OUTER HOUSE, COURT OF SESSION

[2021] CSOH 104

P190/21

OPINION OF LORD ERICHT

In the petition

NORTH LOWTHER ENERGY INITIATIVE LIMITED

Petitioner

against

SCOTTISH MINISTERS

Respondents

Petitioner: Steele QC; Shepherd & Wedderburn LLP
Respondents: D Edwards; Scottish Government Legal Directorate

15 October 2021

Introduction

[1] By Decision Letter dated 8 January 2021 (the "Decision"), the respondents refused an application of the petitioner for consent under section 36 of the Electricity Act 1989 for the development of a wind farm near Sanquhar. The Decision agreed with a recommendation of a Reporter in a Report of 21 October 2020 ("the Report").

[2] The petitioner brought judicial review proceedings and sought declarator that the Decision was unlawful and *ultra vires* and reduction of the Decision. The petitioner also sought a declarator that notification of the Decision was subject to unreasonable delay in breach of the petitioner's Article 6 Convention right.

The Decision Letter

[3] In deciding to refuse the application, the Reporter and the respondents took into account a wide range of factors. The Reporter and the respondents took the view that although the development would provide benefits in relation to helping meet renewable energy targets timeously and that the net economic impact would be substantial and positive, it would give rise to unacceptable significant adverse landscape and visual aspects and adverse impact on the historic setting of Wanlockhead.

[4] The Decision Letter stated:

> **"<u>Main Determining Issues</u>**
>
> Having considered the Application, the ES, FEI, Supplementary Information, responses from consultees and third parties, the inquiry Report and all other material information, the Scottish Ministers find that the main determining issues are:
>
> - the environmental impacts, including the landscape and visual impacts, including cumulative effects, likely to occur as a consequence of the proposed Development;
> - the benefits of the proposed Development, including its renewable energy generation, greenhouse gas emissions savings and net economic impact; and
> - the degree to which it would be in conformity with national planning policy, the local development plan, national energy policy and other relevant guidance."

[5] The Decision Letter went on to say:

> "**<u>The Scottish Ministers' Considerations</u>**
>
> At Chapter 3 of the Report the Reporter considers the landscape and visual effects of the proposed Development. The Reporter's findings are set out at paragraphs 3.178 - 3.331 of the Report. A summary of the findings can be found at paragraphs 3.332 - 3.343 of the Report. The Reporter concludes in Chapter 6 of the Report at paragraph 6.21:
>
> > *'The proposal would have significant landscape and visual effects, including cumulative effects, which would be unacceptable based on the scale and distinct landscape features and scenic quality of the area in which the proposed turbines would be sited, viewed from and impact upon. This conclusion is supported by the*

> *fact that the proposal would have a significant impact on both the Thornhill Uplands Regional Scenic Area and the Leadhills and Lowther Hills Special Landscape Area. There would also be an impact on the landscape and historic setting of Wanlockhead.'*

As a consequence the Reporter advises:

> *'the proposal would gain no favour from Scottish Planning Policy as a development that contributes to sustainable development; that the proposal would not accord overall with the provisions of the development plan; and in consideration of the National Planning Framework 3, that it would not overall promote Scotland as 'a natural resilient place' affecting a landscape that significantly contributes to Scotland's identity.'*

At Chapter 4 of the Report the Reporter considers other relevant matters including national energy policy, summarising findings at paragraphs 4.125 - 4.127. The Reporter concludes in Chapter 6 of the Report at paragraph 6.20:

> *'The proposed development would provide some substantial benefits in relation to meeting emission reduction targets; reducing greenhouse gases; habitat creation and hen harrier conservation; and contributing to the economy through construction, operation and maintenance and, if secured, community ownership.*

The Reporter draws together the conclusions on the determinative factors at paragraph 6.24 of the Report stating:

> *'Overall, I find that in balancing the factors for and against the proposal the significant adverse effects on the natural beauty of the area outweigh the benefits envisaged. I have considered all other matters but find none that would lead me to conclude otherwise.'*

The Scottish Ministers agree with the Reporter that the proposed Development would provide benefits in relation to helping meet renewable energy targets and that the '*early predicted connection to the grid would also mean that this contribution could occur timeously in reaction to net zero targets and the emergency declared*'. The Scottish Ministers also acknowledge that '*the net economic impact, including local and community socio-economic benefits would be substantial and positive*'.

However, the Scottish Ministers consider the proposed Development would give rise to unacceptable significant adverse landscape and visual impacts as well as adversely impact on the historic setting of Wanlockhead. Therefore, the Scottish Ministers agree with the Reporter's findings, reasoning and conclusions and adopt them for the purposes of their own decision.

The Scottish Ministers' Determination

Having agreed with the Reporter's findings, reasoning and conclusions and adopted them for the purposes of their own decision, the Scottish Ministers refuse the

application for consent under Section 36 of the Electricity Act 1989 for the construction and operation of North Lowther Energy Initiative Wind Farm on land approximately 5km south of Crawfordjohn, 2km north-east of Sanquhar and 2km west of Wanlockhead, wholly within the planning authority area of Dumfries & Galloway Council."

The Report

[6] As is apparent from the Decision Letter, the respondents agreed with and adopted the Reporter's findings, reasoning, and conclusions. It follows that errors by the Reporter are also errors by the respondents.

[7] The Report extends to 212 pages. In order to give a proper understanding of the context of the submissions in this judicial review, I set out here the Reporter's conclusions in full:

"Reporter's conclusions on matters

6.3 Overall, having regard to my findings, I conclude in relation to the proposed development that:

- The applicant, when forming its proposals, has had regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and has suggested forms of mitigation where appropriate.

- The content of the environmental information submitted provides a sound basis to assess the proposed development; the findings and proposed mitigation (as controlled through conditions which would be imposed on consent and deemed planning permission) are sufficient to find that, other than in relation to landscape and visual impact (including cumulative impact) and cultural heritage, there would be limited adverse effects arising from the proposed development, including (as far as possible) to the stock of fish in any waters.

- The application site is within a group 3 area where there is potential for wind farms and the southern uplands landscape character type which is a landscape that, generally, can accommodate wind turbines. However, following the Dumfries and Galloway wind landscape capacity study, there would be no scope for very large turbines (>150m) in the wider Nithsdale area in which the proposed 149m high turbines would be

located; and significant effects would likely result from large turbines (80-150m) being located in the southern uplands (Lowthers unit) that the proposal would be sited.

- Refined units of the southern uplands (the Lowther unit in Dumfries and Galloway and the Lowther Hills west of Clyde / Daer in South Lanarkshire); the upland river valley (Duneaton Water); and upper dale (Upper Nithsdale) would experience significant landscape character effects. No significant landscape effects would occur to the southern uplands (Nithsdale and North West Lowthers units); the upland glens; rolling moorland or foothills.

- Significant effects to the Thornhill Uplands Regional Scenic Area would be of a degree that the proposal would not respect the special qualities of the designated area. Significant effects on the Leadhills and Lowthers Special Landscape Area would also occur. No significant effects on the special qualities of other special landscape areas within 15 kilometres of the application site are predicted.

- The Lowther Hills is an area of scenic quality with characteristics which convey a reduced capacity to accommodate wind energy development than other southern upland landscapes. While not a designation in its own right, the proposal would be a prominent feature which would erode the distinctiveness of the Lowther Hills regional character area and significantly affect an area where regional distinctiveness is most clearly expressed.

- Significant visual effects are predicted for Brandleys Farm, Brandleys Cottage and Muirhead to the south of the site; Spango Farm (group) to the west of the site; and Duntercleuch (not occupied) within the application site. Only a single property (Clackleith) would be affected to such a degree that it would become an unattractive place to live but that house is in the ownership of the landowner with an interest in the development, is currently uninhabited with no plans to reinstate within the lifetime of the proposed development.

- Significant visual effects would occur at the following receptors:

    - To the east, at Wanlockhead affecting residents but also visitors to the lead mining museum, mine, beam engine and mining cottage as well as those travelling through the settlement southbound along the B797 and walkers using the Coffin Road (limited instances). From the summits and west-facing slopes of Lowther Hill and East Mount Lowther affecting recreational users of the Southern Upland Way, the Covenanters' Path (or Enterkin Pass) and Skiers on the primary snow slope.

- To the south and south-west, residents and visitors to Kirkconnel as well as road and rail-users along the A76 for two kilometres between Knockenjig and Sanquhar and Glasgow-Carlisle railway for same length (in both directions). Road users of minor roads south of the Nith Water from Kelloholm to Mennock would experience significant visual effects. And, those travelling north on the B797 (Mennock Pass) in glimpses for around a kilometre north of Mennock. Walkers using core path 108 across Auchentaggart Moor. Visitors to the Crawick Multiverse Park and Sanquhar Golf Course.

- To the north/north-west/west, road users of the B740 just north of Crawfordjohn to Crawick in two sections and a minor road at the Snar Water / Duneaton Water confluence overbridge. Recreational users on the Muirkirk to Wanlockhead Drove Road (limited instances); core path CL/3529/1 from Leadhills to Snar; and the summit of Cairn Table.

- Within the application site, users of core path 110 between Nether Cog and Cogshead.

- Repeated significant visual effects along the Southern Upland Way between Whing Head and Lowther Hill (including the alternative loop around Duntercleuch). An accessible section of the route between Sanquhar and Wanlockhead possible for day-walkers with an overwhelming and oppressive effect on the section between Cogshead and Glengaber Hill (within the application site).

- There would be no significant visual effects from other settlements, including Sanquhar, Leadhills and Crawfordjohn; the summits of Tinto Hill, Blackcraig Hill and Todholes Hill; other attractions including the Leadhills and Wanlockhead Railway and Leadhills Lending Library; recreational users of the Mennock Pass for car/motorcycle touring, cycling, wild camping, bee keeping, mineral hunting and gold panning (other than the kilometre section mentioned above); or visitors to the Drumlanrig Garden and Designed Landscape. The use of infrared lighting means that there would be no significant visual effects from lighting at dawn/dusk or night.

