Neutral Citation Number: [2018] EWHC 2012 (Admin)

Case No: 794/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before:

LORD JUSTICE FLAUX

-and-

MR JUSTICE HOLGATE

- -

Between:

THE QUEEN **on the application of** **Brooke Energy Limited**	**Claimant**
- and –	
Secretary of State for Business, Energy and Industrial Strategy	**Defendant**

- -
- -

Mr Richard Drabble QC (instructed by **Prospect Law**) for the **Claimant**
Mr Jason Coppel QC and Mr Tom Cross (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: The 3rd and 4th of July, 2018

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Approved Judgment

Lord Justice Flaux:

Introduction

1. In this claim for judicial review, the claimant, which is a company involved in projects to generate energy through Biomass Combined Heat and Power ("CHP") systems, seeks to challenge the Renewable Heat Incentive Scheme (Amendment) (No. 2) Regulations 2016 (which for reasons which will become apparent below I will refer to as "the 2017 Regulations") which amended the Renewable Heat Incentive Scheme Regulations 2011 ("the 2011 Regulations"). The 2011 Regulations set out a statutory scheme called the non-domestic Renewable Heat Incentive scheme ("the RHI scheme") under which tariffs are payable, at differing levels, in respect of the generation of renewable heat energy.

Statutory framework and background to the dispute

2. Section 100 of the Energy Act 2008 empowered the Secretary of State to establish an RHI scheme. The non-domestic RHI scheme with which this case is concerned was established by the 2011 Regulations. To become eligible for support under the RHI scheme, the owner of an installation has to make an application under regulation 22 for accreditation by the Office of Gas and Electricity Markets ("Ofgem"). Ofgem will not grant accreditation unless satisfied that the installation satisfies the relevant eligibility criteria laid down by the 2011 Regulations. Under Regulation 22(9), added by the Renewable Heat Incentive Scheme (Amendment) Regulations 2014 ("the 2014 Regulations"), Ofgem must not accredit an eligible installation unless it has been commissioned, in other words the plant is operational and producing renewable heat.

3. Once a plant is accredited, its owner becomes eligible for support in the form of periodic support payments from the "tariff start date", defined in regulation 2, in relation to an eligible installation, as the date of its accreditation. Regulation 2 also defines the date of accreditation as the later of (a) the first day after the date of receipt by Ofgem of the application for accreditation on which both the application was properly made and the plant met the eligibility criteria and (b) the date on which the plant was first commissioned.

4. Prior to accreditation, there is no certainty that an installation will be accredited and therefore have any entitlement to payment under the RHI scheme. The scheme is funded by the taxpayer and there is no guaranteed budget to support new applications. A budget cap mechanism would allow the Government to close the scheme altogether to new applications if there were a risk of overspending. Furthermore, the tariff payable to a new entrant may be lowered pursuant to a process euphemistically described as "degression", which may occur in relation to particular technologies as numbers of installations using that technology grow. Degression has ranged from a 5% to 25% reduction in tariff level.

5. Under Regulation 37(1) the periodic support payments accrue from the tariff start date and are payable for 20 years. Regulation 37(3) provides that the tariff is fixed when the installation is accredited. The tariffs payable were originally set out in Schedule 3. The 2014 Regulations added a new Schedule 3B which set out a tariff rate for CHP installations of 4.1p/kwh of heat generated. This was much higher than the tariff previously payable, which for large heat-only biomass plant was 2p/kwh. The higher rate was payable to a biomass CHP plant with a tariff start date on or after 4 December 2013, provided that it was certified under a quality assurance scheme called CHPQA. The rationale for the higher tariff was that the cost of biomass CHP plant was understood to be much higher than biomass heat only plant of a similar capacity.

6. However, after the higher tariff had been operating for some time, a concern developed in the Department of Energy and Climate Change, now the Department for Business, Energy and Industrial Strategy ("the Department") that ways were being found to convert plant generating heat only into plant which generated both heat and power, so that the plant could qualify for the higher CHP tariff even though only small amounts of electricity were being generated, for example by biomass plants which used a "heat converter". These did not face the significantly higher costs which had been the rationale for the higher tariff and did not represent value for money for the taxpayer. The problem was discussed in an internal report within the Department in October 2015. This put forward a number of potential solutions to the problem, including requiring higher CHPQA requirements for all CHP plant, requiring a minimum heat: power ratio to attract the higher tariff or excluding these type of heat converters from the higher tariff.

7. Discussions ensued between the Department and Ricardo-AEA, the organisation which administers the CHPQA scheme on behalf of the Government. They suggested two options, either a minimum heat: power ratio or the introduction of a 20% minimum power efficiency threshold, in other words the ratio of the electrical power output from the turbine/generator divided by the total fuel input to the system. The benefit of the latter option was that the CHPQA certificate already included the power efficiency, so Ofgem would have readily available evidence without any additional burden. In addition, the power efficiency was already used to determine a plant's access to other benefits such as the exemption from Climate Change Levy payments. In relation to the latter option, there were also two possible approaches: to exclude altogether from the higher tariff plant with power efficiencies below the proposed threshold or to apportion payments to plant on the basis of their power efficiency compared with the power efficiency threshold, in other words a tapering mechanism.

8. The latter option with the tapering mechanism was what was eventually introduced by the Renewable Heat Incentive Scheme (Amendment) Regulations 2016 ("the 2016 Regulations). In terms of consultation, with which the present judicial review is concerned, the submission made to the relevant minister in April 2016 identified as the problem with consultation, that there was a risk of a rush of further applications for accreditation to take advantage of the higher tariff by operators of plants who were "gaming" the system by using heat converters or similar technology to obtain the higher tariff in relation to all their heat output, even though the power efficiency of such plants might be 5% or less.

