Energy Regulation
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Format

- Introduction
- Case law update
- Focus on A1P1 issues
- Panel discussion and questions

Introduction

- Energy regulation a hot topic
  - Domestic and industry energy bills
  - Failure of 29 suppliers since start of 2021
  - Difficulty and cost of meeting Net Zero
  - Calls for windfall tax on gas companies
  - Risk to gas supplies internationally

What is energy regulation?

- Economic regulation of suppliers
- Social and economic regulation
- Administration of various Schemes and Incentives
- Licensing of oil and gas exploration and exploitation
- Control of infrastructure/development
- Environmental regulation of emissions, including GHGs

Pressures and conflicts

- Consumer protection/prices
- Security and resilience
- Net Zero and decarbonization
- Politics …

- How far to intervene in the market?
  - More robust scrutiny of suppliers/stress tests
  - Need to intervene in electric vehicle charging and domestic heating decarbonisation
  - Intervention inevitably means winners and losers ….

Energy Regulation: Case Law Update

Daniel Stedman Jones

Introduction

1. Ofgem
2. Oil & Gas Authority
3. Infrastructure
4. Conclusions

1. Ofgem

1. Ofgem

Leading into the pandemic, there were 3 important successful challenges to Ofgem decisions:

- ***R. (on the application of Gwynt-y-Mor Offshore Wind Farm Ltd) v Gas and Electricity Markets Authority*** [2019] ACD 54 – scope of Ofgem expertise - not expert in insurance cover!
- ***R. (on the application of British Gas Trading Ltd) v Gas and Electricity Markets Authority*** [2019] EWHC 3048 (Admin) – Price Cap case – declaration granted in respect of flawed consultation assumption.
- The Northern Irish case: ***Re Green Belt (NI) Ltd's Application for Judicial Review*** [2019] NICA 47 – Renewable Heat Incentive case – unsuccessful applicants could submit further information at review stage.

1. OFGEM

How has Ofgem fared since the Pandemic? A few recent cases:

R. (on the application of Scottishpower Energy Retail Ltd) v Gas and Electricity Markets Authority [2022] EWHC 37 (Admin):

- C challenged Ofgem decision not to authorise payment of £3.1m from the industry levy of customer debt incurred as Supplier of Last Resort.
- 3 grounds – fetter/fairness, irrationality and reasons.
- Did Ofgem close its mind by in-principle decision that the costs were outside the scope of Last Resort Supply Payment (LRSP)?
- Ofgem argued that customer debt is a matter of commercial risk
- Claim heard by Thornton J

Policy/Novelty

Thornton J – common ground that policy must not be over-rigid, but:

> ”[T]here is nothing objectionable about a public authority establishing a principle, policy or rule for the exercise of a discretionary power. […] Applied to the present context it means that an energy supplier bidding to become a SoLR knows from Ofgem's guidance that the regulator's general preference is for a SoLR not to make a LRSP claim and that suppliers will be expected to honour credit balances. This knowledge assists a supplier in assessing cost risks and benefits when bidding to become a SoLR. Accordingly, the existence of a rule, policy or principle governing the exercise of the discretion is not, of itself, a fetter on a discretion. A fetter arises only when the decision maker does not allow for the possibility of any exception to that rule, policy or principle.”

Scottish Power ctd

- Not the case here – the situation was novel, Ofgem had canvassed alternative approaches/resolutions, applied published criteria where possible, consulted properly, and there was no attempt, in Thornton J's view, to create an inflexible rule.
- The decision was a balancing exercise between the ability of SoLRs to recover legitimate costs and the interests of consumers.
- The Judgment was a reinforcement of the typical approach of the court to challenges to regulatory judgments.
- Expert judgments made on the basis of the mixed application of policy and merits/specific circumstances consideration will usually fall within the limits of an authority's broad discretion absent hard-edged or procedural public law error.
- Classic application of *Wednesbury* approach.
- The reasons were adequate and intelligible.

Scottish Power ctd.