- There would be significant cumulative effects for the southern uplands, upland river valleys, and upper dale landscape character types; the regional scenic area and special landscape area; and significant visual effects for a range of receptors cumulatively with existing schemes with only substantial change affecting the Crawick Multiverse Park, Whing Head, just north of Crawfordjohn (B740) and along the A76 and railway west of Sanquhar in relation to consented and in-application schemes. The contribution from the proposal to a landscape 'with windfarms' or a 'windfarm landscape' would be meaningful.

- The proposal would not contribute to an unsatisfactory accumulation of wind turbines along the Southern Upland Way.

- In causing harm to its setting, the proposed development would not preserve or enhance the character or appearance of the Wanlockhead Conservation Area.

- The proposal would provide a substantial contribution to the local and regional economies through construction, operation and maintenance.

- A share of the wind farm is offered to the Upper Nithsdale Trust (and the local community) which, if taken up, would result in significant economic gain for the community, businesses and investment in the region.

- Although not relevant to the determination of the application, a substantial community payment of £18.4 million would be provided over the lifetime of the proposal. There is also the opportunity to combine this benefit with that gained from other significant proposals in the area to allow investment of some £62 million which, using the prepared Nithsdale Action Plan, could lead to transformational economic change in the area. A sum of £33.6 million would also be paid in non-domestic rates.

- Owing to potential effects on hen harrier, merlin, peregrine, short-eared owl and golden plover an assessment, under Regulation 61 of the Conservation of Habitats and Species Regulations 2010, requires to be made of the implications of the project for the Muirkirk and North Lowther SPA in view of the site's conservation objectives. For the reasons given in chapter 4, and having identified all the aspects of the proposed development which, whether by themselves or in combination with other consented or proposed developments, could affect the conservation objectives of the SPA, I conclude that the proposed development would not have an adverse effect on the integrity of the SPA. That conclusion is based on my assessment of the evidence submitted and I am satisfied that no reasonable scientific doubt remains as to the absence of such effects.

- The conservation management plan would enable significant habitat creation to the benefit of biodiversity and include a regional hen harrier conservation management plan to improve the conservation status of hen harrier in South Scotland (including the employment of a Hen Harrier Project Officer).

- Any impacts in relation to hydrology, hydrogeology, geology and soils (including contamination and flood risk); forestry; ecology and ornithology (subject to an appropriate assessment); noise; access, traffic and transportation; socio-economics, tourism and recreation; wild land; human health; major accidents and disasters; aviation and defence;

telecommunications; and community buy-out proposals would be insignificant, acceptable and/or mitigated successfully with conditions.

- The application site is within the Eskdalemuir seismic consultation zone but has been allocated noise budget to allow it to proceed without mitigation.

- The application has support from local bodies and individuals and the consultation carried out by the applicant was satisfactory.

- The internal processes of Scottish Natural Heritage were reasonable.

- Any impact on house prices is not relevant to the determination of the application.

- The conditions presented in Appendix A are reasonable and enforceable should the need arise.

Reporter's conclusions in relation to environmental assessment

6.4 As referred at paragraph 1.53, I agree with the findings of the ES/FEI in relation to the anticipated significant effects other than those I additionally identify in chapter 3 on landscape and visual effects and chapter 4 in relation to cultural heritage.

Reporter's conclusions in relation to the policy context

Renewable energy policy

6.5 The proposed development would install 30 wind turbines generating up to 147 MW to the energy supply. This contribution would support greenhouse and emission reduction targets (for which there is no cap); aid the reduction of carbon dioxide emissions; and help tackle the climate change emergency. The early predicted connection to the grid would also mean that this contribution could occur timeously in reaction to net zero targets and the emergency declared.

National Planning Framework 3

6.6 The proposed development would support the vision and aims of NPF3 to make Scotland 'a low carbon place' by capitalising on the wind resource and keeping open the option for community/shared ownership. It would also align with the vision and aims of NPF3 to make Scotland 'a natural resilient place' by sufficiently protecting and enhancing biodiversity. However, it would not support the promotion of 'a natural resilient place' in failing to protect assets and facilitate change in a sustainable way by significantly impacting on landscapes, the distinctive qualities of a regional character area and cultural heritage.

Scottish Planning Policy

6.7 In the context of the provisions of paragraph 169 of SPP, I conclude the following in relation to the proposed development:

- The net economic impact, including local and community socio-economic benefits would be substantial and positive (see chapter 4).
- The proposal would make a valuable contribution to emission reduction targets and reducing greenhouse gas emissions (see chapter 4).
- Significant cumulative effects are predicted in relation to landscape and visual effects, no other cumulative effects are likely to occur (see chapter 3 and chapter 4).
- Settlements and some individual dwellings would experience significant visual effects but there would be no significant impact on residential amenity, noise levels or impacts arising from shadow flicker (see chapter 3 and chapter 4).
- There would be significant landscape and visual effects (including impacts on two local landscape designations) but acceptable impact on wild land (see chapter 3 and chapter 4).
- There would be no unacceptable impact on the natural heritage, including birds (subject to appropriate assessment; see chapter 4).
- The impact on carbon rich soils would be acceptable (see chapter 4).
- No unacceptable impacts on public access would occur but there would be significant visual effects from along the Southern Upland Way and core paths in the area (see chapter 3).
- There would be significant effects on the setting of the Wanlockhead Conservation Area but no other items of historic interest (see chapter 4).
- Any impact on tourism or recreation would be limited (see chapter 4).
- There would be no impact on aviation or defence interests and seismological recording (see chapter 4).
- There would be no impact on telecommunications, broadcasting, and transmission links (see chapter 4).
- Impacts on road traffic and the trunk road network would be adequately controlled (see chapter 4).
- Any effects on the water environment and hydrology/hydrogeology would be suitably controlled. The proposed development would not be at significant risk of flooding, or increase risk to other persons or infrastructure from flooding (see chapter 4).
- Suitable conditions could be imposed to control and monitor the development proposed, and to provide a basis (if necessary) for enforcement action (see chapter 5 and Appendix A).

6.8 SPP also introduces a presumption in favour of development that contributes to sustainable development. I have identified negative impacts which would arise as a consequence of the proposed development through my findings (particularly in relation to landscape and visual impact). As concluded below, the proposed development would not accord with the provisions of the up-to-date development

plan. Therefore, the presumption in favour of development that contributes to sustainable development is a 'material consideration' as opposed to a 'significant material consideration' as indicated at paragraphs 32 and 33 of SPP.

6.9 Turning to the principles which guide decisions involving the presumption (at paragraph 29 of SPP), I find that although the proposal would provide net economic benefit; respond to economic opportunities; make efficient use of existing capabilities of land (wind resources); support provision of energy provision; support climate change mitigation; protect the natural heritage (flora and fauna) and enhance it through conservation management; and safeguard water, air and soil quality, it would not, through its poor design and location, protect or enhance the landscape, its distinctive characteristics or the historic environment (Wanlockhead Conservation Area). Balancing the costs and benefits of the proposal over the longer term I find that the impact of the development is such that it would not achieve the right development in the right place; and so could not be considered as development that contributes to sustainable development.

The Dumfries and Galloway Local Plan 2

6.10 The proposed development would protect and enhance biodiversity; minimise the need to travel by car (through a transport management plan); limit the impacts of climate change (through renewable energy production and emission savings); and would maintain the water quality and manage flooding compliant with criteria d), e), f) and g) of policy OP1 (development considerations).

6.11 The proposal would not lead to unacceptable on-site or off-site flood risk, impact on water quality or water margins; suitable investigation and proposed mitigation has been conducted in relation to past mining activity, contamination and unstable land; there would be no impact on the setting of any listed building; significant archaeology and historic assets would be protected; the character, archaeological interest and setting of archaeological sensitive areas would be safeguarded; the setting of gardens and designed landscapes would be protected; forestry felling and sensitive replanting schemes are promoted; the loss of carbon rich soils has been minimised and offset with the benefits of carbon savings; the national and strategic role of the strategic transport network would not be compromised; and new access to the site would not materially reduce the level of service on a regional road network; sustainable and active forms of transport for construction and operation workers would be encouraged; and there would be no direct physical impact on any access route. Therefore, the proposal would comply with policies IN7 (flooding and development); IN10 (contaminated and unstable land); HE3 (archaeology); HE4 (archaeological sensitive sites); HE6 (gardens and designed landscapes); NE7 (forestry and woodland); NE8 (trees and development); NE11 (supporting the water environment); NE12 (protection of water margins); NE14 (carbon rich soil); NE15 (protection and restoration of peat deposits as carbon sinks); T1 (transport infrastructure); T2 (location of development / accessibility); and CF4 (access routes). It would also align with paragraph 4.33 supporting policy HE1 (listed buildings).

6.12 There would be no likely adverse effects on the Muirkirk and North Lowther SPA (subject to an appropriate assessment); European protected species; or sites of special scientific interest in accord with policies NE4 (sites of international importance for biodiversity), NE5 (species of international importance) and NE6 (sites of national importance for biodiversity).

6.13 However, the proposal would fail to be compatible with the character of the area; would harm the setting of Wanlockhead Conservation Area; and would not protect or enhance the landscape character and its scenic qualities, including the scale and local distinctiveness of the landscape contrary to the provisions of criteria a), b) and c) of policy OP1 (development considerations).

6.14 Similarly, while more applicable to smaller scale development proposals, the wind farm would not, through its design and siting, contribute positively to a sense of place and local distinctiveness contrary to policy OP2 (design quality and placemaking).