9. In the submission, the Department's officials recommended to the Minister that there should be no public consultation prior to the introduction of amended Regulations introducing the 20% power efficiency threshold, in order to avoid the risk referred to in the previous paragraph. The Minister agreed with that approach. Accordingly, the 2016 Regulations were laid before Parliament on 11 July 2016 and came into force on 1 August 2016. They applied to plant with a tariff start date on or after that date.

10. Regulation 5 of the 2016 Regulations introduced a new Regulation 39D into the 2011 Regulations which provided:

> "39D.—(1) This regulation applies where— (a) an accredited RHI installation which is, or includes, a new solid biomass CHP

> system has a tariff start date on or after 1st August 2016; and (b) the power efficiency of the CHP system is lower than 20%."

11. A complex formula for the calculation of the tapered periodic support is then set out, but the effect of it is explained clearly in the Explanatory Note:

> "The formula in the new regulation 39D for calculating the payments provides that the heat generated using solid biomass in a CHP system (in accordance with regulation 9A of the 2011 Regulations) will only receive the new solid biomass CHP tariff for all of that heat where the CHP system achieves a power efficiency of at least 20%. Where the power efficiency is lower than 20%, the proportion of the heat which receives that tariff will be reduced in accordance with the reduction in power efficiency below the 20% threshold (for example, where a CHP system has a power efficiency of 15%, 75% of the heat generated using solid biomass will receive the new solid biomass CHP tariff). The periodic support payment for the remainder of the heat generated using solid biomass will be based on the standard solid biomass CHP tariff which applies where a biomass CHP system is not certified under CHPQA. The formula provides for payments calculated for heat generated using other sources of energy to be added to the payment calculated for the new solid biomass CHP system in order to give a total periodic support payment figure for the installation for each quarterly period."

12. After the 2016 Regulations came into force, the owners of affected plants wrote to the Department, to their MPs and to ministers. The Department developed a standard response letter which stated, inter alia:

> "Recently, the Government has become aware that some types of CHP systems can qualify for the RHI's biomass-CHP tariff for all their eligible heat output despite having relatively low levels of power efficiency and / or delivering only a small amount of power, meaning they do not necessarily face the significantly higher capital costs and / or constitute the highly efficient use of biomass the biomass-CHP tariff reflects. This represents a significant risk to the value for money of the scheme and as such a decision was taken to act quickly to address this issue.
>
> We are therefore introducing a change to the RHI regulations. This will add a new requirement for biomass-CHP plants to achieve a minimum power efficiency of 20% in order to fully qualify for the biomass-CHP tariff for eligible heat use. Plant with a power efficiency of 20% or above will continue to receive the biomass CHP tariff for all heat produced. For plants with a power efficiency of below 20% the level of heat receiving the CHP biomass tariff will reduce proportionately. The remaining heat will receive the relevant biomass tariff.

> A decision was taken not to consult on the specifics of this change given the potentially significant financial risk to the scheme which could arise should a rush of applications for the relevant types of CHP plant emerge. It was judged that further consultation would increase the risk of such a rush.
>
> …
>
> The Government is however happy to receive and consider further information about the impacts of the proposed change on all potential applicants to the RHI for biomass-CHP. Please feel free to submit any relevant information about your / your client's / your member's plant…"

13. The responses received by the Department were predominantly from SMEs (including the claimant) and farm projects. Reported power efficiencies were between 3 and 17%. The claimant's case is that these responses set out information which was not otherwise available to the Department which the Department would have received before any amendment to the 2011 Regulations had been tabled, had it consulted beforehand.

14. The Department also consulted the two main trade associations, the Association of Decentralised Energy ("ADE") which represents larger CHP Biomass projects and the Renewable Energy Association ("REA") whose members tend to be at the smaller end of the range of project sizes. It was REA members who reacted most vocally to the introduction of the 20% threshold. The REA provided anonymised data from 37 members whose projects were affected, 64 projects in total. In contrast the ADE informed the Department that a couple of companies had contacted them to say their projects could not achieve 20% but were in the region of 16-17% power efficiency, so their business case was not fundamentally impacted.

15. The Department referred to the various responses it had received in the submission to the relevant Minister, Baroness Neville-Rolfe, dated 27 September 2016. This stated, inter alia:

> "Officials have now reviewed this information. Following this review officials still believe the revised policy to be reasonable as a way of ensuring payments represent value for money and avoiding high levels of overcompensation. It is, however, clear that a range of projects currently under construction and not yet accredited will receive significantly lower RHI payments, be financially less viable as a result, with the potential for, in extreme cases, losses or bankruptcies. It is not possible to separate potential bankruptcy cases from those where the changes merely bring down the project return to or beyond the target level (a 12% rate of return on investment)."

16. The submission referred to an investment case for a project received from one party who was a complainant in a potential claim for judicial review[1] (in fact a reference to an Excel spreadsheet and detailed modelling information provided by Mr Brooke of the claimant to Mr Quast, an official in the Department with whom Mr Brooke had been in communication). This was said to show a reduction in the rate of return from well over 12% under the old rules to 4-7%. The submission then set out a number of options for responding to "stakeholder and parliamentary activity", the recommended option being to announce their intention to introduce as soon as possible regulations which would reduce the 20% power efficiency threshold to 10% for an interim period, for example until 31 March 2017 and then reinstate 20% thereafter. It was said:

> "This would remove the impact on CHP biomass plant which has a power efficiency of greater than 10%, whilst continuing to reduce RHI tariffs for those with much lower power efficiencies ie. the plant which we believe represent the highest risk of over-compensation. This option would return the project for which we have the investment case to an internal rate of return of above 12%."

In his evidence for this hearing, Mr Brooke asserts that the Department had misinterpreted the financial information he had provided in adjusting the assumptions made. The information showed, according to him, that the internal rate of return if a 10% threshold applied would be no more than 8-9%, making the projects financially unviable. He had not been afforded the opportunity to comment on whether the Department had been correct on the changes it made to the assumptions in the spreadsheet.

