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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY SONI LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION ACTING THROUGH ITS SINGLE ELECTRICITY MARKET COMMITTEE

AND IN THE MATTER OF DECISIONS BY THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION

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Margaret Gray QC and Alistair Fletcher (instructed by A & L Goodbody) for the Applicant
John Larkin QC (instructed by O'Reilly Stewart) for the first proposed Respondent
Tony McGleenan QC and Philip McAteer (instructed by Cleaver Fulton Rankin) for the second proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant, SONI Limited ('SONI'), is the electricity transmission system operator for Northern Ireland. It operates under a Transmission System Operator Licence ('TSO Licence').

[2] SONI also participates in the Single Electricity Market ('SEM') as part of a contractual joint venture with its counterpart in Ireland, EirGrid plc, who together form the SEM Operator ('SEMO').

[3] In Northern Ireland, SONI is regulated by the Northern Ireland Authority for Utility Regulation ('UR') whilst the SEM is regulated by the SEM Committee

('SEM-C') whose members are made up of three members of the UR, three members of the Commission for Regulation of Utilities ('CRU') (the UR's equivalent in Ireland) and one independent member.

[4] The entire share capital of SONI is owned by EirGrid UK Holdings Limited which is in turn wholly owned by EirGrid plc. In July 2019 the UR commenced a consultation on the modification of the terms of SONI's TSO licence by way of a call for evidence. The subject matter of the consultation was SONI's corporate governance arrangements.

[5] In its initial response, SONI made the case that the question of its governance was a 'SEM matter' and ought therefore to be the subject of consideration by the SEM-C rather than the UR.

[6] In April 2021 the UR published its proposals in relation to SONI's corporate governance which identified areas of potential harm to consumers in Northern Ireland and set out options for reform, including modifications to SONI's TSO licence. The detail of the proposed options for reform is not relevant for the purpose of the issues at hand but does involve significant restructuring of the board and management of the applicant company.

[7] SONI has brought two applications for leave to apply for judicial review which have been consolidated by order of the court. The first of these applications seeks to impugn a decision of the SEM-C, made on 23 December 2021, whereby it determined that the issue of SONI's governance was not a SEM matter and therefore the question of the proposed modifications to SONI's licence was properly a matter for the UR.

[8] The second application challenges the UR's ongoing decision to consult on the question of SONI's governance as well as engaging a procedural issue in relation to the time afforded for responses to the latest consultation paper. The latter application is coupled with a claim for interim relief restraining the UR from continuing with its consultation and/or making any decision in respect of modifications to SONI's licence.

The Test for Leave

[9] In this jurisdiction it is well-established that the test for leave to apply for judicial review requires an applicant to show *"an arguable ground for judicial review on which there is a realistic prospect of success"*, per Nicholson LJ in *Re Omagh District Council's Application* [2004] NICA 10.

The SEM-C Challenge

[10] Article 6 of the Electricity (Wholesale Single Market) (Northern Ireland) Order 2007 ('the 2007 Order') provides as follows:

> "(1) There shall be a committee of the Authority to be known as the Single Electricity Market Committee (referred to in this Order as "the SEM Committee").
>
> (2) Any decision as to the exercise of a relevant function of the Authority in relation to a SEM matter must be taken on behalf of the Authority by the SEM Committee.
>
> (3) For the purposes of this Order a matter is a SEM matter if the SEM Committee determines that the exercise of a relevant function of the Authority in relation to that matter materially affects, or is likely materially to affect, the SEM.
>
> (4) For the purposes of this Order "a relevant function" means—
>
> (a) a function under Part II of the Electricity Order;
>
> (b) a function under the Energy Order which relates to electricity;
>
> (c) a function under Part IV of the Electricity Order 1992 (Amendment) Regulations (Northern Ireland) 2005 (SR 2005/ 335);
>
> (d) a function under Article 3 or Schedule 1,
>
> other than a function which is mentioned in paragraph (5)."

[11] "The Authority" in this context means the UR so the SEM-C is established as a committee which takes decisions in relation to SEM matters on behalf of the UR. The question of what constitutes a SEM matter is itself a matter for the determination of the SEM-C under Article 6(3), applying the test of whether the exercise of the function materially affects or is likely to materially affect the SEM.

[12] The 'relevant functions' include those contained in Part II of the Electricity (Northern Ireland) Order 1992 ('the 1992 Order'). Article 14 of the 1992 Order gives power to the UR to modify the conditions of any licence.