6.15 The provisions of policy IN1 (renewable energy) and IN2 (wind energy) use similar criteria to assess renewable energy and wind energy developments as those stated in paragraph 169 of SPP assessed above at paragraph 6.7. Consequently, other than with respect to landscape and visual effects (including cumulative effects) and impact on the historic environment, the proposal is favourable in terms of the considerations of these policies. However, support is only provided where a development is located, sited and designed appropriately, which - in this case, and as outlined above - the proposed development is not and fails to be of a design and scale which is appropriate to the scale and character of its setting. Consequently, in consideration of all the factors (and taking into account the substantial economic, habitat and ornithological benefits, and effect on greenhouse gas emissions) I find that overall the proposal would be unacceptable and would not, therefore, gain support from policies IN1 and IN2.

6.16 The proposal would not respect the special qualities of the Thornhill Upland Regional Scenic Area and there is not a need for the development in the location proposed. While there are no cited factors for which the area was designated there is a description which contains qualities which I have found would be significantly adversely harmed. Consequently, the proposal would be contrary to policy NE2 (regional scenic areas).

6.17 In addition, the proposal would affect the quality of views from within the Wanlockhead Conservation Area contrary to policy HE2 (conservation areas).

Supplementary guidance

6.18 Although part of the development plan the provisions of the council's 'wind energy development: development management considerations' (February 2020) follow the same criteria as set out in local development plan policies IN1 and IN2

providing additional guidance and explanation. I have already indicated that the proposed development would be contrary to these policies.

Development plan conclusion

6.19 In balancing and considering the level of compliance with the LDP and the supplementary guidance, which constitute the development plan covering the application site, I find that the proposed development would not accord overall with the provisions of the development plan.

Overall conclusions

6.20 Drawing all the considerations together, I conclude that the proposed development would provide some substantial benefits in relation to meeting emission reduction targets; reducing greenhouse gases; habitat creation and hen harrier conservation; and contributing to the economy through construction, operation and maintenance and, if secured, community ownership. The proposal would have acceptable impacts in relation to hydrology, hydrogeology, geology and soils (including contamination and flood risk); forestry; ecology and ornithology (subject to an appropriate assessment); noise; access, traffic and transportation; socio-economics, tourism and recreation; wild land; cultural heritage (other than affecting the setting of Wanlockhead); human health; major accidents and disasters; aviation and defence; telecommunications; and community buy-out proposals. There is no impediment from the Eskdalemuir noise budget and a grid connection could be made by 2024.

6.21 However, the proposal would have significant landscape and visual effects, including cumulative effects, which would be unacceptable based on the scale and distinct landscape features and scenic quality of the area in which the proposed turbines would be sited, viewed from and impact upon. This conclusion is supported by the fact that the proposal would have a significant impact on both the Thornhill Uplands Regional Scenic Area and the Leadhills and Lowther Hills Special Landscape Area. There would also be an impact on the landscape and historic setting of Wanlockhead. These conclusions have lead me to find that the proposal would gain no favour from Scottish Planning Policy as a development that contributes to sustainable development; that the proposal would not accord overall with the provisions of the development plan; and in consideration of the National Planning Framework 3, that it would not overall promote Scotland as 'a natural resilient place' affecting a landscape that significantly contributes to Scotland's identity.

6.22 Therefore, having regard to the requirements of Schedule 9 of the Electricity Act 1989, I conclude that the proposed development would conserve flora, fauna and geological and physiographical features of special interest and protect sites, buildings and objects of architectural, historic or archaeological interest as well as avoiding injury to fisheries or to the stock of fish in any waters.

6.23 The application has been revised and the applicant has proposed mitigation measures. However, as evidenced by the significant and unacceptable landscape and visual effects (and impact on the setting of Wanlockhead) predicted, these measures are insufficient to ensure that the natural beauty and historic interest of the area would be preserved.

6.24 Overall, I find that in balancing the factors for and against the proposal the significant adverse effects on the natural beauty of the area outweigh the benefits envisaged. I have considered all other matters but find none that would lead me to conclude otherwise. Therefore, I conclude that the application should be refused.

Recommendation

6.25 It is recommended that Scottish Ministers refuse section 36 consent and deemed planning permission."

Whether the respondents erred in law in their interpretation of schedule 9 of the Electricity Act 1989

Statutory Provisions

[8] Section 36 of the 1989 Act provides:

"**36.— Consent required for construction etc. of generating stations.**

(1) ….. a generating station shall not be constructed at a relevant place (within the meaning of section 4), and a generating station at such a place shall not be extended or operated except in accordance with a consent granted by the appropriate authority."

[9] Schedule 9 provides:

"*Preservation of amenity and fisheries: Scotland*

3 (1) In formulating any relevant proposals, a licence holder or a person authorised by an exemption to generate, distribute, supply or participate in the transmission of electricity —

(a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and

(b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.

(2) In considering any relevant proposals for which his consent is required under section 36… of this Act, the Secretary of State shall have regard to —

(a) the desirability of the matters mentioned in paragraph (a) of sub-paragraph (1) above; and

(b) the extent to which the person by whom the proposals were formulated has complied with his duty under paragraph (b) of that sub-paragraph."

Report

[10] The Reporter sets out the legal context as follows:

"Legal context

The Electricity Act 1989

1.29 The application to construct and operate a wind farm is being made under Section 36 of the Electricity Act 1989 which requires the consent of the Secretary of State (Scottish Ministers) to extend or operate a generating station (a wind farm in this case). The grant of consent may include conditions as appear appropriate to Scottish Ministers.

1.30 When formulating proposals, and when considering proposals, the provisions of Schedule 9 of the Act (which relate to the preservation of amenity and fisheries) apply. Those formulating proposals:

> '(a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
> (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects'.

Those considering proposals shall have regard to:

> (a) the desirability of the matters mentioned in paragraph (a) [as set out above]; and
> (b) the extent to which the person by whom the proposals were formulated has complied with his duty to reasonably mitigate any effects [as set out in (b) above].

Furthermore, in exercising the above functions both those operating a wind farm and Scottish Ministers shall avoid, so far as possible, causing injury to fisheries or to the stock of fish in any waters.

The Town and Country Planning (Scotland) Act 1997 (as amended)

1.31 Section 57 of the Town and Country Planning (Scotland) Act 1997 (as amended) gives 'deemed planning permission' to development that otherwise requires government authorisation. Section 57(2) states:

> 'On granting a consent under section 36 or 37 of the Electricity Act 1989 in respect of any operation or change of use that constitutes development, the Secretary of State may direct that planning permission for that development and ancillary development shall be deemed to be granted, subject to conditions (if any) as may be specified in the direction'."

Submissions for the petitioner

[11] Senior counsel for the petitioner submitted that the duty under paragraph 3(2)(b) of schedule 9 was not applicable because there was no duty arising on the part of the petitioner under (1)(b) (*Trump* v *Scottish Ministers* 2016 SC (UKHL) 25 at paragraphs 11 and 17). The respondents erred in law in treating schedule 9(3) of the Electricity Act 1989 as if it laid down a substantive development management test for the petitioner to satisfy. If a matter is taken into account which was not relevant nor lawful, the balancing exercise will be unduly influenced by that matter and the Decision which follows will be vitiated by error of law. Paragraph 1.30 of the Report portrayed the error of law which was to purport to place an obligation on the petitioner which did not arise under the statute. In paragraph 6.20 and 6.24, the Reporter found that the petitioner had failed to comply with its purported obligations under schedule 9. In setting out and applying inaccurately the legal framework against which the application was to be assessed, the Reporter had erred. The Scottish Ministers who adopted his final conclusions and reasoning had also erred as a result. Schedule 9 does not set out a test of acceptability. The matters to which the respondents required to have regard in terms of subparagraph (1)(a) were provided by the petitioner under its obligations in terms of *The Electricity Works (Environmental Impact Assessment)*

*(Scotland) Regulations 2000 a*nd *The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017.* The Reporter treated schedule 9 as if it were a summary or truncated version of the EIA process and assessed the proposal on that erroneous basis, and that error was not corrected by the respondents in the Decision Letter. Paragraph 6.23 of the Report purported to place an absolute obligation on the petitioner to ensure preservation of the features this listed in subparagraph 1(a) of schedule 9(3). Such an obligation did not exist. In purporting to assess the application against a non-existent duty, the Reporter took an immaterial consideration into account and therefore did not carry out the necessary lawful balancing exercise.

Submissions for the respondents

[12] Counsel for the respondents made general submissions as follows. The court was concerned only with the lawfulness of the decision-making process and not with the merits of decisions or planning judgment (*Tesco Stores Limited* v *Secretary of State* [1995] 1 WLR 759, 780). The court will only interfere with a planning decision if it is *ultra vires* (*Wordie Property Co Limited* 1984 SLT 345 at 347 to 8). Arguing that a planning decision is *Wednesbury* unreasonable is a daunting task (*R* (*Newsmith) Stainless Limited* v *Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 Adminat [7] to [12]). It is for the planning decision-maker to resolve the determining issues (*Moray Council* v *Scottish Ministers* 2006 SC 691 at paragraphs 29 and 30). Planning decisions should be read as a whole and not be subjected to forensic textual analysis (*Upritchard* v S*cottish Ministers* 2013 SC (UKSC) 219 at paragraphs 44-48, *Abbotskerswell Parish Council* v *Secretary of State for Housing and Local Government* [2021] EWHC 555 (Admin) at paragraph 53). Issues of interpretation of policy, appropriate for judicial analysis and issues of the application of

planning judgment to policy were distinct and should be not be elided (*Suffolk District Council* v *Hopkins Homes Limited* [2017] UKSC 37 at paragraphs 26 and 73). The amount of information that a planning decision-maker required in order to decide is a question of planning judgment (*Simson* v *Aberdeenshire Council* 2007 SC 366 at 379). The court will not likely intervene with the judgment of a Reporter as to what information should be included in the Report (*Byrom* v *City of Edinburgh Council* [2017] CSOH 125 at 30). A decision-maker may decide to give no weight to considerations to which regard may be had at the discretion of the decision-maker (*R* v *Somerset CC, ex p Fewings* [1995] 1 WLR 1037, 1049, *R (Friends of the Earth) Limited* v *Heathrow Airport Limited* [2020] UKSC 52, paragraphs 116 to 122, 121). Some deference was due to those who are experts in planning matters (*Hopkins Homes* at 25). The court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker (*RSPB* v *Scottish Ministers* [2017] CSIH 31, paragraph 204). If the court concluded that there was an error but there was no real possibility that a different decision would have been reached, the court had discretion not to quash the Decision (*Bova* v *Highland Council* 2013 SC 510 at 57; Carroll v *Scottish Borders Council* 2016 SC 377 at paragraph 66). The court should be vigilant against excessive legalism infecting the planning system (*Mansell* v *Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 at paragraph 41).

