OUTER HOUSE, COURT OF SESSION

[2024] CSOH 10

P833/23

OPINION OF LORD SANDISON

In the Petition

WILDCAT HAVEN COMMUNITY INTEREST COMPANY

Petitioners

for

Judicial review of a decision by the Scottish Ministers to grant consent under section 36 of the Electricity Act 1989 for the construction and operation of Clashindarroch (II) Wind Farm dated 26 June 2023

Petitioners: J. Findlay, KC, Colquhoun; R & R Urquhart LLP
Respondents (Scottish Ministers): Crawford, KC, Welsh; SGLD
Interested Party (Vattenfall Wind Power Ltd): Mure, KC; Eversheds Sutherland LLP

8 February 2024

Introduction

[1] The petitioners are a community interest company, the object of which is to protect and conserve the wildcat population of Scotland. On 26 June 2023 the Scottish Ministers, on an application made by Vattenfall Wind Power Ltd, granted consent in terms of section 36 of the Electricity Act 1989 for the construction and operation of the Clashindarroch (II) Wind Farm, and directed that planning permission be deemed to be granted for the same in terms of section 57(2) of the Town and Country Planning (Scotland) Act 1997. The petitioners seek declarator that that grant of consent was unlawful in that the Ministers and their reporter

failed, contrary to Policy 3(b)(iii) of the Fourth National Planning Framework ("NPF4"), to apply correctly the mitigation hierarchy furnished in Annex F to NPF4 in considering the application for consent, and ask the court to reduce the consent and grant various ancillary orders.

Background

The Fourth National Planning Framework

[2] Policy 3 of the Fourth National Planning Framework provides *inter alia* as follows:

> "b) Development proposals for national or major development, or for development that requires an Environmental Impact Assessment will only be supported where it can be demonstrated that the proposal will conserve, restore and enhance biodiversity, including nature networks so they are in a demonstrably better state than without intervention. This will include future management. To inform this, best practice assessment methods should be used. Proposals within these categories will demonstrate how they have met all of the following criteria:
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> …
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> iii. an assessment of potential negative effects which should be fully mitigated in line with the mitigation hierarchy prior to identifying enhancements; …"

[3] Annex F to the Fourth National Planning Framework defines the "mitigation hierarchy" as follows:

> "The mitigation hierarchy indicates the order in which the impacts of development should be considered and addressed. These are:
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> i. Avoid – by removing the impact at the outset
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> ii. Minimise – by reducing the impact
>
> iii. Restore – by repairing damaged habitats
>
> iv. Offset – by compensating for the residual impact that remains, with preference to on-site over off-site measures."

Factual background

[4] On 23 December 2019 Vattenfall Wind Power Ltd submitted an application to the Scottish Ministers for consent to the development of a wind farm at Clashindarroch Forest, in terms of section 36 of the Electricity Act 1989. The forest is home to a population of wildcats of uncertain number. Development, operation and decommissioning of the wind farm would involve disturbance to that population. Vattenfall commissioned an Environmental Impact Assessment and an outline Habitat Management Plan which proposed a number of measures aimed at mitigating that impact. The application was opposed by the local planning authority, Aberdeenshire Council, resulting in a public inquiry being held before a reporter appointed by the Scottish Ministers. The reporter made site visits in November 2021 and held inquiry and hearing sessions between 28 February and 3 March 2022. The petitioners attended the sessions and made submissions as to the effect of the proposed development on the local wildcat population. A further site visit was undertaken in August 2022, and the reporter issued an initial report on 17 October 2022, recommending refusal of the application on the basis that it was not compliant with national or local planning Policy on the basis of landscape and visual impact. The Scottish Ministers subsequently remitted the application back to the reporter for further consideration, in light of the changes to national planning Policy effected by NPF4. After a further virtual hearing session on 8 February 2023, at which the petitioners made further submissions regarding the impact of the proposed development on the local wildcat population, arguing that assessment of potential negative effects and application of the mitigation hierarchy was inadequate for the purposes of NPF4 Policy 3(b)(iii), on 3 March 2023 the reporter issued a further report recommending approval of the application, which was accepted by the Scottish Ministers in their grant of the application on 26 June 2023.

Petitioners' Submissions

[5] On behalf of the petitioners, senior counsel submitted that the petition raised a short point concerning the approach taken by the reporter to the application of Policy 3(b)(iii) of NPF4. In essence, the petitioners contended that, in considering the measures which Vattenfall proposed to put in place to mitigate negative impacts on the wildcat population as a result of the development, the reporter failed to have proper regard to the 'mitigation hierarchy' provided for in Policy 3(b)(iii) and that, had she done so, she might have assessed those measures as non-compliant with NPF4, and have concluded that the proposed development was not supported by NPF4.

[6] Applications for consent to develop wind farms were made directly to the Scottish Ministers in terms of section 36 of the Electricity Act 1989, who had the power under section 36(5) to attach conditions to the consent and to provide that it should subsist only for a period of time. In terms of Regulation 3 of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, the applicant was required to complete an Environmental Impact Assessment ("EIA") before a section 36 consent might be granted. In addition to consent in terms of section 36, planning permission was required before development might commence. However, where consent was granted in terms of section 36, the Scottish Ministers might direct that planning consent be deemed to be granted, in terms of section 57 of the Town and Country Planning (Scotland) Act 1997, without the need for any separate application. When directing that planning permission was deemed to be granted, the Scottish Ministers were not required to take their decision in accordance with the relevant local development plans (as would otherwise be required in terms of sections 25(1) and 37(2) of the 1997 Act). The local development plan remained, however, a material consideration to be taken into account when considering applications

under section 36 of the 1989 Act: *William Grant & Sons Distillers Ltd, Petrs.* [2012] CSOH 98, 2013 SCLR 19. Upon the adoption of NPF4 on 13 February 2023, it became part of the development plan (1997 Act, section 24 (as amended by the Planning (Scotland) Act 2019)). The reporter recognised that NPF4 was a material consideration to which she had to have regard, and she had done so. The petitioners' criticism – their public law challenge – was that that exercise required her properly to understand, and then to apply, the true requirements of NPF4. That was not merely a complaint about the weight she had given to various matters she required to consider.