Thornton J gave a useful formulation of unreasonableness, drawing on recent case law:

> **"91. The legal basis for a challenge on the basis of irrationality, or as it is more accurately described, 'unreasonableness', has two aspects. The first is concerned with whether the decision under review is capable of being justified, or whether, put simply, it is outside the range of reasonable decisions open to the decision maker. The second aspect is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it; for example that significant reliance was placed on an irrelevant consideration or that there was no evidence to support an important step in the reasoning or that the reasoning involved a serious logical or methodological error (Secretary of State for Work and Pensions v Johnson [2020] EWCA Civ 778 .).**

1. Ofgem ctd

Havant Biogas Ltd v Gas and Electricity Markets Authority [2021] ACD 39

- Renewables Heat Incentive (RHI) – Decision to refuse four SPVs under RHI as producers of Biomethane for Injection due to apps not properly made.
- RHI Regulations 2011 and 2018 – Ofgem's decision based on an alleged absence of "Proposed Process Details" and 3rd party supply chains in accordance with its interpretation of the regulations.
- Fordham J dismissed several grounds but held that Ofgem's statutory review officer had made multiple errors in interpreting and applying the registration requirements in the applicable regulations.
- There was a failure to refer to, or apply, relevant guidance, a confusion of reqs pertaining to registration and those applicable to "ongoing obligations", inadequate and unsupported conclusions and a misdirection that preconditions existed where they did not.

1. Ofgem ctd.

Fordham J:

> "[89] It is no answer […] to say that the Operative Decision did no more than involve matters of appreciation which Ofgem was entitled to choose to regard as 'highly material' as an exercise of reasonable judgment[…] in undertaking its evaluative judgment Ofgem needed to ask the right questions[…] It needed to appreciate that features being referred to were not Preconditions[…] Further, an exercise of evaluative judgment needs to be addressed having regard to the Applicable Guidance – including as to Proposed Process Details, Properly Made Applications, and Future Third Party Operator Contracts."

1. Ofgem ctd.

R. (on the application of Gravis Solar 1 Ltd) v Gas and Electricity Markets Authority [2021] EWHC 490 (Admin)

- Removal of accreditation under Renewables Obligation Scheme.
- Effect on 3rd Party subsequent owner of inaccurate info provided when accredited.
- Sir Duncan Ouseley held that the decision nevertheless proportionate – fraud could not be tolerated.

1. Ofgem ctd

Gas and Electricity Markets Authority v Utility Point Ltd/Gas and Electricity Markets Authority v People's Energy (Supply) Ltd [2021] EWHC 2757 (Ch)

- Declarations made that the defendant energy supply companies were insolvent so that GEMA could revoke their gas and electricity supply licences and appoint suppliers of last resort.
- Notable for Meade J's comment that urgency in dealing with such matters was justified in order to "customers of the companies can have a greater degree of reassurance about their position, and indeed that greater reassurance can be given about the functioning of the energy markets generally."
- Signal of court's readiness to assist energy market.

Oil and Gas

2. Oil and Gas

R. (on the application of Cox) v Oil and Gas Authority [2022] EWHC 75 (Admin)

- Climate ESG Challenge to revisions made by the OGA to the "The Maximising Economic Recovery Strategy for the UK".
- Key issue: whether the statutory objective (from s. 9 Petroleum Act 1998) of "maximising the economic recovery of Petroleum" is inconsistent with the Government's Net Zero target (under s. 1 Climate Change Act 2008).
- Introduced in 2016 as part of the Wood Review reform proposals, the original Strategy was binding on the SoS and other key players.
- Revised Strategy produced following review in 2020 to take account of the 2050 Net Zero target, came into force in February 2021.
- Claimants criticised the Strategy's tax approach to O&G.

2. Oil and Gas ctd.

Cox ctd.

- Claimants argued that the new definition in the Strategy of economically recoverable was inconsistent with the definition in the Petroleum Act 1998 with the result that the favourable tax treatment of O&G on a pre-tax basis was not factored in.
- The result, C argued, would be increased emissions from greater O&G extraction than would have been the case on an a tax-related basis.
- The Claimants also criticised a failure to take into account so-called scope 3 emissions arising indirectly up and down the value chain.
- The Defendants submitted, and court (Cockerill J) accepted, that the detailed assessment and definitions adopted through the Strategy, and the responsibility for balancing competing statutory objectives were matters for the expert sectoral regulator subject only to rationality/reasonableness.