17. Annex C to the submission set out the results of the Department's information gathering exercise. It stated, inter alia (in a passage clearly not referring just to the claimant's projects):

> "A significant number of the communications received from stakeholders suggest that the changes will have a material impact on the revenues for their projects. Some stakeholders suggest that the change will affect the viability of their projects and/or that their projects will be loss-making and threaten to bankrupt them. This assertion is more common amongst the smaller businesses and individual farms in particular. Many respondents are concerned about loss of deposits if their project does not go ahead, and some are concerned that they are contractually obliged to continue with the project.
>
> It is not possible to validate the above representations from stakeholders or determine what impact the changes have had on any of the individual projects' economic viability. However,

[1] Two applications for judicial review were in fact issued in October 2016. One of the claimants was the current claimant. Those applications are referred to as necessary below, but for the present it is only necessary to note that those judicial review proceedings are not before the Court.

> where power efficiencies are reported these range from 3.5% - 12% which suggests a reduction of ~21-42% in RHI payments."

18. The Annex noted the substantive arguments against the 20% threshold as being that it was argued by a number of stakeholders that smaller biomass CHP projects were not able to meet the threshold, or that biomass CHP systems meeting that threshold were not commercially available, or that the threshold is more suitable for larger bespoke engineered projects. Under the heading "Market Intelligence" the Annex said that market intelligence and further industry feedback enabled the Department to distinguish two categories of affected plant. First, the biomass installations which, by adding cheap and inefficient electricity production equipment, produced poor levels of electricity production of 1 to 5%. The 20% threshold had reduced their RHI payments and thus reduced this "gaming" behaviour. The second category was more specially engineered biomass installations deploying more efficient combinations of ORC technology and steam turbines, which produce power efficiencies in the range of 10 to 15%. The effect of the amendment to introduce the 20% threshold had reduced their RHI payments and reduced their ability to achieve high levels of project finance. Project returns were likely to be diminished to below 12%. Whilst the affected parties were claiming bankruptcies as a distinct possibility, the Department was not aware that project development had stopped.

19. The Minister approved the approach recommended in the submission of introducing a reduction to the threshold from 20% to 10% for an interim period as soon as possible. The Department did not formally consult on this amendment as it was thought desirable to make provision for the 10% threshold quickly to provide greater certainty for the industry and those applying for the RHI scheme. The Department did, however, recognise the desirability of a formal consultation once the reduction to 10% for a transitional period had occurred.

20. The 2017 Regulations were laid before Parliament on 9 December 2016 and came into force on 1 January 2017. Regulation 2 amended regulation 39D(1) as set out at [10] above to read:

> "For paragraph (1) substitute—
>
> "(1) On or after 1st January 2017, this regulation applies where— (a) an accredited RHI installation which is, or includes, a new solid biomass CHP system—
>
> (i) has a tariff start date on or after 1st August 2016;
>
> (ii) the power efficiency of the CHP system is lower than 10%; and
>
> (iii) sub-paragraph (b) does not apply; or
>
> (b) an accredited RHI installation which is, or includes, a new solid biomass CHP system—
>
> (i) has a tariff start date on or after 1st August 2016 but before 1st January 2017;

> (ii) the power efficiency of the CHP system is lower than 20%; and
>
> (iii) the participant notifies the Authority, in such form as the Authority may require, by 1st February 2017 that on and after the date on which the notification is received, this sub-paragraph should apply.".

21. Following the implementation of the 2017 Regulations, there was a formal consultation by the Department in February 2017 concerning the biomass CHP tariff and, specifically, the way in which it should be calculated. The formal Consultation document referred to the current policy, which had involved reducing the minimum power efficiency threshold from 20% to 10% for a transitional period, following engagement with stakeholders. It went on to say in the "Policy Proposals" that the Government believes that it is appropriate to limit access to the biomass CHP tariff for some plant which only produce a small amount of power. To achieve this, the Government proposes to retain the principle of a power efficiency threshold, but to increase it to 20% again. The Consultation then asked a number of questions including (question 2) whether consultees agreed that the use of a power efficiency threshold is the best way to determine the extent to which a plant's heat output is paid for under the higher tariff, with the remainder paid under the lower biomass tariff and (question 4) whether they agreed that a power efficiency threshold of 20% is appropriate.

22. The Government received some 30 responses to question 2. As set out in the "Government response to consultation" dated September 2017, 80% of those responses thought that the power efficiency threshold was the best way to determine to what extent the higher tariff was paid. There were thirty-one responses to question 4. Five respondents agreed the 20% threshold was appropriate as it would incentivise high efficiency installations. Twenty-two respondents disagreed with the proposal to restore the 20% threshold, pointing out that it was not achievable for small and medium sized plant and was more applicable to steam turbine-based plant. Four respondents had mixed views supporting the 20% threshold for larger projects but lower thresholds for smaller scale projects. Mr Brooke's response agreed that a power efficiency threshold was the best way to determine to what extent the higher tariff should be paid. However, he suggested a sliding scale of efficiency hurdles depending upon the capacity of the plant, with 12.5% for plant with a capacity up to 1MWe, 18% for plant between 1 and 5 MWe, 22% for plant between 5 and 10 MWe, 30% for plant between 10 and 20 MWe and 40% for plant over 20 MWe.

23. Notwithstanding these responses, the Government decision was to increase the power efficiency threshold to 20% again. The "Government response to consultation" stated:

> "The Government recognises that, while a 20% power efficiency may not be achievable by all types of biomass-CHP plant, setting it at this level better manages the risk of over-compensation compared to the costs of building and operating the plant and the benefits they deliver."

