1 September 2022

SUMMARY

The Queen (on the application of (1) BT Pensions Scheme Trustees Limited (2) Marks and Spencer Pension Trust Limited (3) Ford Pension Scheme for Senior Staff Trustees Limited (4) Ford Salaried Pension Fund Trustees Limited (5) Ford Pension Fund Trustees Limited v (1) UK Statistics Authority (2) Chancellor of the Exchequer

[2022] EWHC 2265 (Admin)

NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: https://www.judiciary.uk and https://www.nationalarchives.gov.uk

Mr Justice Holgate

Introduction

1. This is a claim for judicial review against the UK Statistics Authority ("USKA)[1] and the Chancellor of the Exchequer. It arises from the UKSA's decision under s.21 of the Statistics and Registration Service Act 2007 ("SRSA 2007") to change the methods used to compile the Retail Prices Index ("the RPI").

2. Since 2016 the UKSA has treated the Consumer Prices Index including housing costs ("the CPIH") as the UK's main measure of inflation. It is common ground that because of flaws in the methodology of the RPI that index produces inflation figures about 1% higher than the CPIH. This is referred to as "the wedge". Because the RPI in its current form has an upwards bias, the UKSA decided several years ago that it should no longer be used as the UK's measure of inflation, but retained solely as a "legacy index" because of its use in commercial contracts.

3. In fact, the RPI is used for a wide variety of purposes, including price regulation, setting interest rates on student loans, wage negotiations, and annual adjustments of certain tax thresholds and liabilities. It is also used in contracts, for example, as an adjustment for rents in leases and index-linked pension benefits.

4. The UK Government introduced index-linked gilts in 1981. They are all linked to the RPI.

[1] The Office for National Statistics is the executive office of the UKSA.

5. Gilts issued between 1981 and 2002 contain a clause allowing the holder to redeem the gilt before it matures if a "fundamental change" is made to the RPI which is materially detrimental to stockholders. The existence of these gilts is the reason why s. 21(3) of the SRSA 2007 gives the Chancellor a power to refuse to allow such changes to be made. The last gilts of this kind will mature in 2030, at which point the Chancellor's power of veto will cease to apply in practice.

6. Gilts issued from September 2005 onwards no longer contain this early redemption clause. Instead they have a "cessation clause" which, in the event of the RPI ceasing to be published, requires the Chancellor to select a replacement index after consulting with an independent body. A replacement index must be an officially recognised index of changes in UK retail prices which the Chancellor considers just and equitable, taking into account the interests of HM Treasury and the gilt-holders.

7. The House of Lords Economic Affairs Committee launched an inquiry in June 2018 into the use of the RPI as a measure of inflation. Its report, published in January 2019, criticised the UKSA for failing to correct the admitted flaws in the RPI, and suggested that it was untenable for the UKSA to continue to publish the RPI with its acknowledged methodological flaws. It also recommended that the UKSA and the Government should agree on a single measure of inflation for official use within the next 5 years.

8. In February 2019 the UKSA decided that it would align the RPI with the CPIH by bringing into the RPI the methods and data sources of the CPIH. This is referred to as "the RPI decision".

9. In March 2019 the UKSA wrote to the Chancellor asking him to consent to its proposal to align the RPI with the CPIH, as an interim measure, and to promote legislation repealing the UKSA's obligation under the SRSA 2007 to publish the RPI, as a permanent solution. In September 2019 the Chancellor responded refusing to promote that repeal because of potential disruption to users of the RPI. He also refused to consent to the proposed change to the RPI before February 2025.

10. In March 2020 the UKSA and the Chancellor began a joint consultation on (1) the methods for aligning the RPI with the CPIH and (2) whether the Chancellor should give his consent under s. 21(3) of the SRSA 2007 to that change being made between 2025 and 2030. The Chancellor's consent will no longer be necessary from 2030.

11. The claimants challenge three decisions:

    (1) "The RPI decision";

    (2) In March 2020 the Chancellor withheld his consent under s.21(3) of the SRSA 2007 to the RPI decision being implemented before 2030;

    (3) In March 2020 the Chancellor announced his decision that the Government would not pay compensation to the holders of UK index-linked gilts because of the UKSA's decision to align the RPI with the CPIH from 2030 ("the compensation decision").

12. The claimants are large pension funds with substantial liabilities for index-linked pension payments. They have heavily invested in RPI-linked gilts as part of a strategy aimed at

matching those liabilities. The anticipated 1% reduction in the RPI from 2030 onwards, affecting future interest payments to holders of the gilts, is said to have resulted in the value of the relevant gilts falling by around £90 billion - £100 billion.

13. About 10.5 million people in the UK have private sector "defined benefit" pensions, a majority of which are linked to the RPI. It is said that they will receive reduced payments amounting to 4-9% of their lifetime benefits. On average women are expected to experience a greater reduction because of their longer lifespan.

The issues in the case

14. The claimants relied upon the following grounds of challenge:

    Ground 1

    The UKSA's RPI decision falls outside the scope of its power to amend the RPI under s.21 of the SRSA 2007 and is therefore unlawful.

    Ground 2

    (1) The UKSA failed to take into account the impact of its RPI decision on the holders of RPI index-linked gilts and bonds and persons entitled to index-linked pensions ("legacy users") or wrongly decided that it was not entitled to take that impact into account. Consequently, the UKSA also failed to comply with its Public Sector Equality Duty ("PSED") under s.149 of the Equality Act 2010;

    (2) In making his compensation decision, the Chancellor failed to have regard to the interests of legacy users and to comply with the PSED.