2. Oil and Gas ctd

AT v Oil and Gas Authority [2021] EWHC 1470 (Comm); [2021] Bus. L.R. 1232

- Interesting case on JR/Arbitration jurisdiction concerning role and obligations of the OGA and the Claimant.
- OGA wanted to issue a Notice to 3rd Parties regarding C's Petroleum licence – C challenged as prejudicial.
- Question was whether the decision could be challenged by way of application for interim relief under the Arbitration agreement or by way of JR.
- Court held that the matter related to a power conferred on OGA alone and so JR was only route.
- Relief granted on modified *American Cyanimid* principles.

Infrastructure

3. Infrastructure

Tidal Lagoon (Swansea Bay) Plc v Secretary of State for Business, Energy and Industrial Strategy **[2021] EWHC 3170 (Admin)**

- **Developer sought declarations from the court that works had begun works under the Swansea Bay Tidal Generating Station Order 2015.**
- **Key issue: had the works "begun" the development such that the wording of the order could be amended to replace "commence" so as to extend the time within which development must "commence".**
- **Court held that the relied upon surveys and investigatory works were excluded from the definition of commencement and that although there was a distinction in the Order between the two terms, a less unsatisfactory result should be preferred to the developer's construction, which harmed 3rd party rights (through CP) and undermined the necessary certainty for limiting the duration of consents under the Planning Act 2008.**

3. Infrastructure

EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 2697 (Admin)

- Challenge to the SoS refusal of a DCO for an energy from waste facility.
- Existing facility made two applications for consent, one of which fell with an NPS and the other which was below the threshold. The SoS issued a direction that both should proceed to be assessed under s. 104 Planning Act 2008 (procedure where NPS applied).
- The court (Dove J) held that while it was possible to include more than one project within a DCO application, each must be examined in accordance with whether an NPS applied or not. The scope of the NPS could not be enlarged by the SoS direction.
- Relief, however, was refused because no material prejudice and decision would have been the same.

3. Infrastructure

Pearce v Secretary of State for Business, Energy and Industrial Strategy [2022] Env. L.R. 4

- C challenged the grant of a DCO for a Windfarm due to failure to consider information on cumulative impacts of similar nearby facility.
- Holgate J held that a decision-maker must not grant a DCO without:
  - being satisfied that he/she possessed sufficient information as regards potential significant environmental effects having regard to any reasonable constraints on what an applicant could provide, and then
  - evaluating that information.
- These are essentially planning judgments to be made by the decision-maker subject to *Wednesbury* irrationality/unreasonableness.
- Given significant cumulative effects here, the decision-maker should have taken them into account and evaluated them, and the DCO was quashed.

Concluding Thoughts

3 key themes emerge from these cases:

- Tensions between energy need and environmental impact and transition to Net Zero.
- The recurring battleground of *Wednesbury* unreasonableness.
- Continuing importance/prominence of ESG litigation

How will courts respond as crisis grips?

Thank you for listening!

A1P1 for Energy Regulation Lawyers

Katherine Barnes

Introduction

1. Review of A1P1
2. Reliance on A1P1 in the context of energy regulation

Structure

1. Meaning of “possessions”
2. Interference
3. Justification
4. Remedies

1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

Meaning of “possessions”

- “Possessions” an autonomous Convention concept – independent from formal classification in domestic law (Breyer [2015] EWCA Civ 408)
- Widely interpreted (tangible and intangible).
- Examples in energy regulation context
  - Subsidies due under legislation (Infinis [2013] EWCA Civ 70)
  - Concluded contracts (Breyer [2014] EWHC 2257)
  - Contractual rights (Mellacher [1990] 12 EHRR 391)
  - Marketable goodwill in a business (but not loss of future profits) (Breyer [2015] EWCA Civ 408)
  - Licences (Tre Traktörer [1989] 13 EHRR 309)
  - Legitimate expectation of obtaining a property right (Stretch (2004) 38 EHRR12)
  - Interests in land (Chassagnou [1999] 29 EHRR 615)
  - Welfare benefits under legislation providing for their payment as of right, whether contributory of non-contributory (Stec [2005] 41 EHRR SE18)