24. The resumption of the 20% threshold was effected by the Renewable Heat Incentive Scheme Regulations 2018 ("the 2018 Regulations") which came into force on 22 May 2018. Regulation 92 of the 2018 Regulations repealed the 2011 Regulations and the

relevant part of the 2014 Regulations, together with the 2016 Regulations and the 2017 Regulations. Regulation 68(1) of the 2018 Regulations provides:

> "68.—(1) This regulation applies in relation to an accredited RHI installation which is, or includes, a new solid biomass CHP system, where—
>
> (a)the tariff start date is on or after 1st August 2016 but before the date on which these Regulations come into force, provided that—
>
> (i)the power efficiency of the CHP system is less than 10%; and
>
> (ii)sub-paragraph (c) does not apply;
>
> (b)the tariff start date is on or after the date on which these Regulations come into force, provided that—
>
> (i)the power efficiency of the CHP system is less than 20%; and
>
> (ii)sub-paragraph (c) does not apply;
>
> (c)the participant notified the Authority in accordance with regulation 39D(1)(b) of the Renewable Heat Incentive Scheme Regulations 2011."

25. Regulation 59, headed "Calculation and payment of periodic support payments to participants" provides that periodic support payments are payable for 20 years from the tariff start date, replicating Regulation 37 of the 2011 Regulations. "Participant" is defined in Regulation 2 of the 2018 Regulations as, so far as presently relevant, the owner of an accredited RHI installation. Regulation 2 of the 2018 Regulations also sets out definitions of "accreditation", "date of accreditation" and "tariff start date" in essentially the same terms as the 2011 Regulations as discussed in [2]-[3] above. Under Regulation 30(12), as under the earlier Regulations, Ofgem must not accredit a plant unless it has been commissioned.

The claims for judicial review

26. As noted in the footnote above, in October 2016 the present claimant and others commenced judicial review proceedings seeking to challenge the 2016 Regulations on the ground of absence of consultation. Those proceedings are not before the Court save in relation to one aspect of the relief currently sought.

27. The present claim for judicial review was issued on 10 February 2017. In summary, the grounds claimed that the implementation of the 2017 Regulations was procedurally unfair because of the failure to consult before they were implemented. On 27 March 2017, Collins J made an Order indicating that the claim was clearly arguable but staying it pending the consultation which had then commenced, as set out above, over what became the 2018 Regulations, recognising that complaints about the lack of consultation over previous regulations might become academic. On 29 January 2018, Ouseley J made a consent Order lifting the stay, granting permission to claim judicial review and making directions leading up to the hearing before this Court.

28. As the claimant's case was developed before this Court, the claim that there was a duty on the Secretary of State to consult before the 2017 Regulations were implemented was put on two bases: (i) that there was an established practice of consultation in relation to similar issues within the RHI scheme; and (ii) that this was an instance of a secondary case of procedural expectation as described by Laws LJ in the Court of Appeal in *R on the application of Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 755.

29. The remedies sought in the Amended Statement of Facts and Grounds are quashing of the 2017 Regulations, an order that any decision by the Department in relation to the solid biomass CHP tariff should only be made following consultation with those affected and a declaration that the 2016 Regulations were made unlawfully and do not have the effect of setting a minimum effective threshold in respect of the claimant's three plants at Hemyock, Exeter and Winchester.

30. Those are the three plants said to have been "in the pipeline" at the time when both the 2016 and 2017 Regulations were implemented. Applications for accreditation were made to Ofgem on 5 February 2017 in the case of Hemyock, 30 March 2017 in the case of Exeter and 24 March 2017 in the case of Winchester. Their respective capacity and calculated power efficiency are 3MW and 8% in the case of Hemyock, and 4MW and 9% in the case of each of Exeter and Winchester. We were informed that all three plants had been fully commissioned at the time that the applications for accreditation were made. Although those applications were now made some 16-17 months ago, none of the three plants has yet been accredited.

31. In his submissions before this Court on behalf of the claimant, Mr Richard Drabble QC recognised that since the Grounds as amended were pleaded, the 2018 Regulations which repeal both the 2016 Regulations and the 2017 Regulations had come into force and said that if there was an issue as to whether the 2017 Regulations could be quashed, the claimant sought a declaration that the 2017 Regulations were made unlawfully and were of no legal effect. Mr Drabble QC also made it clear that the declaration that the 2016 Regulations were made unlawfully and of no legal effect would only arise if the claimant were successful in its case on the 2017 Regulations having been made unlawfully.

32. The Secretary of State resists the claim on a number of bases. First, it is said that there was no practice of consultation on previous occasions, sometimes there was consultation, sometimes there was not. Second, it is said that this is not one of those exceptional cases which would fall within the concept of procedural expectation as developed in *Bhatt Murphy*. In any event, Mr Jason Coppel QC on behalf of the Secretary of State submitted that, since the Government had conducted a wide formal consultation in relation to the resumption of the 20% threshold in what was now the 2018 Regulations which had repealed both the sets of Regulations in relation to which the claimants complained about lack of consultation, the challenge in these judicial review proceedings was entirely academic and should be rejected by the Court. Alternatively, he submitted that, even if the claimant could establish a breach of a duty to consult, the result of the formal consultation in February to September 2017 demonstrated that the thresholds of 10% and 20% would have been exactly the same if consultation had taken place, so that the Court should exercise its discretion under section 31(2A) of the Senior Courts Act 1981 to refuse the relief sought.

Is the challenge to the 2016 Regulations and the 2017 Regulations academic?

33. Before considering in more detail the rival submissions as to whether there was a duty to consult in the circumstances of this case, I propose to consider the question raised on behalf of the Secretary of State as to whether the challenge made by the claimant is academic.

