LAW SOCIETY Gazette

Environment

Electricity - Supply - Feed-in tariff

R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change; R (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change; R (on the application of Solar Century Holdings Ltd) v Secretary of State for Energy and Climate Change: Queen's Bench Division, Administrative Court (London) (Mr Justice Mitting (judgment delivered extempore)): 21 December 2011

In April 2010, the Secretary of State for Energy and Climate Change introduced a scheme to encourage the installation of generators for small-scale, low-carbon electricity generation (the scheme), including solar panels. The scheme required licensed electricity suppliers to pay a sum of money per kilowatt hour of electricity generated by such systems to the installer (the feed-in tariff).

The original feed-in tariff was to be fixed for 25 years, subject to the Retail Prices Index. The scheme was established and came into effect pursuant to the Feed-in Tariffs (Specified Maximum Capacity and Functions Order) 2010, SI 2010/678 and by amendments to the standard licence conditions issued to electricity suppliers. The procedure for making modifications to the licence conditions in relation to the scheme was contained in section 42 of the Energy Act 2008.

In October 2011, the secretary of state issued a consultation paper. The consultation paper proposed a reduction in the feed-in tariff payable for electricity generated by small solar systems. The proposed new tariffs were to come into force from 1 April 2012 (the reference date).

The new tariff was also apply to installations installed and certified on or before 12 December 2011. Therefore those installations would only receive the current tariff until 1 April 2012. The consultation period was due to expire on 23 December.

The secretary of state's assessment of impact showed a potential reduction in uptake of small solar systems of 70% between 12 December 2011 and 1 April 2010. The claimants applied for judicial review of the proposal.

The issues that fell to be determined were, *inter alia*: (i) whether judicial review was available in relation to a proposal which was not yet passed into law; (ii) if yes, whether section 41 of the act gave the secretary of state power to amend the feed-in tariff; and (iii) whether the proposal was to effect a modification to the feed-in tariff retrospectively/ unauthorised by the act.

The court ruled:(1) A proposal had to be to make a lawful decision. Lawfulness might properly be the subject of judicial review especially if the proposal was to have an immediate and significant effect. In the instant case, the proposal had a significant impact in principal and in practice. The proposal had converted the expectation of a prospective installer from one of certainty to a situation of uncertainty in which they were likely to receive the current tariff for no more than a few months. Further, in practice the proposal had had a significant impact. Judicial review was available in relation to the proposal. *R (on the application of Royal Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2011] All ER (D) 44 (Nov) considered.

(2) In the instant case, the court would proceed on the basis that the secretary of state had the power to amend the feed-in tariff.

(3) There was a strong presumption against retrospective legislation. That assumption might be overruled by express statutory language or clear parliamentary intention. In the instant case, the secretary of state was only entitled to make modifications for two purposes: (i) in order to establish financial incentives to encourage the small scale low carbon generation of electricity; or (ii) to make arrangements for the administration of the scheme for the statutory purpose. The arrangements made would, of necessity, take into account the long-term nature of the industry, the fact that a significant capital outlay was required and that it was designed with pay-back over 25 years.

The proposed changes which were to be made by reference to a date other than the date on which the changes were to come into effect were not conductive to furthering the statutory purpose. On the contrary, the changes tended to undermine confidence in those considering installing solar panels. Parliament had explicitly provided under section 42 for a mandatory process to be followed before making such a modification. The whole tenor of the statute was prospective. It was not possible to ascertain a clear parliamentary intention that the secretary of state was entitled to make a modification having such an adverse impact before the date the modification would be made and come into effect. If the proposal to make the modification in exercise of the statutory power was implemented, such a modification would be unlawful. The decision to implement the modification by reference to the date 12 December would be unlawful. The court would grant declaratory relief.

Nigel Fleming QC and Duncan Sinclair (instructed by Friends of the Earth) for Friends of the Earth Ltd; Sam Grodzinski (instructed by Asserson Law Offices) for Homesun Holdings Ltd; Edmund Robb (instructed by Prospect Law) for Solar Century; Paul Nicholls and James Cornwell (instructed by the Treasury Solicitor) for the secretary of state.