[13] Counsel made the following three points at the outset. Firstly, the petitioner had to obtain consent under both section 36 of the 1989 Act and under section 57(2) of the 1997 Act. The application was not exclusively governed by schedule 9 to the 1989 Act. Secondly, the Reporter's recommendation that consent be refused was based exclusively on his conclusion that the wind farm would give rise to unacceptable significant adverse landscape and visual impacts and also adversely impact on the historic setting of Wanlockhead. All of the matters

favourable to the application were considered, acknowledged and balanced in the process of decision-making, and the balance came down against the proposal because of the significant adverse environmental impacts on the landscape and the setting of Wanlockhead. This was a matter of planning judgment. Thirdly, even if the petitioner could establish some error in the approach taken to schedule 9, this could not affect the lawfulness of the Minister's decision which was based solely on the adverse environmental impact. The environmental impacts were material issues for the purposes of schedule 9 of the 1989 Act, but even if they were not, they were certainly relevant to the determination of the application for deemed planning permission under the 1997 Act.

[14] In relation to the petitioner's arguments on schedule 9, counsel submitted that the Decision refusing consent was solely by reference to the environmental impact and the terms of schedule 9 were only relevant to the Decision refusing consent to that extent. Further, even if an applicant for consent was not a licence holder nor exempt person, such that the provisions of schedule 9(3)(1) did not apply to him, the Scottish Ministers were still bound to follow schedule 9(3)(2) and have regard to the matters specified therein when considering proposals (*Trump International Golf Club* v *Scottish Ministers* at paragraph 11). Even if the Reporter incorrectly paraphrased schedule 9, his consideration of the application for consent was in line with the decision in *Trump International*. The various environmental matters which ultimately tilted the balance against the proposal were properly material under schedule 9.

Analysis and decision

[15] During the first day of the judicial review hearing, counsel for the respondents' position was that an applicant for a consent under section 36 must also apply for planning

permission. At the start of the second day he informed the court that he had been instructed that this was not the case.

[16] In my opinion counsel was correct to make that concession. The law is authoritatively stated by Lord Malcolm in *William Grant & Sons Distillers Limited* v *Scottish Ministers* [2012] CSOH 98 at paragraph 17 in which he explains that Parliament intended that the relevant provisions of the 1989 Act would provide a self-contained code and the consents required for the construction, etc of generating stations are dealt with under section 36.

[17] Against that background, I turn to the question of whether the Reporter erred in law in his interpretation of schedule 9.

[18] In my opinion paragraph 1.30 of the Report displays a clear error of law. The obligation to mitigate under schedule 9 paragraph 3(1)(b) applies only to licence holders or persons authorised by an exemption. It does not apply to parties, like the petitioner, who fall into neither of these categories (*Trump International* v *Scottish Ministers*). The Reporter errs when he says that those formulating proposals (which in the current case would be the petitioner) are under the obligation to mitigate and those considering proposals (ie the respondents) are required to have regard to whether the person by whom the proposals were formulated have complied with their duty to mitigate: the petitioner is under no such obligation. He also errs in the first bullet point in paragraph 6.3 when he makes a finding that the petitioner has complied with the obligation to mitigate: the petitioner is under no such obligation.

[19] However, an error of law is not in itself sufficient for the reduction of a decision in judicial review. It is necessary to consider whether the error is material in the sense that if it had not been made, a different outcome would have resulted (*Bova* v *Highland Council* at 57,

Carroll v *Scottish Border's Council* at para [66]). In my opinion, the error is not material in this case. Regardless of whether or not the particular person making the proposal is under an obligation to mitigate under paragraph 3(1)(b), the respondents are under a separate obligation under paragraph 3(2)(a) to consider the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest. (*Trump International* v *Scottish Ministers* at paras [11] and [17]). Accordingly, far from it being wrong for the Reporter or the respondents to consider these matters, they were legally obliged to do so, which the Reporter did in paragraph 6.22.

The treatment by the Reporter of the Conservation Area

The Report

[20] The Reporter's conclusions on Scottish Planning Policy ("SPP") are set out in bullet points in paragraph 6.7 of the report. One such conclusion is:

> "There would be significant effects on the setting of the Wanlockhead Conservation Area but no other items of historic interest (see Chapter 4)"

[21] Chapter 4 includes the following:

> "4.42 The boundary of the Wanlockhead Conservation Area is again shown in FEI figure 10.2 encompassing the built settlement but also including land along the Wanlock water valley feature and adjoining hillsides. There is no conservation area character appraisal for this designation and, consequently, Mr Mudie [petitioner's expert] agreed in questioning that it would be for the decision-maker to determine the character and appearance of the area and to gauge any impact on the designation. Mr Mudie described the conservation area's interest as including 'the combination of village houses and the street layout and the proximity and connectivity with the industrial remains that are in the village and extend to the south-east. The isolated and almost secluded location of the settlement. A mix of late 18th century single-storey formerly thatched workers cottages and larger mine supervisor houses of the 19th century and the supporting community buildings. The dispersed character gives it unique qualities and there is also a very intimate feel'. I agree with this description and note that it follows that of Gerard Godfrey's [for local

> community groups] description of a sense of place, isolation and remoteness. In addition, I agree with Mr Godfrey that approaches to the settlement and views down the Wanlock water valley are important to the setting of the conservation area.
>
> 4.43 In chapter 3 above, I found that there would be significant visual effects from Wanlockhead and from the B797 southbound through the village. Therefore, it is clear that views from within the conservation area would be influenced. As with Leadhills, the settlement is intrinsically linked to the surrounding upland landscape and the legacy of mining which is still visible, particularly along the Wanlock water valley with spoil heaps and other infrastructure featuring. The feel of isolation and remoteness are also key components of the setting. The proposed turbines would be a prominent and detracting feature along the Wanlock water valley. Their presence would, in my view, harm the upland setting and deteriorate the atmosphere of isolation and remoteness. Consequently, I find that the proposal would fail to preserve or enhance the conservation area leading to a significant effect."

Submissions for the petitioner

[22] Senior counsel for the petitioner submitted that section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 required the decision-maker to follow a two stage process: firstly to have regard to the desirability of preserving and enhancing the character or appearance of the Conservation Area, and secondly to then consider whether the proposal was acceptable. At paragraph 4.43 of the report, the Reporter conflated the two stages of the process into one and thereby erred in law.

[23] Counsel further submitted that the setting of a Conservation Area was not mentioned in section 64, nor in schedule 9 of the 1989 Act, nor in paragraph 169 of Scottish Planning Policy. Paragraph 6.7 of the Report was misleading in that it indicated that it was. Setting is a term primarily applied to listed buildings. The only place in SPP where the setting of a Conservation Area is mentioned is at paragraph 143. It was therefore clear that the setting of a Conservation Area was not protected as a matter of policy. Setting is to be considered to the extent to which development may impact the character or appearance of the Conservation Area and not independently. The application of consideration of setting of

the Wanlockhead Conservation Area was contrary to the relevant legislative provisions and the national policy which the Reporter required to apply.

[24] The petitioner further submitted that such a finding was perverse and irrational given the finding in paragraph 6.22 that the proposed development would conserve objects of historic or archaeological interest (*Energiekontor UK Limited* v *Advocate General* 2021 SLT 101 at page 108 I to K).

Submissions for the respondents

[25] Counsel for the respondents submitted that the grounds of challenge relying on SPP were nothing more than disagreements about the application of SPP which was a matter exclusively for ministers. The Reporter considered and applied SPP, including paragraph 169 and the conclusions which he and the ministers reached were properly matters for them.

[26] Counsel also submitted that the setting of a Conservation Area was a protected matter. This was clear from paragraph 143 of SPP. It would have been superfluous for the Reporter to refer to paragraph 143 given the reasons which he gave under paragraph 169.

Analysis and decision

Section 64 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

[27] Section 64 provides:

> **"64.—General duty as respects conservation areas in exercise of planning functions.**
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any powers under any of the provisions in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
> (2) Those provisions are—

(a) the planning Acts, and
(b) Part I of the Historic Buildings and Ancient Monuments Act 1953."

[28] The Reporter considers the section 64 duty in paragraph 4.43 of the Report. In my opinion the Reporter has not erred in law in that paragraph in the manner submitted by the Petitioner. The paragraph demonstrates that the Reporter has considered the matters set out in section 64(1). The paragraph sets out the reasons why he thinks the proposal is deficient in relation to these matters. The reader of paragraph 4.43 can be in no doubt that the Reporter's view is that it is desirable to preserve and enhance certain features and that the proposals fail to do so. The Reporter has not conflated two stages into one but has considered both desirability and the proposals. He has paid special attention as required by section 64(1). He has complied with section 64(1).

Setting of conservation area

[29] The Reporter's consideration of setting was not, as the petitioner submitted, contrary to national policy: it was in accordance with SPP.