34. The submissions made by Mr Coppel QC on behalf of the Secretary of State are disarmingly simple. He submits that, until a plant has been accredited by Ofgem, there is no right to be paid any biomass CHP tariff or, indeed, any periodic support payments at all, and, given the complexity of the eligibility criteria, it is distinctly possible that any given plant will not, in fact, receive accreditation. In the present case, none of the three plants in respect of which the claimant has made an application for accreditation has yet been accredited, so there is no question of the claimant having any accrued or vested rights to be paid the tariff on any particular basis or, indeed, at all. The 2018 Regulations have repealed the 2016 Regulations and the 2017 Regulations so that, if and when the claimant's plants receive accreditation, the entitlement to receive periodic support payments will then run from the day after the application for accreditation was made by virtue of the definitions in Regulation 2 (i.e. the dates in February and March 2017 set out at [30] above), so that the claimant's plants will fall within Regulation 68(1)(a) to which the 10% threshold applies. Those Regulations were introduced following full consultation and there has been no challenge to them. It followed that, whatever the result of these proceedings, the claimant's plants, if accredited, will be subject to the 10% power efficiency threshold under Regulation 68(1)(a) irrespective of what happens in the present proceedings, which are, accordingly, academic.

35. Mr Drabble QC sought to resist that conclusion in a number of ways. He submitted that there had not in fact been consultation over the appropriateness of the 10% threshold even in and after February 2017, which addressed Mr Brooke's concern that it is not possible to achieve the threshold in the case of plants such as his which were part built when the changes were introduced.

36. He also contended that, in the case of plant such as the claimant's which was already commissioned when the applications for accreditation were made, if the plant met the eligibility criteria in due course, the date of accreditation as defined would be the day after the applications were made in each case, the claimant had an accrued right as at that date to receive periodic support payments. Mr Drabble QC relied upon the decision of the Court of Appeal in *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778.

37. In that case, the claimant had been assessed with disablement resulting from vibration white finger (a prescribed industrial disease) at 8% with effect from 1 April 1985 for life. Special hardship allowance ("SHA") was a component of disability benefit under the Social Security Act 1975. With effect from 1 October 1986, SHA was repealed and replaced with reduced earnings allowance under the Social Security Act 1986. The claimant first claimed disability benefit on 1 November 1989. He subsequently claimed REA which was backdated to 1 October 1986. Before the Court of Appeal the remaining issue was his entitlement to SHA for the period from 1 April 1985 to 1 October 1986.

38. It was argued on behalf of the Secretary of State that he was not entitled to SHA because the relevant provision of the 1975 Act had been repealed. That argument failed before the commissioner at first instance on the basis that it was untenable in view of the

presumption against retrospectivity, both at common law and by virtue of section 16 of the Interpretation Act 1978 which provides, so far as relevant:

> "…where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—
>
> …
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;"

39. The basis for the argument on behalf of the Secretary of State on appeal was that no right could be categorised as an accrued right unless a specific step had been taken prior to repeal. The claimant had contracted the disease which had been prescribed but, at the date of repeal, he had not made any claim to SHA. This argument was rejected by the Court of Appeal. Simon Brown LJ said at 1787H:

> "A mere hope or expectation of acquiring a right is insufficient. An entitlement, however, even if inchoate or contingent, suffices. The fact that further steps may still be necessary to prove that the entitlement existed before repeal, or to prove its true extent, does not preclude it being regarded as a right."

40. Mr Drabble QC placed particular reliance on that passage, submitting that here the claimant had a contingent right to be paid periodic support payments (which, if the judicial review succeeded, should be paid pursuant to the 2011 Regulations as amended by the 2014 Regulations without any power efficiency threshold) and it was nothing to the point that Ofgem still had to take steps to accredit the claimant's plants.

41. Mr Drabble QC also relied upon 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; [2012] Env. L.R. 25. That case concerned a challenge to the lawfulness of a proposal to reduce the tariff paid to solar energy installations not just in relation to installations commissioned after 1 April 2012 (when the proposals were to take effect) but those commissioned in the previous three and a half months from 12 December 2011. The basis for the challenge was that the relevant scheme under the Energy Act provided for a tariff rate to be paid for 25 years from the date of the relevant installation becoming eligible for such payments. The Court of Appeal held that the proposal was unlawful because it purported to vary the rate after an installation had achieved eligibility and thus after the rate had been fixed for 25 years. Mr Drabble QC submitted that a similar analysis applied here. The claimant had an accrued right to be paid the tariff fixed by the 2011 Regulations from the day after its application to Ofgem which could not be taken away by the 2018 Regulations unless they expressly provided for retrospectivity, which they do not.

42. At the hearing, we invited further written submissions from the parties on the authorities subsequent to *Maguire* on the basis that we were concerned that the issue had not been fully explored in the oral submissions. Mr Drabble QC referred in particular in his written submissions to the decision of the House of Lords in *Wilson v First County Trust (No. 2)* [2003] UKHL 40; [2004] 1 AC 816, in fact cited by Moses LJ in his judgment in the *Friends of the Earth* case.

43. As Mr Coppel QC pointed out, Moses LJ noted at [44] that Lord Nicholls, in his speech in *Wilson* at [19], adopted the principle expressed by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724:

> "the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

44. In his speech at [196], Lord Rodger referred to *Maguire* as one of the cases where the courts had grappled with the concept of vested or accrued rights whilst noting that it was not easy to reconcile all the decisions and saying:

> "This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label "vested" to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule'".

45. Mr Drabble QC also relied upon the subsequent decision of the House of Lords in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230. That case concerned an application by the applicant for leave to remain as a postgraduate doctor. After her application was made but before it was determined, the Immigration Rules changed so that only postgraduate doctors with degrees from a recognised UK institution would be given leave to remain. The applicant submitted that the application should be determined in accordance with the Immigration Rules in force at the time that the application was made, relying on the presumption against retrospectivity. Mr Drabble QC, who appeared for the applicant in that case, sought to draw an analogy with social security legislation and relied upon the judgment of Simon Brown LJ in *Maguire*. In rejecting that argument, Lord Brown of Eaton-under-Heywood said at [37]:

> "So far from assisting Mr Drabble's argument, the *Maguire* case seems to me to point up the critical distinction between, on the one hand, legislation conferring "money or other certain benefit" and, on the other hand, a mere statement of policy as to how presently it is proposed to exercise an administrative discretion when eventually it comes to be exercised, a policy which may change at any moment. In the former case (the *Maguire* case) the right vests even *before* the necessary claim is advanced; in the latter case no right accrues even *after* the application is made. Indeed the argument based on the *Maguire* case surely proves

> too much: if the situations were truly analogous, the applicant here would not have needed even to make her application for leave to remain.