Meaning of “possessions”

- Not enough to identify a “thing” which is covered by A1P1 – must also show some degree of “ownership” by the applicant.
- The underlying question is whether the circumstances of the case have conferred on the applicant “title to a substantive interest” protected by A1P1 (Saghinzadze (2014) 59 EHRR 24)

Interference

3 Rules within A1P1

- Overarching, general principle - Rule 1: Principle of peaceful enjoyment of property
- Instances of interference with the right to peaceful enjoyment of property: Rule 2 and Rule 3
- Rule 2: Prohibition on unlawful deprivation of property
- Rule 3: Entitlement of the State to control the use of property in the general interest
- Often, little concern with whether interference falls under Rule 2 or Rule 3 (relevance is that it is only in exceptional cases that a deprivation of property (ie Rule 2 interference) without compensation will be proportionate)

Interference

Identifying an "interference" more generally

- Need to identify a real world impact on the relevant possession
- Eg Breyer [2015] EWCA Civ 408: Government consultation resulted in an interference with possessions protected by A1P1 "because as a matter of fact it did in a real and practical sense interfere with the claimants' businesses"

Justification

- A1P1 a qualified right
- For an interference with A1P1 to be lawful it must be:
  - Prescribed by law
  - Pursue a legitimate aim in the public interest
  - Proportionate (often described as striking a “fair balance” between the interests of the community and the rights of the individual (Mott [2018] UKSC 10)
- Assessing proportionality involves considering:
  - Whether the measure in question is suitable and appropriate to achieve the objective pursued
  - Whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (Lumsdon [2015] UKSC 41)
- The margin of discretion (i.e. deference) afforded to public bodies in undertaking the proportionality assessment will depend on the subject matter (Countryside Alliance [2007] UKHL 52). Environmental protection gives a wide margin (Mott [2018] UKSC 10)

Remedies

Challenges to legislation

- Section 3 HRA

3.— Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

- Section 4 HRA Declaration of incompatibility

Remedies

Damages

8.— Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) […]

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford **just satisfaction** to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Remedies

- Compensation under the HRA supposed to be “of secondary, if any, importance” (Anufrijeva [2003] EWCA Civ 1406). Declaratory relief may provide “just satisfaction”
- BUT damages typically awarded where there has been significant financial loss caused by the breach of a Convention right.
- Significant authority that in such circumstances, damages are to be avoided on a restitutio in integrum basis
  - Infinis [2013] EWCA Civ 70: Damages for refusal to grant accreditations based on company’s actual loss
  - Breyer [2015] EWCA Civ 408: Damages available with regards to a deadline being brought forward for tariffs for installing solar panels
  - Bank Mellat [2015] EWHC 1258 (Admin): Bank could claim damages for all its losses that had resulted from A1P1 breach

Remedies

- Causation: loss must have been “demonstrably and directly” caused by the A1P1 breach (Breyer [2015] EWCA Civ 408). Evidence required to show the loss claimed
- Mitigation: Applicant expected to mitigate loss (Infinis [2011] EWHC 1873 (Admin)
- Difficulties in assessment do not prevent award of damages (Breyer [2015] EWCA Civ 408)

Examples (1)

Gas and Electricity Markets Authority v Infinis Plc [2013] EWCA Civ 70

- Challenge to refusal to grant accreditation for Renewables Obligation Certificates (ROCs) for two power stations
- Consequence of ROCs would have been avoidance of a charge
- The Authority's position was that the relevant stations fell within an exclusion for accreditation under the statutory scheme
- Court found that the exclusion relied on by the Authority did not apply. Refusal therefore unlawful
- Legitimate expectation of the right to accreditation arising under a statutory scheme was an possession for A1P1 purposes
- Damages based on restitutio in integrum principle "manifestly appropriate" given Infinis wrongly deprived of pecuniary benefit to which it was entitled by statute and the "lost" benefit readily calculable