[30] Paragraph 143 of SPP states:

> "Conservation Areas
> 143. Proposals for development within conservation areas and proposals outwith which will impact on its appearance, character or **setting**, should preserve or enhance the character and appearance of the conservation area. Proposals that do not harm the character or appearance of the conservation area should be treated as preserving its character or appearance." (Emphasis added)

[31] Paragraph 169 of SPP states:

> "Development Management
> 169. Proposals for energy infrastructure developments should always take account of spatial frameworks for wind farms and heat maps where these are relevant. Considerations will vary relative to the scale of the proposal and area characteristics but are likely to include:
> ……
> - Landscape and visual impacts, including effects on wild land

……

- Impacts on the historic environment, including scheduled monuments, listed buildings **and their settings"** (Emphasis added)

[32] As both of these paragraphs of SPP specifically refer to setting, the Reporter required to consider the setting of the Wanlockhead Conservation area. . He did so at paragraphs 4.42, 4.43 and 6.7 of his Report. The issues around the question of the setting were closely related to the issues of visual impact, which he also considered. He was entitled to consider setting in the way he did.

Perverse and irrational

[33] The petitioner seeks to set up a conflict and inconsistency between the Reporter's conclusion paragraph 6.22 that the proposed development would "protect sites, buildings and objects of architectural, historic and archaeological interest" and his conclusion in paragraph 6.23 that

> "as evidenced by the significant and unacceptable landscape and visual effects (and the impact on the setting of Wanlockhead) predicted, the [mitigations included in the development proposals] are insufficient to ensure that the natural beauty and historic interest of the area would be preserved".

In my opinion, reading the Report as a whole, there is no such conflict. In essence the Reporter finds that the buildings at Wanlockhead would be protected but the visual effect on Wanlockhead would not. Paragraph 6.22 deals with the issue of the protection of the buildings themselves, which the Reporter deals with in depth at paragraphs 4.43 and 4.44. Paragraph 6.23 deals with visual effects, including the visual effect on Wanlockhead, which the Reporter deals with at length in Chapter 3. In my opinion there is no conflict or inconsistency between these findings. As there is no conflict or inconsistency, the petitioner's argument that the findings are perverse or irrational falls away.

Whether the respondents erred in not applying prior decisions of the Scottish Ministers consistently

Submissions for the petitioner

[34] Senior counsel for the petitioner submitted that it may be unreasonable for the respondents not to have regard to a previous appeal decision bearing on the issues in the application they were considering, even in circumstances where none of the parties had relied on it or brought it to the Ministers' attention, and that the principle was not restricted to situations where there was a similar development at the same development site (*Ogilvie Homes* v *Scottish Ministers* [2021] CSIH 8 at paragraph 39).

[35] Counsel submitted that shortly prior to the present decision, the respondents made another decision in respect of a section 36 application at Fallago Rigg 2. In that case, the Reporter was expressly corrected by the respondents for applying schedule 9 of the 1989 Act as if it contained a substantive development management test. The respondents failed to issue a similar correction in the present decision and therefore have failed to act consistently in its decision-making. The respondents similarly failed to apply the same reasoning on government energy policy which it had applied in the Paul's Hill II decision made shortly prior to the present decision.

Submissions for the respondents

[36] Counsel for the respondents submitted that the petitioner's submissions on this were hopeless. Decisions on other developments were collateral issues in this petition, and would have other relevant considerations by reference to which the decisions were made. Consistency will invariably be overtaken by other considerations if a lawful decision is to be

made in particular cases. The petitioner's suggestion that the ministers should explain to the petitioner why other developments elsewhere in Scotland obtained approval, while theirs did not, was absurd.

Analysis and decision

[37] In *Ogilvie Homes* v *Scottish Ministers* [2021] CSIH 8 the Lord President, giving the opinion of the court stated:

> "[39] Thirdly, and perhaps of the greatest concern in the general context of the planning process, there is the failure of the Reporter to take proper account of the previous planning decisions and to explain why he reached a decision which differed from them. The interpretation of planning policies in a development plan is a matter of law. The application of those policies to particular sites may require planning judgment. Planning authorities and Reporters are not courts of law. They are not subject to a system of *stare decisis*. They are not bound by previous decisions, even when they relate to the same site and cover the same issues. Nevertheless, it is important for them to have regard to the principle of consistency in decision-making. If a Reporter seeks to depart from the reasoning in an earlier decision relating to the same site and on the same issue, it is incumbent upon him to explain clearly why he is departing from it. It is not sufficient to recognise the existence of the earlier decision and to state that he or she must reconsider the proposal on its merits."

[38] Given this high and recent authority on the importance of consistency in decisions made by Reporters and the respondents, I do not agree with the respondents' position that the petitioner's submissions on this issue are hopeless or absurd. They need to be taken seriously and carefully considered.

[39] By decision letter dated 11 December 2020 the respondents granted an application for a section 36 consent for Paul's Hill II windfarm extension. In so doing, they agreed with the conclusions of the Reporter and gave reasons for doing so. The main determining issues were environmental impacts (including landscape and visual effects), the benefits of the development (including renewable energy generation) and the degree with which the proposed development accorded with national planning policy. These issues were

considered in detail by the reporter and in the decision letter. The respondents agreed with the Reporter that the landscape and visual impacts would be acceptable. The respondents stated that Scotland's energy and climate change targets and energy policies were all material considerations and that renewable energy deployment remained a priority of the Scottish Government and should be accorded significant weight in favour of the proposed development.

[40] By decision letter dated 25 June 2020 the respondents refused an application for a section 36 consent for Fallago Rigg 2 windfarm extension. The main determining issues were the environmental impacts (and more particularly landscape and visual impact) and the extent to which the proposed development would be consistent in principle with national energy and planning policy. With one exception, they agreed with the conclusions of the reporter and adopted his reasoning. The exception was that the reporter had concluded that

> "the applicant failed to fulfil their duty under schedule 9 of the Electricity Act 1989 to do what they reasonably could to mitigate those effects on 'natural beauty' and that it is now not open to the Scottish Ministers to mitigate those effects in granting consent".

In the decision letter the respondents stated:

> "Scottish Ministers disagree with the view of the Reporter taken on this matter. Scottish Ministers note that Schedule 9 of the Electricity Act contains no substantive development management tests. Ministers consider that the environmental information sufficiently accounts for the consideration of the design of the proposed Development and its impacts on the environment. The Company has demonstrated throughout their ES that they have had regard to the relevant environmental matters and, within the parameters of their chosen design, taking account of the environment as a whole, they have done what they reasonably could to mitigate any impact. Ministers are therefore satisfied that the relevant requirements have been complied with."

[41] In my opinion there is no inconsistency between the decisions in Fallago Rigg 2, Paul's Hill II and the current case.

[42] In each of Fallago Rigg 2, Paul's Hill II and the current case, the respondents required to balance landscape and visual issues against the renewable energy issues. How that balance was struck was an exercise of judgment, taking into account the facts and circumstances of the particular case. The balancing exercise in the current case, in respect of which there were difficult landscape and visual issues, was a different balancing exercise from that in Paul's Hill II, where the landscape and visual aspects were acceptable. The result of the balancing exercise was different: the Paul's Hill II application was granted. In both the current case and Fallago Rigg 2 there were difficult landscape and visual issues, and the result of the balancing exercise was the same: the applications were refused.

[43] Nor is there any inconsistency in respect of the issue on which the respondents disagreed with the Reporter in the Fallago Rigg decision. In Fallago Rigg the respondents disagreed with the Reporter's conclusion that the applicant failed to fulfil its duty to mitigate under paragraph 3(1)(b) of schedule 9 to the 1989 Act. However that issue does not arise in the current case as paragraph 3(1)(b) does not apply to the petitioner.

[44] Accordingly, I find that in the current case the Reporter has not applied previous decisions inconsistently and has not erred in law in that regard.

Whether the respondents had proper regard to their obligations arising from the Climate Change (Scotland) Act 2009, the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 and related Scottish Government policy

Submissions for the petitioner

[45] Senior counsel for the petitioner submitted the Decision failed to properly consider and apply the provisions of the 2019 Act which had come into force on 23 March 2020. The statement of the Reporter in paragraph 28 that the ministerial statements and council's

declaration carry limited weight was not consistent with the new obligations on the respondents under the 2019 Act. It was also inconsistent with the Paul's Hill II decision, where legislation and policy were afforded significant weight.

[46] He further submitted that the respondents failed to act in accordance with their obligations under section 44 of the 2009 Act. The Report at paragraph 2.68 demonstrated a failure to have due regard to the obligations incumbent on the respondents as a public body, and the respondents erred in adopting the Reporter's reasoning.

Submissions for the respondents

[47] Counsel for the respondents submitted that Ministers were mindful of their climate change duties, but this did not mean that they had to be referenced in every Decision Letter when, on the facts of the application, there were countervailing environmental considerations by reference to which the application was to be determined. In this decision, far from being missing in the decision-making, the contributions by the proposed development to sustainability and climate change were central. However the Ministers' climate change duties did not mean that all proposals to develop sustainable energy projects must be given consent. Some will have to be determined by other considerations such as landscape and environmental ones. The petitioner's argument that climate change matters should have trumped other matters was simply a disagreement about weight which was not a matter for judicial review.