46. In his written submissions, Mr Drabble QC submitted that the RHI scheme, like that considered in *Maguire*, confers "money or other certain benefit" where the right vested on the date that the application for accreditation in the case of each plant was made.

47. Mr Coppel QC submitted that nothing in any of these authorities assisted the claimant. Unlike the position in *Maguire* or *Friends of the Earth* the claimant had no entitlement to payment of the biomass CHP tariff unless and until its plant was accredited, which it was not at the date the 2018 Regulations came into force and is still not. Even if that analysis were wrong, the presumption against interference with "vested" or "accrued" rights can be rebutted if a contrary intention appears from the relevant legislation. There was a clear contrary intention in Regulation 68(1)(a) of the 2018 Regulations which expressly applies to accredited installations where the tariff start date is on or after 1 August 2016 but before the coming into force of the Regulations on 22 May 2018.

48. In my judgment, whether the issue is viewed in terms of vested or accrued rights or more broadly in terms of fairness, as the speeches in *Wilson* suggest, there was and is no entitlement to be paid any periodic support payments until the plant in question has been accredited, which it has not been and, as Mr Coppel QC rightly points out, may never be, if Ofgem concludes it does not satisfy the eligibility criteria. *Maguire* does not assist the claimant here, as in that case, the claimant clearly did have a right to SHA at the date of the repeal of the relevant section of the 1975 Act, as Lord Brown pointed out in *Odelola*. He qualified for the benefit but he simply had not claimed it. In the present case, the claimant may or may not qualify for payment of the biomass CHP tariff. Whether it does so will depend upon whether the plant in question is accredited and there is no basis for presuming that it will be.

49. I also agree with Mr Coppel QC that, even if that were wrong and the claimant did have some accrued right, Regulation 68(1)(a) of the 2018 Regulations is clearly intended to have retrospective effect in that it only applies to accredited installations whose tariff start date antedates the coming into force of the Regulations. By definition, that would encompass installations which were accredited between 1 August 2016 and 22 May 2018. The position of the claimant's plants which are yet to be accredited, but which if and when they are will have tariff start dates in February and March 2017, is equally encompassed by that Regulation.

50. In the circumstances, whatever the result of the present judicial review proceedings, the entitlement of the claimant to the biomass CHP tariff will be subject to the 10% power efficiency threshold in Regulation 68(1)(a), a provision which went through Parliament pursuant to the affirmative resolution procedure and after full and wide consultation. I reject the suggestion made on behalf of the claimant that the consultation between February and September 2017 did not include any consultation about the 10% threshold for an interim period. The consultation questions were in broad terms which would have entitled and enabled Mr Brooke to raise his concerns about his plant in the pipeline which could not achieve the 10% threshold and, in any event, looking at the Consultation paper as a whole, there clearly was, as Holgate J said during the course of argument, a prospective element concerned with the reduction of the threshold from 20% to 10% for an interim period.

51. Accordingly, I consider that the present challenge to the 2016 Regulations and the 2017 Regulations, both now repealed, is indeed academic and I would dismiss the claim on that ground alone. However, since we heard full argument on the consultation issues I will deal with them fully.

Was there a duty to consult?

52. The circumstances in which the common law will impose a duty on a public authority to consult by virtue of the doctrine of legitimate expectation are threefold:

(1) Where there has been a promise to consult;

(2) Where there is an established practice of consultation; and

(3) Where, in exceptional cases, a failure to consult would lead to conspicuous unfairness.

(see per Mostyn J at [16] of *R on the application of L v Warwickshire County Council* [2015] EWHC 203 (Admin) which correctly summarises the law.)

53. As noted above, the Amended Statement of Facts and Grounds does seek to contend for a duty to consult because of an established practice of consultation. This aspect of the case was not pursued orally by Mr Drabble QC which is scarcely surprising since the evidence does not support the alleged established practice. The alleged practice must be clear, unequivocal and unconditional: see per Laws LJ in *Bhatt Murphy* at [29]; per Mostyn J in *L* at [17]. The practice must be sufficiently settled and uniform to give rise to an expectation that the claimant would be consulted: see per Stanley Burnton J in *R on the application of BAPIO Action Ltd v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) at [53]. It is also clear from [17] of *L* and from [28] of *Bhatt Murphy* that there must be unfairness amounting to an abuse of power for the public authority not to be held to the practice.

54. The evidence shows that there are occasions when the Government has consulted over changes to the RHI scheme and occasions when it has not. For example, the introduction of the Budget Cap with effect from 1 April 2016 was not the subject of consultation. The position was accurately summarised by Mr Andrew Cowdrill, the former Senior Policy Adviser at the Department at [102] of his witness statement:

> "Although there have been a number of consultations in relation to the RHI schemes, it is important to note that the scope and detail of the changes made through the several sets of regulations …outstrips the subjects that have been dealt with through consultation. Put simply, it is not the case that the Government has routinely consulted on any change to the non-domestic RHI scheme."

55. It follows that there is no settled or uniform practice, let alone one that is unequivocal, such as to give rise to an expectation of consultation and no sense in which it could be said to be unfair for the Department not to have followed any such practice. Accordingly, there will only have been a duty to consult if the claimant can bring itself within the third category identified at [52] above, that the failure to consult would give

rise to conspicuous unfairness. This is the so called "secondary case" of procedural legitimate expectation identified by Laws LJ in *Bhatt Murphy* at [39] and was the principal way in which Mr Drabble QC put his case. Before considering the parties' submissions in more detail, I will examine the scope of this aspect of the duty to consult.

