach of a promise which was so grossly unfair that it amount to an abuse of power. The Courts' reasons for saying this where –

(a) the importance of what was promised;
(b) the fact that the promise was limited to a few individuals; and
(c) because the consequences of the Health Authority of requiring it to honour its promise was merely financial.

Here, handoff course, the consequences both to the Department and to the potential applicants are all simply financial. Secondly, the promise was not given to specific individuals. On the other hand, if there were a group of persons who were able to show that they invested in installations that were eligible to be accredited in the expectation of receiving payments then that would be a sufficiently discrete and well defined group for the purposes of showing a substantive legitimate expectation. And the financial cost to those individuals may be significant. Presumably the financial assistance was given because the fear was that otherwise the investment would not be viable. A good deal would, however, depend upon just how serious the financial impact any decision to suspend payments would be. Without knowing more it is impossible to say more than that there is likely to be a significant risk that a change in policy would breach the substantive legitimate expectations of those who had actually invested in installations in expectation of receiving payments.

This brings me to the second type of legitimate expectation; namely the procedural. This means the claimants are held to have a right to be heard before a new decision is taken.

The duty to consult may arise on one of two circumstances. The "Paradigm case" will arise where a public authority has provided an unequivocal assurance that it will give notice or embark upon consultation before any change to its existing policy. This does not arise in the present case (I assume). But the so called "secondary case"

does. This case is where the impact of the Authority's past conduct gives a small group of persons

> "substantial grounds to expect that the substance of a relevant policy will continue to enure for their particular benefit; not necessarily forever but at least for a reasonable period to provide a cushion against change".

In such cases, the Courts will not allow the decision maker to effect the proposed change without notice or consultation unless the want of notice or consultation is unjustified by the force of an overriding legal duty owed by the decision maker or a countervailing public interest.

In the present case, I think the express promises that the present legislative Scheme makes and the significant consequences of a change in that policy for a comparatively limited number of bodies or persons will bring the Department within this "secondary case". This group may include not only those who have already invested in installations but those who may be contemplating doing so. In other words, before the Department can amend the legislation to provide for a suspension, it will have, at the very least, to consult.

Yours sincerely

Paul McGinn

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