    Ground 3

    (1) The UKSA failed to consult the public on its RPI decision and to take into account their views when that proposal was at a "formative stage";

    (2) The Chancellor failed to consult with legacy users on the issue of compensation and to take into account properly their representations on compensation.

15. The claimants also brought a private law claim in the event of the court deciding that the RPI decision is lawful. They submitted that the effect of implementing the RPI decision in 2030 will be that the RPI will cease to be published and so the cessation clause in gilts issued from 2005 onwards will be triggered. On that basis the Chancellor would be obliged to select a replacement index for the RPI. The Chancellor submitted that the clause will not be triggered because, once the RPI decision is implemented, the RPI will still continue to be published. The parties asked the court to make a declaration as to whether the cessation clause will, or will not, be triggered.

The contents of the judgment

16. Paragraph [**33**] sets out the contents of the judgment with paragraph numbers.

17. The Statutory framework is set out at [**34**] – [**68**], followed by a comparison between the RPI and the CPIH [**69**] – [**78**]. The flaws in the RPI are dealt with at [**79**] – [**118**] and the effects of the RPI decision on legacy users are explained at [**119**] – [**127**].

Ground 1 **[128] – [155]**

18. The court rejects ground 1.

19. The court decides that, as a matter of law, the UKSA has the power under the SRSA 2007 to amend the RPI by bringing the methods and data sources of the CPIH into the RPI. That power includes the making of "fundamental changes" to the coverage or basic calculation of the RPI. The power is to be understood in the context of the UKSA's statutory objective of promoting and safeguarding the quality of, and good practice in relation to, official statistics (s. 7 of the SRSA 2007).

20. Parliament has entrusted the power to amend the RPI to the judgment of the UKSA as an independent, expert body. It has not laid down any express constraints upon the exercise of that power, nor has it identified any aspects of the RPI which must be treated as immutable. It is legally permissible for the UKSA to correct all the flaws identified in the current version of the RPI by developing an alternative index, or by introducing into the RPI methods used in part of, or the whole of, an existing index, such as the CPIH.

21. There is nothing in the language of the SRSA 2007 to suggest that any statutory limitations on the UKSA's power to change the RPI are concerned with perpetuating "the wedge", or with protecting any particular level of return on investments linked to the RPI.

22. The court rejects the claimants' argument that the UKSA's RPI decision was simply an attempt to circumvent the need to repeal s. 21 of the SRSA 2007 so that the RPI need no longer be produced.

Ground 2: **[156] – [189]**

23. The court rejects both of the claimants' contentions under ground 2.

24. It is common ground that because the RPI is used in so many different situations, the effect of leaving the RPI as it is, or changing it in accordance with the RPI decision, produces winners and losers in many parts of society and the economy. The claimants accept that the UKSA could not take into account the impact of the RPI decision on the financial interests of legacy users in isolation. The inevitable corollary of the claimants' case is that the UKSA would also have to take into account advantages and disadvantages to others, as a result of either allowing the RPI to continue to over-estimate inflation or aligning it with the CPIH. The UKSA would then have to balance those competing interests before it could make a decision to alter the RPI.

25. On a proper interpretation of the SRSA 2007, the UKSA's statutory functions are concerned with promoting and safeguarding the quality of official statistics. Parliament has not authorised the UKSA to evaluate and balance such competing interests, or the policy issues to which they give rise. In relation to the RPI, the UKSA is essentially concerned with its statistical quality and its fitness to be used as a measure of consumer price inflation. Decisions on whether to use an index such as the RPI in a commercial or social context are for others.

26. On the claimants' second point under Ground 2, the Chancellor received ample briefing from his officials on the effects of the RPI decision on legacy users and the PSED. That was taken into account in his decision that compensation should not be provided out of the public purse.

Ground 3: **[190] – [208]**

27. The court rejects both of the claimants' contentions under ground 3.

28. On the first point, the claimants accepted that their complaint that the UKSA had failed to consult on the RPI decision must fail if they do not succeed on ground 2(1). They cannot complain about a failure by the UKSA to consult on the RPI decision, given that in substance their complaint relates to matters falling outside the UKSA's statutory functions.

29. Nevertheless, the court goes on to explain why each of three legal bases upon which the claimants argued that the UKSA had been legally obliged to consult on this subject could not succeed in any event ([**196**] – [**203**]).

30. In respect of the claimants' second point, the court decides that they failed to demonstrate any legal basis for their assertion that the Chancellor was legally obliged to consult on whether compensation should be paid to legacy users. In any event, even if it is assumed for the sake of argument that consultation on this aspect should have taken place, the complaint would still fail. Consultees did make extensive representations on the subject and they were fully taken into account by the Chancellor. The claimants have not suggested that the consultation carried out prevented any additional point on compensation being made by consultees to the Chancellor.

31. The court also explains why ground 3 also fails on the grounds of the delay in bringing this part of the claim ([**209**] – [**215**])

The claim in relation to the cessation clause: **[216] – [237]**

32. The court explains why the RPI will not cease to be published when the RPI decision is implemented from 2030. Accordingly, a declaration will be made that that decision will not cause the cessation clause in index-linked gilts issued from 2005 to be triggered.