56. As Laws LJ put it at [29] of *Bhatt Murphy*: "the paradigm case [of procedural legitimate expectation] arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy". At [31] he referred to "another class of procedural expectation" which he considered further later in his judgment.

57. He identified the relevant issues with which the case was concerned at [40]:

> "There remain two issues to be confronted. They bear a close similarity. The first relates to substantive legitimate expectation. It is the question I posed at paragraph 36: what are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit? The second relates to the secondary case of procedural legitimate expectation: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation? Answers to these questions might give sharper edges to the doctrine of legitimate expectation."

58. He made the overall point at [41] that both these types of legitimate expectation are concerned with exceptional situations, and explained the reasons for this as follows:

> "It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement — in truth, a duty — is ordinarily repugnant to any requirement to bow to another's will, albeit in

> the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult."

59. Laws LJ went on at [42] to describe the exceptional circumstances in which the Court would enforce such an obligation to consult:

> "But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations — the two kinds of legitimate expectation we are now considering — something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that '[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage'."

60. Laws LJ considered *R v Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 further at [48]. The case concerned the treatment by the Inland Revenue of Unilever's claims for loss relief against corporation tax. The relevant statute stipulated a time limit for making such claims but gave the Revenue discretion to allow late claims. Over a period of some 20 years, Unilever submitted late claims which were accepted by the Revenue. However, in the tax years 1986 to 1988, without prior notice, warning or consultation, they refused the claims on the ground that they were not made within the statutory time limit. The Court of Appeal regarded this refusal as so unreasonable as to be irrational in public law terms. Laws LJ in *Bhatt Murphy* quoted what Sir Thomas Bingham MR said at 691g: "On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power." Laws LJ also referred to Simon Brown LJ's description at 697c of the Revenue's conduct as: "so outrageously unfair that it should not be allowed to stand."

61. Laws LJ sought to summarise the circumstances in which this secondary case of procedural legitimate expectation would arise at [49] of his judgment in these terms:

> "I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural

> expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in Ex p Coughlan (paragraph 66):
>
> > "In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process."
>
> Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

62. The basis upon which Mr Drabble QC submitted that the present case did fall within this principle was as follows. The "past conduct" of the Department was the setting up of the non-domestic RHI scheme intended to deliver a public benefit of renewable energy. The scheme is dependent for its working on SMEs investing considerable sums of money in the scheme without any legal guarantee of receiving periodic support payments because the legal right to those payments does not crystallise until the tariff start date. That characteristic makes it objectively unfair to change the scheme (as happened with both the 2016 Regulations and the 2017 Regulations) without consultation in circumstances where the SME is committed financially and has put capital at risk. Although the SME with a plant in the pipeline such as the claimant had no guarantee of receiving the tariff at a particular rate, it would have reasonable grounds for believing the criteria pursuant to which tariffs were paid would continue unchanged for a reasonable period and that if changes were proposed, the Department would consult so as to understand the impact of the proposals on the SMEs.

63. Mr Drabble QC recognised in his oral submissions that this case was in territory not covered by *Bhatt Murphy*, because the relationship between SMEs such as the claimant and the Department was different from that considered in other cases. The relationship here was one where the SMEs were investing considerable amounts of money in a technology which the Department did not fully understand. This is what took this relationship out of the ordinary run of cases: fairness required that the Department consult with the SMEs such as the claimant with projects in the pipeline in circumstances where the SMEs had technical knowledge and information that the Department did not possess. The reaction of the industry to the 2016 Regulations, over which there was no consultation, shows that something had gone badly wrong because of that failure to consult.

64. Mr Coppel QC emphasised in his submissions that, as Laws LJ said in *Bhatt Murphy* the circumstances in which this secondary case of legitimate procedural expectation

would arise were exceptional and limited to where a failure to consult gave rise to conspicuous unfairness amounting to an abuse of power. The only example of a case where a duty to consult had been successfully established on the basis of *Bhatt Murphy* was *R on the application of Luton Borough Council and others v Secretary of State for Education* [2011] EWHC 217 (Admin) where the past relationship between the local authorities and the Department was akin to a partnership: see per Holman J at [91]-[96]. Nothing in the past relationship between the Department and the claimant gave rise to a duty to consult.

65. To the extent that Mr Drabble QC was submitting that the relevant "past conduct" of the Department was the setting up of the scheme, Mr Coppel QC submitted that a number of critical features of the scheme were inconsistent with that conclusion: the scheme was voluntary and there was no certainty that a particular plant would benefit from the scheme until it was built and commissioned and then accredited. Until an application for accreditation was made there was no relationship between the Department or Ofgem on the one hand and the relevant SME on the other. Furthermore, the scheme could change in a number of ways over time which might or might not vindicate investment decisions. For example, there could be degression before a plant had been commissioned.

66. Despite the elegance of Mr Drabble QC's submissions, I cannot accept them. I agree with Mr Coppel QC that the claimant gains no support for its case from the supposed one to one relationship between Mr Brooke and Department officials such as Mr Quast. What the secondary case of legitimate procedural expectation is focusing on, as [49] of Laws LJ's judgment makes clear, is whether the impact of the past conduct of the public authority is "pressing and focused", not whether the relationship itself can be said to be "pressing and focused". Likewise, at [50] Laws LJ stated a claimant must show that an authority "has established a policy *distinctly and substantially affecting* a specific person or group …" It simply cannot be the case that merely by engaging with Mr Brooke, taking account of his views and using his financial information, a legitimate expectation of further consultation within the exceptional circumstances envisaged by Laws LJ in *Bhatt Murphy* was created.

67. Furthermore, the setting up of the RHI scheme cannot amount to "past conduct" of the Department whose impact is pressing and focused. If that were the touchstone of relevant past conduct, this narrow exception would rapidly become the norm and there would be a general duty to consult whenever any such voluntary scheme for Government assistance was set up by the Government. Indeed, were this aspect of Mr Drabble QC's submissions correct, it is difficult to see why a duty to consult did not arise in *Bhatt Murphy* itself in relation to the relevant legal aid scheme.