[13] Article 6(3) is mirrored in Ireland by section 8A of the Electricity Regulation Act 1999, introduced by a 2007 amendment and which provides for an identical definition of a SEM matter.
[14] These are peculiar statutory provisions in that the SEM-C is not a separate legal entity but acts as a committee of either the UR or the CRU. As Clarke J noted in *Viridian Power v Commission for Energy Regulation* [2011] IEHC 266:

> "However, it is not a separate person in law, so that it is common that the Commission remains the proper respondent for these proceedings. In passing, it should be noted that there are parallel provisions in the law of Northern Ireland, making the SEM Committee a committee of the Utilities Regulator, comprising the same people as the SEM Committee established under the laws of this State. In theory, therefore, there are two committees but they act as a single body." [para 3.4]

[15] On 23 December 2021 the SEM-C stated:

> "The SEM Committee has a discretion as to whether to make a 'SEM matter' determination which it exercises having regard to the circumstances. In this particular context, having regard to the nature and effect of the UR proposals, the SEM Committee does not consider it to be necessary or appropriate to make such a determination."

[16] There was an argument advanced on behalf of the SEM-C that the application for leave to apply for judicial review was premature in that no decision or determination had been made by it. Whilst it was true to say that no positive determination had been made, it is clear that there was a public law decision to the effect that it was not appropriate to make a determination in the circumstances.

The Standard of Review

[17] The applicant's case is that the proposed modifications in the consultation document constitute a SEM matter within the meaning of Article 6(3) of the 2007 Order. It is argued that the failure on the part of the SEM-C to recognise this is an error of law which can be reviewed by the court applying a correctness standard.

[18] The proposed respondent accepts that whether a function falls within the definition of 'relevant function' is a binary matter but says that the determination of whether the matter materially affects, or is likely to materially affect, the SEM gives rise to questions of specialist judgment. Such matters, it is contended, are properly the subject of light touch rationality based review only.

[19] In the *Viridian Power* case (supra) Clarke J analysed the different standards of review applied to certain public law decisions:

> "5.4 The reason why the courts defer to decision makers across a whole range of areas is, therefore, because the law confers the decision making power in question on the relevant person or body. Public law gives the power to make planning judgments to planning authorities, private law gives to the disciplinary body designated by a major sporting organisation the power to determine breaches of the rules of the sport concerned. The primary reason why the courts should be slow to interfere in the decisions of such bodies (even if the court considers them to be wrong) is because the law has decided that it is the relevant body and not the courts which is to make the decision in question. The courts are only concerned, therefore, with the lawfulness of the decision and not with whether it is correct.
>
> 5.5 There is, in addition, perhaps a second basis for deference which stems from the nature of the decision in question. Where, and to the extent that, a decision of an expert body requires the exercise of a high level of expertise (which the courts do not possess) in a particular field, then there may be an added reluctance on the part of the courts to attempt to "second guess" the expert judgment of the body concerned. However, that additional level of deference only applies to those aspects of the decision making process in question which involve the exercise by the expert body of its particular expertise.
>
> 5.6 However, it seems to me that the first port of call in any analysis of the proper approach of the courts to a controversy arising from a decision of a relevant body is to analyse what type of decision is in question and what the legal basis for the decision maker having the power to make the decision in question actually is.
>
> 5.8 It seems to me to follow that the key question that needs to be asked with some precision is as to the exact decision making role which the law confers, in the relevant context, on, on the one hand, a non-court decision maker and, on the other hand, the courts. If the law confers the particular decision making power on a body other than the courts, then it follows that the courts must accord a significant level of deference to the

> determinations of the decision maker in question. If, on the other hand, no such decision making power is conferred on the person or body in question, then the courts should decide all relevant issues of law and fact necessary to determine the case. It is, in my view, crucially important to recall that the fact that a decision maker may have significant powers in a particular area (for example a regulator within the field of regulation entrusted to the regulator in question) does not necessarily mean that every decision taken by such a regulator is a decision which the law confers on the party in question. The analysis of the position in planning is illustrative of that point. The law confers, to a large extent, decisions on the merits of the grant or refusal of planning permissions and the terms on which same might be granted, on planning authorities. The law does not confer any particular status on the interpretation which a planning authority might place on a planning permission once granted."

[20] In *R (Jeremy Cox) v Oil and Gas Authority* [2022] EWHC 75 (Admin) Cockerill J considered a judicial review relating to the meaning of the words "*maximising the economic recovery of UK petroleum*" in section 9A of the Petroleum Act 1998. In her analysis:

> "68. Here we have a provision which is effectively instructions to a specialist authority; which is couched in imprecise terms – certainly broad enough not simply to call of the exercise of judgment, but in all the circumstances hallmarking the exercise as one to be done by reference to the authority's specialist understanding and judgment. It is, to my mind, a very considerable distance from the kind of case where an exercise of statutory construction could determine a single right answer.
>
> 69. While I do not necessarily accept the Defendants' submission that it is always improper in a judicial review for a Court to substitute itself for the regulator on complex issues of economic assessment, it must be right that the Court will afford considerable deference to the regulator's expert view."

