Solar Century Holdings Limited & Others v Secretary of State for Energy & Climate Change [2014] EWHC 3677 (Admin): lawful decision to close a levy supported scheme to promote electricity generated from renewable sources

Azeem Suterwalla, Monckton Chambers

November 2014

This claim for judicial review was brought by a group of companies generating electricity from renewable sources against the Secretary of State for Energy and Climate Change. The claimants challenged a change in policy on the part of the Department for Energy and Climate Change ('DECC') the result of which was to bring to a premature close a levy supported scheme – "the RO Scheme" – which was due to run until 2017 but which it had been decided would in fact close in 2015. The Court (Green J) rejected all four grounds of challenge advanced and dismissed the claim. The judgment provides a detailed and useful exposition of when and how it is permissible to rely upon material other than the language of a statutory provision, in interpreting that provision. Green J also analysed the law relating to legitimate expectation in public law and when the application of a retrospective provision/policy may be permissible and lawful.

The claimants were four companies engaged in the installation of large scale solar photovoltaic systems ('solar PV' or 'solar farms'). A common feature was that projects could involve a significant lead time from first investment to accreditation by the DECC. The DECC is responsible for schemes supporting and encouraging renewable energy sources.

The scheme in issue in this case was that relating to Renewables Obligation Certificates ('ROCs'). ROCs are issued to operators of accredited renewable generating stations in respect of the eligible renewable electricity that they generate. Under the RO scheme licensed electricity suppliers are required to submit a specified number of ROCs to the Gas and Electricity Market Authority ('Ofgem') for each megawatt of electricity they supply. The RO scheme had been the main support mechanism used by the Government for large scale renewable electricity since 2002.

In March 2011 HM Treasury set out a Control Framework for DECC levy-funded spending ('the LCF'). The LCF set overall limits upon the costs of DECC levy-funded policies, such as the RO scheme. In essence the LCF set out that where spend in one area increased it had to be matched by decreases elsewhere.

In July 2011 the Government announced new measures to increase the rate of decarbonisation of electricity. At the heart of these measures was the proposed introduction of a scheme to support renewable generation based upon Contracts for Difference. Between 2010 and early 2014 there were many statements made by the Government to the effect that under the new measures to be introduced the RO scheme would not be closed until March 2017.

In May 2014 the DECC issued a consultation paper in which it was proposed to terminate the RO scheme for solar PV early – in 2015. The justification for the proposed curtailment was the unexpectedly high projected levels of large scale solar PV deployment and the adverse consequences on the cost cap under the LCF.

Following the consultation, in a decision taken in October 2014 the DECC confirmed its proposal for the RO scheme to terminate from 1 April 2015 for new solar PV capacity above 5 megawatts. Its decision was to close the RO scheme across Great Britain to new solar PV generation stations from 1 April 2015 and to also apply this closure to any additional capacity added to an accredited solar PV station from 1 April 2015 where the station was, or would become, above 5 megawatts. To mitigate the effects of this change in policy a grace period was to be provided to projects that had made a significant financial commitment on or before 13 May 2014 and where other specified criteria were met.

The claimants challenged the DECC's October 2014 decision to end early the RO scheme and did so on four grounds.

Ground 1: the closure of the scheme was ultra vires the Electricity Act 1989.

The claimants submission was that the DECC's power to curtail the operation of the RO was contained in sections 32LA and 32LB EA 1989, but that in the light of the proper purpose of those provisions, any curtailment of the RO scheme before 2017 was outside the permitted purpose or mischief of the provisions and therefore ultra vires the statutory power. It was contended that the pre-legislative material showed a clear and unequivocal explanation of the statutory amendment to the EA 1989 (which had incorporated sections 32LA and 32LB) as including the preservation of investor confidence through the retention of the RO scheme until 2017. This was a clear statutory purpose that therefore served to define and limit the manner in which the power could subsequently be exercised.

In rejecting this ground of challenge Green J considered in detail the relevant legal principles as to how a court must analyse what a statutory purpose is and in what sources it may be found. After an in-depth consideration of several of

the leading authorities, the Judge summarised the relevant principles (at [52]). These were:

i) When construing an enactment, including the exercise of power under an enactment, it is relevant to identify the intention or purpose of the measure, i.e. the mischief to which it is directed.

ii) In all cases (save with regard to consolidating enactments) the purpose or mischief may be identified by the posing of questions such as: If the legislation has changed, what has changed? If there is a problem which had to be resolved, what was the problem? If there was a blemish in the legislation, what was that blemish? If there was an improvement which was sought to be achieved, what was that improvement?

iii) To identify the purpose or mischief and to answer these questions it is permissible to examine Explanatory Notes, White and Green Papers, Ministerial statements (Bradley) and Law Commission Reports, all of which may be admissible forms of evidence.

iv) However, not all such admissible sources are of equal weight. Those sources (such as Explanatory Notes) whose "shape" was closely connected to the "shape of the proposed legislation" may be more informative as guides than other sources which are more remote from the final language selected by Parliament.

v) In addition, a court may draw inferences from the statutory words actually used in the scheme of the legislation as a whole and from any case law on the underlying subject matter and a court might ask whether it may be inferred that Parliament intended to act consistently with the standard set out in case law.

vi) Material that is admissible will reflect the views of their authors. And the views of authors, including the Government of the day, do not necessarily reflect the will of Parliament. If there is an inconsistency between the statutory language and the pre-legislative, admissible, material it cannot, without more, therefore be assumed that the statutory purpose must reflect the purpose set out in pre-existing admissible material.

vii) However, if there is a collision between a literal interpretation of an enactment and the contextual material with the consequence that the literal interpretation "is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief…", then the enactment should be construed in the light of the purpose as evident from the historical context and mischief.