Examples (1)

Gas and Electricity Markets Authority v Infinis Plc [2013] EWCA Civ 70

- Important factor: case not concerned with an administrative discretion but with a statutory entitlement
- So example of A1P1 Rule 2 (deprivation of possession)

Example (2)

R (Drax Power Ltd) v HM Treasury [2016] EWHC 228 (Admin)

- Challenge to removal of the renewable source energy exemption from the climate change levy (with 24 days' notice)
- Main argument that there was a legitimate expectation of a two year lead in time (LE not made out - evidence did not show Gov had consistently operated on basis of two year lead in)
- Secondary argument was that the 24 days' notice was disproportionate under EU law and A1P1. Rejected by the court:
  - Claimants' private economic interests fell within the margin of appreciation
  - Affected private economic interests considered but found to be outweighed by the public interest
  - Sound reasons given

Example (3)

Npower Direct Ltd v Gas and Electricity Markets Authority [2018] EWHC 3576 (Admin)

- Challenge to direction from Ofgem that the claimant company conduct a trial with 100,000 of its customers which involved the claimant informing them that they could potentially save money by switching to another provider
- One argument was that the direction was an unlawful interference with the claimant's A1P1 rights
- Wide margin of discretion in context of Ofgem's functions
- Fair balance struck between rights of the supplier and the interests of the community given need identified by Ofgem to address lack of consumer engagement in switching suppliers

Example (4)

R (Wood Boilers) v Gas and Electricity Markets Authority [2020] EWHC 1578 (permission decision)

- Challenge to decision by Ofgem to stop paying type of subsidy
- Claimants were two renewable energy companies. Had developed a model for the installation and maintenance of renewable boilers in domestic homes through which they received subsidies from Ofgem. Ofgem approved the model as compliant with the regulatory scheme and paid the subsidies for several years
- Ofgem subsequently changed its position. It stopped paying the subsidies on the basis the model did not in fact comply in full with the regulatory scheme. It considered it did not have the power to pay the subsidies to the Claimants as it had been doing
- Case concerned with position where giving effect to a legitimate expectation would be ultra vires

Example (4)

R (Wood Boilers) v Gas and Electricity Markets Authority [2020] EWHC 1578 (permission decision)

- One argument was that the legitimate expectation of continued receipt of the subsidies (even if ultra vires) was a possession for A1P1 purposes. It had been interfered with by the refusal to give effect to the legitimate expectation (ie the Claimants' were deprived of their possessions in that regard). With reliance on Rowland [2003] EWCA Civ 1885; Stretch (2004) 38 EHRR 12
- Claimants' argued s.3 HRA required the statute to be "read down" so as to avoid the breach and/or that they were entitled to damages for the breach of A1P1
- Accepted by Fordham J as arguable

Example (5)

R (Gravis Solar 1 Ltd) v Gas and Electricity Markets Authority [2021] EWHC 490 (Admin)

- Challenge to Ofgem's decision to withdraw the accreditation of a small solar photovoltaic electricity generating station
- Main argument: Deprivation of possession in the form of the accreditation was disproportionate and therefore amounted to a breach of A1P1
- Accreditation obtained on basis of false information by former owner. Ownership then passed to an innocent purchaser for value. Issue was therefore whether proportionality required accreditation to continue or to continue for a grace period in such circumstances
- Court's conclusion: Ofgem's decision not disproportionate. The integrity of the relevant subsidies system and the public acceptance of the cost meant acceptable to take a zero tolerance approach to fraud

Conclusions

- A1P1 capable of providing a powerful remedy (both in financial terms but also in terms of the reading down of legislation) in cases where it can be shown there is a clear entitlement to a financial benefit which is blocked by the action of a public body
- BUT where there is not a clear entitlement, difficult to establish that an interference with A1P1 rights is disproportionate (and, if so, likely to depend on circumstances whether damages on the restitutio in integrum principle are appropriate)

Panel Discussion and Questions