The Modification of Licence Conditions

[21] Article 14 of the 1992 Order governs the modification of licence conditions:

"(1) The Authority may make modifications of—

(a) the conditions of a particular licence;

(b) the standard conditions of licences of any type mentioned in Article 10(1).

(2) Before making any modifications under this Article, the Authority must give notice—

(a) stating that it proposes to make modifications;

(b) setting out the proposed modifications and their effect;

(c) stating the reasons why it proposes to make the modifications; and

(d) specifying the time within which representations with respect to the proposed modifications may be made.

(3) The time specified by virtue of para (2)(d) may not be less than 28 days from the date of the publication of the notice.

(4) A notice under paragraph (2) must be given—

(a) by publishing the notice in such manner as the Authority considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications, and

(b) by sending a copy of the notice to—

(i) each relevant licence holder,

(ii) the Department, and

(iii) the General Consumer Council for Northern Ireland.

(5) The Authority must consider any representations which are duly made.

(6) If, within the time specified by virtue of paragraph (2)(d), the Department directs the Authority not to make any modification, the Authority shall comply with the direction.

(7) Paras (8) to (10) apply where, having complied with paras (2) to (5), the Authority decides to proceed with the making of modifications of the conditions of any licence under this Article.

(8) The Authority must—

(a) publish the decision and the modifications in such manner as it considers appropriate for the purpose of bringing them to the attention of persons likely to be affected by the making of the modifications;

(b) state the effect of the modifications;

(c) state how it has taken account of any representations duly made; and

(d) state the reason for any differences between the modifications and those set out in the notice by virtue of para (2)(b).

(9) Each modification has effect from the date specified by the Authority in relation to that modification (subject to the giving of a direction under para 2 of Schedule 5A).

(10) The date specified by virtue of para (9) may not be less than 56 days from the publication of the decision to proceed with the making of modifications under this Article."

[22] Article 14(1) gives the power to modify but this cannot be exercised without a number of preceding steps being taken. Firstly, the UR must give notice of the proposed modifications, with reasons, and then seek representations. The time during which representations can be made must not be less than 28 days. Representations which are received must then be the subject of consideration. Once this has been done, the UR must then decide whether or not to proceed with the making of the modifications and, if it does so, these must be published together with reasons. The modifications themselves do not take effect until at least 56 days from publication of the decision to proceed.

[23] The current process is at the consultation stage and the UR has agreed to an extension of time for the submission of a response by SONI. Significantly, the UR has not made any decision pursuant to Article 14(7) that it intends to proceed with the proposed, or any, modifications.

[24] The SEM-C contends that the prefatory steps prescribed in Article 14(2) to (6) could not themselves materially affect the SEM. It is only when a decision is made under Article 14(7) that such a judgment could properly be made and it remains open to the SEM-C to 'call in' a decision under Article 6(3) of the 2007 Order at any time.

[25] On proper analysis, the statutory provisions set out above require the SEM-C to bring its particular expertise to bear in assessing whether the exercise of a relevant function materially affects or is likely to materially affect the SEM. This is a matter of judgment and unlike the question of whether a function is a 'relevant function', is not capable of a binary answer. Where the legislature has invested such an area of decision making to a specialist body, the courts should afford the appropriate level of deference or respect to that decision maker. Save in the case of procedural unfairness, such decisions can only be impugned on the ground of irrationality. In this regard, I agree with the analyses in both *Viridian Power* and *Cox* cited above.

[26] SONI's challenge to the decision of the SEM-C of 23 December 2021 is grounded exclusively on an alleged error of law in the application of Article 6(3). As I have determined that the decision in question is not amenable to challenge on this ground, but only on the basis of irrationality, it follows that the challenge must fail. Since the grounds advanced are unarguable, the application for leave to apply for judicial review must be dismissed.

The UR Challenge

[27] In the second related challenge, SONI asserts:

(i) That by continuing to exercise its function under Article 14 of the 1992 Order, the UR is acting *ultra vires*;

(ii) The decision of 24 January 2022 to provide for a 28 day period of consultation gives rise to procedural unfairness; and

(iii) The UR has acted irrationally by refusing to stay the consultation process pending the outcome of the court's decision on *vires*.

[28] The legislative structure of Article 14 makes it clear that licence modifications are exclusively within the jurisdiction the UR unless and until the SEM-C makes a determination under Article 6(3) that a particular matter is a SEM matter. Having

found that the SEM-C has acted lawfully in making its decision of 23 December 2021, it follows that the ongoing consultation process is *intra vires* the UR.

