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28th January 2016

Dear Stuart

SUSPENSION OF RENEWABLE HEAT INCENTIVE SCHEMES

Thank you for your minute of 28th January and for sending me a copy of the questions raised by the DFP Permanent Secretary. Perhaps I could offer the following comments.

The Courts do take judicial notice of the budgetary restraints on Departments. They do not as a general rule attempt to rewrite Departments' budgets for them. So Courts will be very reluctant to interfere with the way in which the Department balances competing budgetary demands. Central Government Departments in particular enjoy wide discretions which it is there duty to exercise in the public interest. They have to decide the content and pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. So long as the Department acts rationally in carrying out this balancing exercise, the Courts will be slow to interfere.

However, the Department's power to change policy is constrained by the legal duty to be fair. A change of policy that would otherwise be legally unexceptionable may be held to be unfair in certain circumstances. And it is here that the present difficulty arises.

I have previously advised about the statutory duty to make periodic and RHI payments under the above Schemes. I do not propose to repeat that advice here. Suffice to say that the general rule is that where conditions of eligibility are satisfied, an applicant's plant must be accredited and where a plant is accredited, there is a duty on the Department to make the payment.

This duty is enshrined in legislation. The legislation does not, of course, say that the Schemes will remain in place for ever. And I do not think that anyone entitled to apply under the Schemes could have understood that there was a promise of funding without limit.

Indeed, in this context I note the reference in the earlier consultation document to the possibility of the Scheme being suspended. I do not think, therefore, that a change in policy as contemplated by the Department would have the characteristics of an abuse of power within the terms of the leading case of R -v- North and East Devon Health Authority ex parte Coughlan. There would, therefore, be no substantive legitimate expectation that the policy would continue. In other words the Department cannot be precluded altogether from deciding to change or suspend the present Schemes.

There is, however, a second type of legitimate expectation, namely the procedural. This means that claimants are held to have a right to be heard before a change in the Schemes or before they are suspended. In effect what we are talking about here is the duty to consult.

Such a duty may arise in three different circumstances. The 'Paradigm' case will be where a public authority has provided an unequivocal assurance that will give notice or embark upon consultation before any change to its existing policy. I am going to assume that no such promise was given here.

A duty may also arise, however, where the Department has established a practice that it will consult before it changes any existing substantive policy. In the present case, I do not think that it would be very difficult for an aggrieved applicant to show that there was a past practice to consult in relation not only to both the Renewable Heat Incentive Schemes under question here, but also other similar type schemes.

In addition, there are the exceptional cases where procedural legitimate expectation exists because an individual or group have substantive grounds to expect that the substance of the relevant policy will continue to endure for their particular benefit. The Courts will only allow such a claim in relatively exceptional cases but it has succeeded in for example R (Luton and others) -v- Secretary of State for Education. In that case the Secretary of State for Education's conduct in changing policy without consultation in relation to funding for local authorities under Building Schools for Future Policy was so unfair as to amount to an abuse of power. The following factors were important:-

1. the degree of continuous and intense dialogue between the local authorities, the Department of Education and others over many years;

2. the sums involved which 'fortified' the duty to consult;

3. the 'pressing and focused' effect of the decision on the applicants; and

4. the fact that there was no pressing reason why there should not have been a short opportunity, perhaps only three weeks, for the local authorities to press their case.

In particular, the Court observed:-

> "However pressing the economic problems, there was no 'overriding public interest' which precluded any consultation or justified the lack of any consultation.".

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In the present case, important issues will be how 'pressing and focused' the effect of a change in policy without notice will be and the significance of the sums involved. If there is serious economic detriment to the conduct of a narrow and well defined set of businesses which had been planned on the basis of the availability of periodic payments, then there must be some risk that a Court would hold that suspension of the Schemes should not proceed without consultation under this ground. In my view it is highly likely that a claim for procedural legitimate expectation can be made on one of these two grounds.

A 'public interest' test does apply to defeat procedural legitimate expectation and the implied duty to consult. But it is for the public authority to identify any overriding interest on which it relies to justify the frustration of an expectation of consultation. It will then be a matter for the Court to weight the requirements of fairness against the competing public interest in question. (See Paponette -v- Attorney General of Trinidad and Tobago.)

In the case of R (on the Application of Cheshire East Borough Council Cheshire West and Chester Borough Council) -v- the Secretary of State for the Environment Food and Rural Affairs and Others, the High Court up held the decision of the Secretary of State to remove PFI credits towards construction of a waste infrastructure as part of the Spending Review. In particular, the Court held that there was an overriding public interest given the Government's commitment to cutting the deficit. A decision-maker in an individual Department of State was to be accorded a very wide margin of appreciation in decisions made as to the allocation of resources in such circumstances.

There is clear scope for making the same public interest case here. Having said this, I have to caution that the balance between on the one hand that the right of an individual to 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. And there is significant room for the appreciation of a particular case to vary between individual Judges. There must, therefore, be a real degree of risk in any decision to proceed without consultation in relation to the public interest test.

The consequences of a decision by a Court that suspension of the Scheme was contrary to procedural legitimate expectations would be very serious. It is most likely that a challenge would be made not to the subordinate legislation itself, but to the issue of the suspension notice. If that challenge were upheld, the suspension notice would be likely to be held to be invalid and therefore, the statutory obligations to continue to process and grant accreditation and make payments on foot of that accreditation would remain in force. In short, the suspension would be ineffective until a period of consultation was carried out and a new decision on suspension reached.

The trade off is therefore between the certainty of a short delay with limited costs and the real risk of a much longer delay with much higher costs.

Finally, in relation to the need to refer the matter to the Executive, in the case of the matter of an application by the Minister of Finance and Personnel for Judicial Review, the High Court held that a decision as to the allocation of funding between different purposes under the EU Common Agricultural Policy was 'significant and controversial' and, should therefore be referred to the Executive. It was significant because it would materially impact upon the flexibility to support different areas eligible for funding and it was controversial because

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there was a strong difference of opinion between the farming community and environmentalists over how the decision should be made. In the light of this judgement, it seems almost inevitable that any decision to suspend the above Schemes would be significant and controversial. Any decision to proceed without referring the matter to the Executive would be unlawful and would deprive the relevant Minister of ministerial authority.

I am, of course, happy to discuss.

Yours sincerely

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