Applying these principles to the facts of the case Green J analysed the relevant White Papers, statements in Parliament by Ministers and Explanatory Notes and concluded that sections 32LA and 32LB had been introduced to serve two separate purposes, distinct from the Claimants' contention that their purpose was to guarantee the RO scheme's operation until 2017. The Judge concluded that statements of intent as to the closure date of the RO scheme were policy statements capable of change but were not the purpose or mischief behind the amendments. Furthermore, the historical or broader context to sections 32LA and 32LB showed that these provisions sat under the umbrella of the LCF and that the Claimants' interpretation of the provisions was inconsistent with the assumption that the Secretary of State would seek to act consistently with the LCF, which was a key Government policy.

Ground 2: the pre-legislative statements by the Government constituted a binding "assurance"

The Claimant's second ground of challenge was that an assurance had been given by the DECC that the RO scheme would continue until 2017 and this was both admissible and, in effect, binding upon the Defendant.

In rejecting this ground, Green J stated that a clear assurance by the Government could not, without more, be taken to reflect the will of Parliament. The Judge observed that: (1) the pre-existing statements relied upon must be exceptionally clear and precise; (2) there could be no quick and easy assumption that Parliament necessarily intended to respect this assurance if it in fact used statutory language which was inconsistent with the assurance; (3) the court therefore had to be satisfied that the prior assurance did in fact and law accurately reflect Parliament's will; (4) the underlying principle was applicable to any form of pre-legislative material which is admissible as well as to the process of identifying the purpose of Parliament in an enactment; and (5) there was a tension in this area with normal Pepper v Hart principles which militated against the admissibility of pre-legislative materials as guides to interpretation. This suggested that the circumstances in which a pre-legislative assurance would be treated as reflecting Parliament's will, when this was not apparent from the enactment, may be exceptional.

Applying these principles to the Claimants' case the Judge concluded that the Explanatory Notes to sections 32LA and 32 LB did not create any form of assurance, nor did the statement of the Minister in Parliament in respect of the phasing out of the RO scheme. Neither did statements in relevant White papers and consultation documents assist the Claimants' case in this regard.

Ground 3: There was a legitimate expectation that the RO scheme would continue until 2017 and the Defendant's decision did not provide sufficient justification for defeating that expectation

The Claimants' further argued that the multiple representations made by the Government up until early 2014 – to the effect that the RO scheme would not be closed prior to 2017 – amounted to clear and unambiguous representations which were sufficient in law to amount to a legitimate expectation which had to be protected. None of the purported justifications for the change in policy were sufficient to warrant the frustration of that legitimate expectation.

After reviewing the relevant case law in this area, the Judge concluded that no legitimate expectation arose because the LCF represented a systemic risk that all operators must be taken to have accepted when they sought support under the RO scheme. However, the Judge went on to consider whether there were policy reasons for frustrating a legitimate expectation if he was wrong in his conclusion as to whether or not one had arisen. In this respect Green J focused upon the public interest which came from the macro-economic imperative for the Government to impose its austerity budgetary discipline across all spending departments, which included the DECC. The Judge also relied upon the fact that were the RO scheme to consider unaltered, it would result in an increase of £2-5 for consumers of electricity per annum. He dismissed the argument that this increase was trivial referring, in particular, to the effect it would have on individuals on a low income.

Ground 4: the grace period scheme was retrospective and unlawful

The Claimants' case in respect of this ground was that the grace periods whereby operators, who had yet to be accredited, might acquire continued support under the RO scheme if they met certain conditions by a date – which had already passed – were unlawful. They offended against the principle of non-retroactivity and were in any event unfair.

Citing "first principles" from *Bennion on Statutory Interpretation* Green J noted that the principle of retrospectivity was no more than simple fairness. The Judge then considered the decision of the Court of Appeal in *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28, in which the Court upheld a decision at first instance that an adverse alteration to rates of return for operators who had already been accredited in respect of a renewable energy scheme was unlawful as it offended against the principle of non-retrospection. Green J emphasised that the importance of that decision was the fact that the claimants were operators who had already received accreditation and therefore their case was concerned with a retrospective alteration to a fixed rate.

Green J held that there was some degree of retrospection in the present case but it sat at the least objectionable end of the scale. He was required to consider whether the grace periods were unfair but the Judge considered that they were not because: (1) the Defendant had addressed himself to all relevant considerations; (2) he had not violated any procedural standards; and (3) he had sound policy reasons for wishing to apply the rules in this fashion. Therefore, this ground of challenge also failed.

Comment

This case is another in the line of challenges against Government decisions relating to renewable energy. It is primarily of interest because of the ground of challenge brought with respect to the purpose behind specific provisions of the Electricity Act 1989 and the Court's detailed analysis of how to uncover that purpose. Although this ground of challenge ultimately failed on its facts it was nevertheless creative.

The case also reinforces the uphill task a claimant will have in this particular arena of public law decision making in persuading a court that Central Government has created a substantive legitimate expectation and one which it should not be able to subsequently frustrate. Perhaps unlike other areas of public law, such as social welfare or immigration judicial reviews, this decision reinforces the Court's position that it will be reluctant to infer a substantive legitimate expectation where macro-economic decision making is in play.

Robert Palmer (instructed by The Treasury Solicitor) acted for Secretary of State for Energy & Climate Change.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com