[29] The statutory minimum period for representations in an Article 14 process is fixed at 28 days and this was the period initially allowed by the UR. Without asking for an extension, SONI then issued judicial review proceedings contending that this period gave rise to procedural unfairness. Subsequently, on foot of such a request, the response time has been extended to 25 March 2022, a period of 56 days.

[30] In the context of a process which has been ongoing since July 2019, it cannot possibly be argued that any procedural unfairness has been caused to SONI.

[31] The corollary of these findings is that the irrationality challenge must also fail. Having determined that the UR does have vires under Article 14, and that no procedural unfairness arises, it cannot be criticised for failing to stay the process.

Alternative Remedy

[32] Both the SEM-C and the UR also made the case that even if the pleaded grounds were arguable, there is available to SONI an alternative remedy. It is well established that judicial review is a remedy of last resort and that leave to proceed will be refused in a case where the applicant has failed to exhaust other possible remedies. This will only be the case where the alternative remedy is itself satisfactory and appropriate.

[33] In *R (ex parte Watch Tower Bible) v Charity Commission* [2016] EWCA Civ 154, Lord Dyson MR stated:

> "It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal."

[34] Article 14B of the 1992 Order provides that an appeal lies to the Competition and Markets Authority ('CMA') against a decision by the UR to proceed with the modification of a condition of a licence. It is when an Article 14(7) decision is made that the right to appeal therefore arises.

[35] Article 14D sets out the powers of the CMA in determining appeals:

> "(1) This Article applies to every appeal brought under Article 14B.

(2) In determining an appeal the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard—

(a) in the carrying out of its principal objective under Article 12 of the Energy Order or Article 9 of the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 (as the case may be);

(b) in the performance of its duties under either such Article;

(c) in the performance of its duties under Article 6B of the Energy Order.

(3) In determining the appeal the CMA—

(a) may have regard to any matter to which the Authority was not able to have regard in relation to the decision which is the subject of the appeal; but

(b) must not, in the exercise of that power, have regard to any matter to which the Authority would not have been entitled to have regard in reaching its decision had it had the opportunity of doing so.

(4) The CMA may allow the appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds—

(a) that the Authority failed properly to have regard to any matter mentioned in para (2);

(b) that the Authority failed to give the appropriate weight to any matter mentioned in para (2);

(c) that the decision was based, wholly or partly, on an error of fact;

(d) that the modifications fail to achieve, in whole or in part, the effect stated by the Authority by virtue of Article 14(8)(b);

(e) that the decision was wrong in law.

> (5) To the extent that the CMA does not allow the appeal, it must confirm the decision appealed against."

[36] It is noteworthy that the powers of the CMA on a statutory appeal are more extensive than those available to a court exercising its supervisory jurisdiction in judicial review. Article 14D(4) contemplates a merits based challenge which would be impermissible in the field of administrative law.

[37] The CMA is also expressly empowered to allow an appeal when the decision in question was 'wrong in law.' Both counsel for the SEM-C and the UR accepted that this concept could entail a challenge to the *vires* of the UR in circumstances where it was claimed that the SEM-C ought to have made a determination under Article 6(3). In other words, the CMA could examine the merits of that argument once a decision has been made under Article 14(7) to proceed with modification.

[38] Where the CMA allows an appeal, it can either quash the UR's decision or remit it back for reconsideration or do both. The procedure for such appeals is set out in detail in Articles 14C, 14E, 14F, 14G and Schedule 5A to the 1992 Order.

[39] Under the Enterprise and Regulatory Reform Act 2013 the function of the CMA in relation to such appeals is carried out by a specialist panel appointed by the chair for this purpose.

[40] Insofar as the applicant contends that an appeal to the CMA would be more time consuming and expensive than an application for judicial review, I regard these submissions as carrying little weight. This statutory right of appeal falls squarely within the principle laid down by Lord Dyson in *Watch Tower Bible*. The legislature has decreed that appeals against decisions which relate to the modification of licence conditions should be heard and determined by a specialist tribunal, exercising the powers created in a bespoke scheme. For the court to determine that such a remedy is somehow unsatisfactory or ineffective would be a wholly inappropriate exercise of judicial power.

[41] Therefore had I determined that applicant did have an arguable case at this juncture, I would nonetheless have held that appropriate course of action for it to take was to await a decision under Article 14(7) and then exercise its right of appeal to the CMA. Leave to apply for judicial review is also refused on this basis.

Interim Relief

[42] In the event, the application for interim relief does not therefore require to be adjudicated upon. However, had I granted leave, I would have listed these applications for an expedited hearing and refused the application for interim relief in light of the fact that no decision will be made by the UR in any event prior to 22 April 2022.

Conclusion

[43] For these reasons, the applications for leave to apply for judicial review are dismissed.

[44] I will hear the parties on the question of costs.