Analysis and decision

[48] The Report includes the following:

> "*Renewable energy targets and the 'climate change emergency'*
> 2.68 There is no dispute that climate change is now a critical factor in both energy and planning policy; and is of such importance that Scottish Ministers and Dumfries and Galloway Council have, separately, declared it an 'emergency'. As they are not embedded in policy the Ministerial statements and council's declaration carry limited weight in decision-making but provide a clear direction and commitment to tackling climate change and reducing greenhouse gas emissions.
> 2.69 The recent Climate Change (Emissions Reduction Targets) Act 2019 provides an increased target over that previously set to achieve net-zero emissions by 2045. This is a tangible and notable change in circumstances with statutory weight.
> 2.70 Scottish Planning Policy highlights that the National Planning Framework 3 facilitates a transition to a low carbon economy with a spatial strategy for Scotland that 'aims to reduce greenhouse gas emissions and facilitate adaptation to climate change' (paragraph 17). Roseanna Cunningham's statement clearly identifies that the forthcoming National Planning Framework 4 will address options to speed-up a reduction in emissions but there is no, at this time, change in the policy context or any indication of what 'planning options' might be radically changed to enable such a response. Consequently, the primary change in circumstances at present is the revised target to meet net-zero by 2045 which, as this target is yet to be met, provides a substantial challenge which onshore wind energy generation could usefully contribute. However, I agree with the council that meeting net-zero is not reliant entirely upon onshore wind energy generation but on a range of measures including different forms of renewable energy generation (onshore and offshore), energy efficiency measures, modal change in transportation and optimising heat and waste efficiency.
> 2.71 Energy publications emphasise a shift to clean growth being at the forefront of policy and a shift to a low carbon economy. The Committee on Climate Change and European Union reviews also highlight a need for the response to meet climate change obligations with policy being 'ramped up' and the response to meeting emissions reductions being embedded in decision-making. I find that contributions towards reducing greenhouse gas emissions and talking climate change are very important considerations in the determination of a wind farm application. The weight to be given to such considerations is dependent on the amount of carbon dioxide savings which could be achieved over the lifetime of the development (be it 25 or 30 years as in this case) and the related aspects of grid connection and load factor (the efficiency of converting wind to electricity in a location). However, there is (at present) no policy direction that proposals which aid the reduction in greenhouse gas emissions and help tackle climate change should be given disproportionate weight in decision-making to the extent that other considerations should be set-aside or downgraded. At the heart of many of the energy and planning policy documents is an acknowledgement that, amongst other resources, landscapes, cultural assets and the natural environment are also of significance both on a local and national scale for many reasons including the economy, biodiversity

> and well-being. The balancing exercise remains with respect to assessing whether a proposal is the right development in the right place weighing the costs and benefits over the longer term. Therefore, I find that there is limited justification to suggest that the case for the development proposed is 'materially strengthened' as argued by the applicant. The weight to be afforded to the benefits of the proposal is one for the decision-maker which I provide a recommendation on in chapter 6."

[49] As we have already seen, in paragraph 6.5 the Reporter concludes that the development would support greenhouse gas emission reduction targets, aid reduction of carbon dioxide emissions and help tackle the climate emergency. He also concludes that the early predicted connection to the grid would mean that the contribution would occur timeously in relation to net zero targets and the climate emergency.

[50] These statements and conclusion from the Reporter demonstrate that he gave careful consideration to the statutory and policy considerations regarding renewable energy and climate change. He specifically refers to the updated target for net-zero emissions under the 2019 Act and takes this into account. His conclusions on these issues are favourable to the petitioner. He also takes into account the point, which was very favourable to the petitioner, that the development would be able to be connected to the national grid as early as 2024. The Reporter cannot be faulted on his consideration of these issues.

[51] However, that is not the end of the Reporter's task. He must go on to balance his conclusions on these climate issues with his conclusions on other issues. What the petitioner's complaint comes down to is that in that balancing exercise the renewable energy and climate change conclusions should have outweighed the visual impact conclusions. In my opinion, that balancing exercise is a matter of judgement. There is nothing in any of the policies or legislation that states that renewable energy or climate change issues should be the sole or determining factor in a section 36 application. It is clear from the report that the Reporter gave considerable weight to the renewable energy and climate change issues, but

gave greater weight to the visual impact and landscape issues. That was something that he was entitled to do within the exercise of his discretion and judgment in the balancing exercise.

Whether the respondents erred in law in their consideration of the petitioner's legal submissions in terms of section 3 of the Natural Heritage (Scotland) Act 1991

Statutory provision

[52] Section 3 of the Natural Heritage (Scotland) Act 1991 provides:

> **"3 Duty to take account of certain matters.**
> (1)…. it shall be the duty of SNH in exercising its natural heritage functions to take such account as may be appropriate in the circumstances of—
> (a) actual or possible ecological and other environmental changes to the natural heritage of Scotland;
> (b) the needs of agriculture, fisheries and forestry;
> (c) the need for social and economic development in Scotland or any part of Scotland;
> (d) the need to conserve sites and landscapes of archaeological or historical interest;
> (e) the interests of owners and occupiers of land; and
> (f) the interests of local communities."

[53] The duty under section 3 was referred to by the parties to the inquiry as NatureScot's balancing duties.

The Report

[54] NatureScot was a party to the inquiry. NatureScot presented a joint case with Dumfries and Galloway Council (Report paragraph 3.42) and both NatureScot and Dumfries and Galloway Council were represented by the same Senior Counsel.

[55] An inquiry session was held on the internal procedures of NatureScot (Report paragraph 4.92ff). The petitioner led expert evidence which was very critical of NatureScot

and the petitioner's closing submissions contained trenchant criticism of NatureScot. The Reporter records that the petitioner had two primary arguments (paragraph 4.93). The first, which does not concern us here, was that NatureScot pre-determined to object to the proposed development. The second was that NatureScot failed to carry out its balancing duties under section 3 of the Natural Heritage Scotland Act 1991 and consequently as a matter of law the NatureScot objection could attract no weight. In response to that second argument, NatureScot argued that there was no basis for any assertion as to any error of law or failure to apply the balancing duties; even if there was an error of law there was no basis for any diminution of weight as the decision to object was taken on the merits of the application and any proper application of balancing duties would not have led to a different decision; in any event any hypothetical failure to apply the balancing duties would not render NatureScot's landscape evidence inadmissible and it would be for the decision-maker to determine what regard to have to it (paragraph 4.106).

[56] The Reporter came to the following conclusions in respect of NatureScot's balancing duties.

> "4.114 Turning to the balancing duties, it is not in my remit, or the role of Scottish Ministers, to come to a finding on whether Scottish Natural Heritage has carried out its legal obligations related to the balancing duties set out in the *Natural Heritage (Scotland) Act 1991*, the *Regulatory Reform (Scotland) Act 2014*, and the *Climate Change (Scotland) Act 2009*. That is a matter for another forum. I have set out below the process undertaken and whether I consider that process reasonable (without a finding of legal competence).
>
> 4.115 In general terms the balancing duties require Scottish Natural Heritage as a public body to take account of other interests when exercising its functions. These include taking account of ecological and other environmental changes to the natural heritage of Scotland; the need for social and economic development in Scotland or any part of Scotland; the needs of agriculture, fisheries and forestry; the need to conserve sites and landscapes of archaeological or historic interest; the interests of owners and occupiers of land; the interests of local communities; and act in a way best calculated to deliver emission reduction targets and in a way that it considers

is most sustainable. Regulators should also adopt a positive, enabling approach in pursuing outcomes that contribute to sustainable economic growth.

4.116 The process for applying Scottish Natural Heritage's balancing duties is set out in its guidance note 'applying SNH's balancing duties' (July 2013). The guidance suggests that the balancing duties are there to 'ensure that, where appropriate, we do not focus upon our primary aims and purpose to the exclusion of all other considerations. The importance which should be placed on these interests, relative to our aims and purposes, is a matter for discretion'. Paragraph 41 states that 'there are very limited and specific circumstances in which SNH might decide not to object to a proposal that raises natural heritage issues of national interest. This is where significant public benefit and importance has already been established and agreed'. In cases which do not affect protected designations (as in this case) and involve issues of national interest the balancing assessment is to be carried out by the unit manager and signed off by a Director. The guide continues to advise that 'we will document the application of our balancing duties to provide an internal record of what we know and considered at the time we made our decision'.

4.117 The decision to object to the proposed development was made in August 2017 and the application of balancing duties form was filled-in on 23 October 2017 (pages 49 to 54 in the FOI bundle). There appears to be no timescale for recording or documenting the balancing duty. The fact that it was recorded some two months after a determination was a situation which Mr Halfhide [the NatureScot decision-maker] felt necessary to apologise for but that action does not imply that the balancing duties were not considered as part of the exercising of the functions which each Scottish Natural Heritage employee undertook in the evaluation, assessment and final decision with respect to the proposed development.

4.118 The fact that the recording of the balancing duties describes the benefits of the proposal in different terms to that considered by David Bell [the petitioner's expert] possibly reflects professional opinion and is a matter of discretion. The record clearly includes benefits from the conservation management plan (including employment of a Hen Harrier Project Officer); the effects of climate change; the contribution to emission reduction targets; and job creation. It certainly, in my view, does not imply a direct attempt to underplay the significance of those benefits including the contribution towards meeting renewable energy targets and 'transformational' economic change in the area. It refers to the objection from Wanlockhead Village Council and omits to refer to support for the proposal (including from Sanquhar Community Council) but the question being answered in the form is one about benefits and impacts where it lists the community benefit fund as a positive. I consider that the recording of the balancing duties is fair. I also note that while the balancing exercise was recorded this is not comparable to that of a decision-maker weighing up whether to approve or dismiss an application. There are only very specific instances where Scottish Natural Heritage would decide not to object when national interest is raised and the proposed development does not fall into any of those exceptions.