68. What distinguishes this case from one like *Luton Borough Council* is that, prior to the application for accreditation (which in the case of the claimant's pipeline projects post-dated the failure to consult in relation to the 2017 Regulations of which the claimant complains), there was no relationship between the Department and any given investor in a pipeline project. Whilst the 2018 Regulations have introduced a regime of tariff guarantees for prospective investors, that was not applicable to this claimant. There was no preliminary approval or attainment of gateways such as in the *Luton* case, let alone something akin to a partnership and, as I have held, it is impossible to conjure up anything of the kind from the limited engagement between the Department and Mr Brooke.

69. Equally, in my judgment, the necessary exceptional situation cannot be conjured up by suggesting, as Mr Drabble QC did, that the relationship between the Department and the SMEs was one where the SMEs had knowledge and information which the Department did not possess. Although the claimant was critical of the conduct of various Department officials, it is important to have in mind that this judicial review challenge is only concerned with an alleged duty to consult, not with any other aspect of the Department's conduct.

70. I also agree with Mr Coppel QC that the claimant's focus on the SMEs and their understanding of their business model is unduly narrow. It overlooks that the Department had in-house expertise on which it could and did draw and also had access to expert advisers such as Ricardo-AEA and that the scheme is not limited to SMEs or dependent for its success, as Mr Drabble QC's submissions tended to suggest, upon the financial investment of SMEs. The scheme is open to companies of any size and certainly the companies represented by the ADE were larger companies with more substantial plants. Both in setting up the scheme and in the changes made through the power efficiency threshold, the Government had in mind the industry as a whole and there is no question of some "pressing and focused" concentration on SMEs. The fact that the Government has in this sphere as in many others to balance a number of competing interests across a wide spectrum (as can be seen from the Government response to the public consultation which did take place prior to the 2018 Regulations) militates strongly against the application of the *Bhatt Murphy* exception for the reasons given by Laws LJ in [41].

71. Mr Drabble QC submitted that the reason given by Department officials for not consulting in relation to the 2016 Regulations, that there would be a rush of applications from "gaming" applicants, was flawed because of the lead time for a plant to be commissioned. Even if this were correct, it is of no consequence because (i) the present challenge is in relation to the alleged failure to consult in relation to the 2017 Regulations, for which the reason given was the need to move swiftly to provide a lower threshold for an interim period; and (ii) the issue for the Court is whether there was a duty to consult. If there was no duty to consult, the reason for not doing so is of no relevance. Equally if there was a duty to consult, the reason for not consulting cannot assist the Department.

72. In his evidence Mr Brooke was critical of what he characterised as misinterpretation by Department officials of the financial information with which he provided them and use of the information for an undisclosed purpose without consulting him. There is nothing in that point. The claimant must have appreciated, if financial information was provided in an electronic format, that the Department was likely to seek to test the financial assumptions on which it was based. It simply cannot be the case that there was a duty to go back to the claimant and consult as to the use to which the financial information was being put. As Mr Coppel QC pointed out, there would have been no such duty if there had been a public consultation in relation to the 2017 Regulations, so that it is difficult to see how there could be such a duty where there was no public consultation. Once again, if this point were correct, it would make *Bhatt Murphy* the rule rather than the exception.

73. In relation to the point made by Mr Coppel QC about the ways in which the tariff could change before a given project was accredited, there is some force in Mr Drabble QC's submission that degression is something which can be anticipated by investors and built

into their projections, whereas the imposition of the power efficiency threshold was not something which could necessarily have been anticipated. However, it remains the case that, until accreditation, a project which is in the pipeline can have no assurance that a particular tariff will be payable at a particular rate against achievement of particular criteria. With or without consultation, it is difficult to see how the claimant's pipeline projects (which must have all been nearing completion at the time when the claimant contends consultation should have taken place) could have achieved the power efficiency threshold.

74. Finally, whilst Mr Drabble QC is no doubt correct that, in the words of Lord Bingham, precedent should be a guide not a cage, so that [49] of Laws LJ's judgment should not be equated with a statute, I do consider that what Laws LJ's analysis is directed at is indeed past conduct of the relevant public authority which has given rise to a legitimate expectation that there will not be a change of policy without consultation over a reasonable period, such that the failure to consult is so unfair as to amount to an abuse of power. Contrary to Mr Drabble QC's submission, it is not possible to ignore the need for such past conduct.

75. Accordingly, in my judgment, the claimant has not established any breach by the Department of a duty to consult before the 2017 Regulations were introduced. Given that conclusion, the issue as to the lawfulness of the 2016 Regulations does not arise, but even if it did, it is difficult to see on what basis the challenge could succeed given that the 2016 Regulations never in fact applied to any of the claimant's pipeline projects before they were revoked.

Application of section 31(2A)

76. Given the conclusion I have reached that the claim to judicial review must fail, it is not strictly necessary to consider the alternative defence of the Secretary of State that the Court should refuse to grant relief under section 31(2A) of the Senior Courts Act 1981, but I will consider the issue shortly. The section provides that the Court must refuse relief: "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". I agree with Mr Coppel QC that it is highly likely that the outcome would not have been different, in other words the claimant's projects would still have had to satisfy the 10% power efficiency threshold, even if there had been consultation in relation to the 2016 Regulations and the 2017 Regulations. This is because there was such consultation after the 2017 Regulations came into force and before the 2018 Regulations were passed (which as I have held included consultation about lower potential thresholds than 20%). Notwithstanding the concerns voiced by consultees, Regulation 68(1)(a) was enacted in any event. It is highly likely that the 10% threshold would always have been introduced for an interim period, even if there had been consultation before the 2017 Regulations came into force.

77. I would refuse relief on this ground as well.

Conclusion

78. For all the reasons set out above I would dismiss this claim to judicial review.

Mr Justice Holgate

79. I agree.