> 4.119 In terms of re-evaluation, the FOI bundle includes reassessment of the proposed development following revision commenting that 'though there are slight improvements - with a slight reduction in horizontal extent - these changes are not of a magnitude to fundamentally effect the judgements on the overall effect of the proposal upon the scale and distinctiveness of these hills' (the Lowther Hills); includes commentary on the setting of Wanlockhead; and concludes 'no change to our view' which was reflected in Scottish Natural Heritage's FOI consultation response. There is no direction that Scottish Natural Heritage is required to fill-out a balancing duties form at each stage of an application where it is revised or circumstances change but the balancing duties would be implicit in exercising functions such as the re-evaluation undertaken. In any case, the objection in relation to national interest was maintained meaning that an exception not to object would not apply. Similarly, the refusal of Harryburn Wind Farm occurred on the 27 September 2019 only days before the inquiry session began but, in any event, the responses and information provided by Scottish Natural Heritage show that while cumulative effects were of concern it was the individual effects of the proposed development which were objected to.
>
> 4.120 I find the process of Scottish Natural Heritage to be reasonable. Even in the case that Scottish Natural Heritage had erred in relation to their balancing duties then that would not mean that their concerns regarding landscape and visual effects would simply be disregarded (or given no weight as requested by the applicant). The issues raised could still be valid and need to be addressed. And, in any event, there are other objections to the proposed development on the basis of landscape and visual effects which raise very similar concerns to those presented by Scottish Natural Heritage including from the Dumfries and Galloway Council landscape officer."

Submissions for the petitioner

[57] Senior counsel for the petitioner submitted that the issue he had raised before the Reporter in relation to section 3 was a significant matter requiring determination by the Reporter and thereafter by the respondents. It was inevitable, given the status of NatureScot as a statutory consultee and governmental advisory body, that its objection would be likely to attract significant weight in the respondents' consideration. NatureScot's failure to comply with its legal obligations was a matter going to the legitimacy, credibility and reliability of that body's objections, and ought to have been properly addressed by the Reporter. The Reporter expressly declined to determine the substance of the petitioner's

objection, but nonetheless made a finding that NatureScot's internal proceedings were reasonable. That was irrational. The Reporter should have resolved the issue which he was confronted with before he was in a position to state that NatureScot's internal procedure was reasonable. If the petitioner was correct in its assertion that NatureScot had failed to comply with its statutory duties, it could not follow that its internal procedures were reasonable and it ought to have followed that NatureScot's evidence could be accorded little or no weight.

Submissions for the respondents

[58] Counsel for the respondents submitted that the Reporter was aware of the petitioner's challenge to NatureScot's objection, considered the petitioner's arguments and properly concluded that many of the petitioner's arguments were not for him nor for ministers. He recommended against the proposal on environmental grounds. His conclusions were a matter of weight properly and exclusively for him. Counsel further submitted that the decision of NatureScot to maintain its objection after the petitioner adjusted its proposal reducing the number of wind turbines, was a matter for NatureScot and not the Reporter nor ministers. If the petitioner wished to raise new issues which had not been raised before the Reporter, that was now too late: a judicial review was not the place to re-argue matters which were, or should have been, fully before the Reporter.

[59] Finally, counsel submitted that in any event, even if the petitioner could establish material wrongdoing by NatureScot, there was still the objection by Dumfries and Galloway Council for the Reporter and ministers to grapple with, which was substantially based on the same concerns as NatureScot.

Analysis and decision

[60] What the Reporter required to address in the Report was the petitioner's argument that NatureScot failed to carry out its balancing duties under section 3 of the Natural Heritage (Scotland) Act 1991 and consequently as a matter of law the NatureScot objection could attract no weight. The Reporter dealt with this argument by a careful consideration of the manner in which NatureScot addressed its balancing duties. When paragraphs 4.114 to 4.120 are read as a whole it is clear that what the Reporter has found is that there was not a failure by NatureScot to carry out its balancing duties. He sets out that NatureScot was required to carry out the balancing duties (paragraph 4.115); NatureScot has a guidance note on the procedures to follow (paragraph 4.116); the recording of the balancing duties was fair and the exercise was not comparable to that of a decision maker weighing up where to approve or dismiss an application (paragraph 4.118); the balancing duties were implicit in the re-evaluation after the revision of the proposal (4.119); he finds the balancing process to be reasonable (paragraph 4.120). As he has found that there was not a failure, he does not require to go on to consider what the consequences of a failure would be in terms of the weight to be attached to NatureScot's objection.

[61] When the Reporter says in paragraph 4.114 that it is not his remit or the role of the Scottish Ministers to come to a finding on whether NatureScot has carried out its legal obligations, the point he is making is that the correct forum for breach of statutory duty would be an action for judicial review against NatureScot. He then goes on to address the matter for which the inquiry was the correct forum: whether there was a failure to carry out the balancing duty and the weight to be given to NatureScot's objection. As the Reporter has not failed to address whether there has been a failure in NatureScot's balancing duty, the petitioner's submissions fall.

[62] Even if I am wrong in that, and the Reporter erred in respect of his consideration of NatureScot's balancing duties, this would not entitle the petitioner to the declarator and reduction sought as it would have made no material difference to the Reporter's decision to refuse the application. Giving no weight to the NatureScot objection does not mean that the subject matter of the objection would not be before the Reporter. The matters raised in the NatureScot objection were also raised in the Dumfries and Galloway Council objection. Even if the Reporter had given no weight to the NatureScot objection, he would still have required to address the same matters when addressing the Dumfries and Galloway Council objection.

Whether the respondents demonstrated apparent bias

Submissions for the petitioner

[63] Counsel for the petitioner submitted that the respondents had demonstrated apparent bias. No other party's closing submission was subject to scrutiny after submission.

[64] Further, the petitioner's closing submissions were singled out by the respondents for non-publication. The respondents' replies to letters from the petitioner's solicitors asking about non-publication had been piecemeal, contradictory and lacking in candour. The respondents did not revert to the petitioner in relation to the allegedly problematic content of its closing submissions. No attempt was made to seek submissions from the petitioner in relation to the decision not to publish nor seek consent to redact. The respondents' actions in relation to their perceived difficulties with the petitioner's closing submissions were disproportionate, unfair and prejudicial. It was a matter of admission that the respondents failed to have regard to the petitioner's closing submission and, since the Reporter expressly failed to consider the petitioner's legal submissions, a matter of admission that the

respondents had failed to consider those legal submissions. The objection had gone unconsidered and unanswered by the respondents.

[65] Counsel submitted that the treatment of the petitioner demonstrated a pattern of actions arising from its criticism of NatureScot during the inquiry. The petitioner's closing submissions alone were queried by the Reporter, and its submissions alone were not published. Conversely, the internal procedures of NatureScot were held to be reasonable by the Reporter and the respondents even though the petitioner's legal submission in relation to their participation was not actually addressed. It would accordingly appear to a reasonable observer that there was a real possibility of bias (*Porter* v *Magill* 2002 2 AC 357 at 452A).

Submissions for the respondents

[66] Counsel for the respondents submitted (1) the non-publication had no bearing on the Minister's decision or the Reporter's recommendation; (2) there was no prejudice to the petitioner arising from the non-publication in the determination of the application; (3) the matters complained of originate in the petitioner's own actions in including the comments in the closing submission and the decision not to publish the closing submission on the grounds of some of their content was a reasonable one; (4) the only significance of non-publication of the closing submissions was that they were not available for public view.

Factual circumstances

[67] By letter dated 16 January 2020, the Reporter invited further submissions in relation to the petitioner's closing submissions on its NatureScot balancing duties argument. The

petitioner and others responded to that invitation and their further submissions were taken into account by the Reporter in the Report.

[68] Previously on 20 December 2019 the solicitor for Dumfries and Galloway Council wrote an email to the Reporter's assistant stating:

> "On behalf of DGC and SNH we would like the Reporter to note that we are concerned in respect of accuracy and context of comments attributed to our witnesses, and otherwise by the Applicant in the enclosing submission, but are content to rely on the Reporters notes etc. and our closing submissions".

The email was copied to various other objectors, and to the petitioner's solicitor. The assistant replied on 6 January 2021 stating: "Thank you for your email of 20 December 2019. The Reporter notes the content".

[69] The respondents maintain a website where they publish information relating to public inquiries. The petitioner's solicitor noticed that although all other submissions made to the Reporter were published on the website, the petitioner's submissions were not. He was concerned as to the effect of this. He engaged in extensive correspondence with the respondents and made Freedom of Information requests to establish the position.

[70] The respondents provided to the court an affidavit from Mr William Black, Head of the Energy Consents Unit within the Scottish Government, and from Scott Ferrie, interim Chief Reporter within the Scottish Government Planning and Environmental Appeals Division ("DPEA"). Having considered these affidavits, I make the following findings.

[71] Despite there being no statutory requirement on DPEA to publish on its external website documents in relation to applications for a consent under section 36 of the 1989 Act, in the majority of cases the DPEA does so in the interests of openness and transparency. Its position is set out in a privacy notice which is publically available on the website and states *inter alia*:

> "DPEA also publishes the vast majority of information submitted on cases to its website: this information is redacted as below … DPEA will not publish comments which in their view may be considered defamatory or obscene."

[72] Further detail on publication is given in the respondents' *Planning Appeals: Case File Publication Protocol* (the "Protocol"). The Protocol is described as "Explanation of our arrangements for publication and removal of papers to the dedicated case publication website." Paragraph 1.1.3 states:

> "Publication policy: we aim to publish all documents we receive relating to appeals. This includes everything submitted by the appellant, planning authority and interested parties. We will publish requests for further information issued by DPEA and any responses received."

Paragraph 1.1.2 states *inter alia*:

> "● exceptions: we will not publish any documents that are defamatory, commercially confidential, or otherwise sensitive."

[73] Guidance on this exception is contained in the respondents' Planning and Environmental Appeals Division Guidance note admin GN07 headed *Defamatory and Sensitive Comments and Representations* (the "Guidance Note"). The Guidance Note distinguishes between Ad Hoc sensitive and Ad Hoc Defamatory, and gives the following definitions:

> **"Ad Hoc Sensitive**
> There is no definitive list of what constitutes sensitive information, and some case officer assessment will always be required. However, here is a list of some commonly identified sensitive information:
> - Party indicates that they will be on holiday, or their house will be empty for a period of time.
> - Party indicates that they are frail/infirm.
> - Discussion around health problems/issues.
> - Financial information."

"**Ad Hoc Defamatory**
There is no definitive list of what constitutes defamatory information, and some case officer assessment will always be required. Here is some commonly identified defamatory comments:

- Any personal comments about another party - even if the comments are not particularly demeaning, if they are inflammatory in any way, they should be treated as defamatory.
- Inappropriate comments about the council - regarding their handling of the case, or about the particular planning officer, particularly if they are mentioned by name.
- A good indicator is whether you would be happy to have someone refer to you in a similar manner."

[74] The petitioner's closing submission was received on 6 December 2019. The case worker thereafter received the email of 20 December referred to above. That email gave no detail as to what the concern of Dumfries and Galloway Council nor NatureScot was. The case worker in conjunction with their manager, made the decision not to publish the closing submission on the basis of the internal guidance set out in GN07.

[75] When an appeal or application comes to DPEA a case file is created in the Scottish Government electronic filing system ("ERDM"). The case file on ERDM contains all documents relating to the case, whether or not the document is published on the public website. The Scottish Government Energy Consents Unit has access to ERDM. When Reporters are preparing their reports they do not expect that the Energy Consents Unit would need to read any of the background documents to give a fair understanding of the decisions and reasons. The documents are only there in case the Energy Consents Unit thought there was anything apparently incorrect or unusual in the report such as they might want to read the background document. In the case work file on the application by NLEI there are 1,363 documents, including the petitioner's submissions. It would be unusual for the Energy Consents Unit case officer to look in the ERDM file at any of the documents referred to by the Reporter: this would only be done if there was detail in the Report on

which the case officer needed clarification or more information as to how a suggested conditions were framed, in which case the case officer would only look at the particular documents related to that matter. This was not deemed necessary in this case as the Reporter's report was taken at face value: it was accepted that the Reporter had summarised all the relevant information, including the closing submissions. The submission from the case officer to the Minister seeking the Minister's determination of the application and making a recommendation would append the report, which would give a summary of all the information presented through the public local inquiry process. The Minister would then consider the submission and communicate his determination. Although the Minister can often request additional information, this was not done in this case and the Minister accepted the recommendation based on the Reporter's report and the formal submission by officials to the Minister.

Analysis and decision

[76] The test for apparent bias is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the respondents were biased (*Porter* v *McGill*).

[77] In my opinion that test has not been satisfied in the circumstances of this case.

[78] Firstly, the decision of the Reporter to ask for further submissions on a point raised by the petitioner in closing submissions but not ask for further submissions on any points raised by other parties does not demonstrate apparent bias. The point was not a straightforward one and it was appropriate for the Reporter to ask for further submissions on it if he felt they would be of benefit to him.

[79] Secondly, non-publication of the respondents' closing submissions on the public web-site made no difference to the decision-making process. Although the submissions were not available externally to the public, they were available internally to anyone who wished to look at them. As it happened, neither the respondents' officials nor the Minister looked at the closing submissions, but, in accordance with normal practice, relied on the Reporter's summary of these in his report.

[80] Thirdly, mere non-publication of the closing submissions is not sufficient to demonstrate apparent bias. The decision not to publish was taken by officials who took the view that certain sentences in the petitioner's closing submissions fell within the category "Ad Hoc Defamatory" in the Guidance Note. That decision was about application of the respondents' policy on publication, and not about the merits of the application for section 36 consent. Whether it was right or wrong, it does not demonstrate bias. Fourthly, as I have found above that the Reporter addressed the petitioners' submission on NatureScot's balancing duties, there is no basis for the petitioner's argument that apparent bias is demonstrated by a failure of the Reporter to address that submission.

Observations on the reasons for non-publication

[81] Before leaving this topic, I would make some general observations.

[82] The wording of the Guidance Note groups together under the heading "Ad Hoc Defamatory" matters which are defamatory and matters which fall far short of defamatory. The latter category contains, for example, personal comments which are not particularly demeaning, and comments which the official would not be happy to be made about them in a similar manner. The respondents might wish to consider revising the wording of the Guidance so that it properly distinguishes between comments which are defamatory and

those which are not, and does not include the latter under the heading of "Defamatory". It may also wish to consider revising the wording of the privacy notice to make clear that "defamatory" and "obscene" are not the only reasons for non-publication. There are obvious risks to the respondents if they make a public statement that comments are defamatory when they are not.

Whether notification of the Decision was subject to unreasonable delay in breach of Article 6 of the European Convention on Human Rights

Chronology

[83] The chronology of events was as follows:

June 2017 - S36 application made
Consultation responses on Environmental Impact Assessment being received (from June 2017 to April 2018)
April 2018 - Further Environmental Information submitted (removing 5 turbines)
Consultation on FEI submission (from April 2018 to October 2018)
October 2018 - Dumfries and Galloway Council Response (objection triggering requirement for public inquiry)
November 2018 - position statement submitted
7th December 2018 - sent to DPEA
Reporter appointed February 2019
Pre Examination Meeting 1 - 1st May 2019
Pre Examination Meeting 2 - 29th May 2019
Inquiry Sessions - 1-10 October 2019
Closing Submissions - December 2019
Additional submissions following Reporter's requests - completed by 6th March 2020
Date of Report - 21st October 2020
Date of Decision - 8th January 2021

Submissions for the petitioner

[84] Senior counsel for the petitioner submitted the time taken from the date of application to the date of final determination being 3½ years, the respondents were in breach of the obligation under Article 6 of the European Convention on Human Rights that

everyone was entitled to a fair and public hearing within a reasonable time. The time taken in respect of both the overall determination and the stages within it were not reasonable and longer than comparable decisions *Lafarge Redland Aggregates Limited* v *Scottish Ministers* 2001 SC 298.

Submissions for the respondents

[85] Counsel for the respondents submitted that assuming but without accepting that Article 6 applied, there was no "unreasonable delay" which could breach Article 6. There was no formal target for the determination of section 36 applications. The Reporter had to consider 781 inquiry documents, 19 precognitions and all of the evidence heard at the inquiry and 5 closing submissions which concluded only in March 2020, in addition to his other functions and duties and also the continuing Covid pandemic, the time taken to determine the application was reasonable. The delay was caused by the petitioner.

Analysis and decision

[86] By "assuming but not accepting" that Article 6 applies, the respondents have raised the question of whether Article 6 applies to section 36 applications. However, having raised that question, the respondents have expressly declined to address the court on that question, even when specifically invited by the court to do so during oral submissions. Instead, counsel for the respondents merely stated that he made no concession on that question.

[87] The question of whether Article 6 applies to section 36 applications is a matter of general public importance. It is fundamental to the question of whether the court grants the order sought in this petition, namely "declarator that notification of the Decision was subject to unreasonable delay in breach of the petitioner's Article 6 Convention rights". In my view

it is not appropriate, as the respondents invite me to do, to decide the question of whether on the facts and circumstances there had been unreasonable delay in breach of Article 6, without addressing the prior question of whether Article 6 applies in the first place.

[88] Accordingly, I require to decide this important and fundamental matter, which will have implications for the respondents in the future, without the benefit of the respondents' views on it or any submissions or references to authority from the respondents.

[89] Senior counsel for the petitioner referred me to *Lafarge Redland Aggregates Limited* v *Scottish Ministers* 2001 SC 298. That was a case where there had been considerable delay in determining an application for planning permission for a super quarry at Lingerbay, Isle of Harris. Lord Hardie held that there had been breaches of Article 6(1) and pronounced declarator that the Scottish Ministers were in breach of Article 6.

[90] In my opinion, Article 6 does apply to a section 36 application. The procedures for an application under section 36 closely resemble the procedures for an application for planning permission. The grant of a consent under section 36 carries with it deemed planning permission (section 57(2) Town and Country Planning (Scotland) Act 1997). My attention was not drawn to any material differences between the grant of section 36 consent and a grant of planning application which would justify the court treating them in a different way.

[91] As Article 6 applies, I now turn to the question of whether there has been unreasonable delay in breach of Article 6.

[92] I do not accept the respondents' submission that delay was caused by the petitioner. The respondents' pleadings were completely lacking in detail as to the facts on which that submission was based. During oral submissions this appeared to amount to two things. The first was that the Reporter had required to ask for further submissions arising out of the

petitioner's closing submissions. In my view this delay was not caused by the petitioner. The petitioner was entitled to raise the NatureScot balancing duties and the weight of the NatureScot evidencee in closing submissions and if the Reporter was of the view that it was appropriate to ask for further submissions rather than dealing with the matter on the basis of the submissions he already had, that was a matter for him. In any event, the further submissions dealt only with the discrete matter of assessment of the NatureScot evidence, and there was no reason why the Reporter could not have made progress in drafting his decision on other matters in the meantime. The second was the provision of Further Environmental Information in 2018. However, that pre-dates the period of around 27 months from the triggering of the public inquiry in October 2018 to the issue of the respondents' decision in January 2021, and the time of around 10 months between the initial closing submissions and the issue of the Report.

[93] An application for section 36 consent, like an application for planning permission, must be determined within a reasonable time. What amounts to a reasonable time in any case depends upon the particular circumstances of the case (*Lafarge Redland Aggregates Limited* at para [12]). These circumstances will include its complexity, the length of the public inquiry at which evidence was led and the difficult working environment as a result of the Covid emergency. This was a complex case involving substantial amounts of evidence and submissions. It was common in many sectors of the economy for work to be considerably delayed because of the disruption caused by Covid, particularly in the periods of national lockdown and local restrictions which ran from March 2020 onwards. In all the circumstances, I find that the delay was not unreasonable and that there has been no breach of Article 6.

Order

[94] I shall uphold the respondents' third and fourth pleas-in-law, repel the petitioner's pleas-in-law and refuse the declarators and reduction sought.