[7] The legal principles to be applied when determining an appeal against a decision of a reporter or the Scottish Ministers might be summarised as follows (per Lindblom LJ in *St Modwen Developments* v *Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746 at [6]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties* v *Secretary of State for the Environment* (1981) 42 P & CR 26, at p.28).
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> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant Policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another* v *Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).
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> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality' to give material considerations 'whatever weight [it] thinks fit or no

> weight at all' (see the speech of Lord Hoffmann in *Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J, as he then was, in *Newsmith* v *Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at Paragraph 6).
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> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning Policy is ultimately a matter of law for the court. The application of relevant Policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores* v *Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).
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> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the Policy in question (see the judgment of Hoffmann LJ, as he then was, *South Somerset District Council* v *The Secretary of State for the Environment* (1993) 66 P & CR 80, at p.83EH).
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> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited* v *Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at Paragraph 58).
> …"

[8] In determining a planning appeal the court was concerned with the legality of the decision-making process and not with the merits of a decision. Matters of planning judgment were within the exclusive province of the planning decision-maker: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780. The Court would only interfere with a decision if it was *ultra vires*: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 347 – 348.

[9] It was for the planning decision-maker, having regard to the development plan and the relevant proposal, to decide what the determining issues were, the evidence that was

material to those determining issues and the conclusions to be drawn from the evidence. It was for the planning decision-maker, applying his expertise and judgment, to resolve the determining issues: *Moray Council* v *the Scottish Ministers* [2006] CSIH 41, 2006 SC 691 at [29] and [30].

[10] The amount of information that a planning decision-maker required in order to assess and decide upon the relevant planning application was a question of planning judgment: *Simson* v *Aberdeenshire Council* 2007 SC 366 at 379.

[11] A material consideration was one that served a proper planning purpose and accordingly was relevant to the decision-making process: *R (on the application of Wright)* v *Resilient Energy Severndale Ltd* [2019] UKSC 53, [2019] 1 WLR 6562 at [44]. If the court concluded that a matter was left out of account, and that it was fundamental to the decision or that there was a real possibility that consideration of the matter would have made a difference to the decision, it might hold that the decision was not validly made. If the court was uncertain about whether the matter would have had this effect, or was of such importance in the decision-making process, then it did not have the material necessary to conclude that the decision was invalid: *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063, (1991) 61 P & CR 343.

[12] A planning decision-maker was required to give proper and adequate reasons for its decision, which dealt with the substantial questions in issue in an intelligible way. The decision must leave the informed reader in no real and substantial doubt as to what the reasons were, and the material considerations that were taken into account: *Wordie Property* at 348. The decision did not require a consideration of every issue raised by the parties, and it could be confined to the determining issues. The reasons could be expressed concisely, as long as they were intelligible and adequate: *Moray Council* at [30]. However, fairness

required that the reasons were sufficient to enable those who were interested to understand the key factors in the decision-making process, so that they could challenge their correctness if so advised: *Royal Society for the Protection of Birds* v *Scottish Ministers* [2017] CSIH 31, 2017 SC 552. When considering the duty to give reasons it was necessary to take into account a number of matters including the nature of the decision in question, the context in which it was made, the purpose for which the reasons were provided and the context in which they were given. It was also important to maintain a sense of proportion, and not to impose on decision-makers an unreasonable burden, having regard to the purpose that was intended to be served: *Uprichard* v *Scottish Ministers* [2013] UKSC 21, 2013 SC (UKSC) 219 at [44] and [48]. Where the adequacy of reasons was challenged the court should consider whether the informed reader would understand the basis for the decision complained of. In this regard decision letters had to be read in a straightforward manner on the basis that they were addressed to persons who were familiar with the background and issues: *South Buckinghamshire District Council* v *Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36]; *Uprichard* v *Scottish Ministers* [2011] CSIH 59, 2012 SC 172 at [26]. A reasons challenge would only succeed if the aggrieved party could prove that it had genuinely been substantially prejudiced by a failure to provide adequate reasons: *South Buckinghamshire* at [36]. It had been suggested that prejudice could occur in three main cases: (i) where an application for planning permission had been refused and the reasons were so badly expressed as to raise substantial doubt as to whether the decision was within the relevant statutory powers; (ii) where a developer was prejudiced by inadequacy of reasons because he could not reasonably assess the prospects of succeeding in an application for an alternative form of development; and (iii) an opponent of development, which might include the local planning authority, might be prejudiced if the reasons were insufficiently explained to indicate what

impact if any they might have in relation to decisions made on future applications: *North Lanarkshire Council* v *Scottish Ministers* [2016] CSIH 69, 2017 SC 88 at [28].

[13] NPF4 Policy 3(b)(iii), taken together with the definition of the mitigation hierarchy set out in Annex F, required decision-makers to take a sequential approach to the consideration of mitigation measures, and required them to prefer measures which avoided or minimised environmental impacts over measures which merely sought to offset them. While the requirement to mitigate adverse impacts was not new, the approach taken in NPF4 represented a significant innovation on the state of affairs which preceded its adoption, in particular insofar as it now included a requirement to apply the mitigation hierarchy.

[14] The EIA report was prepared in compliance with regulation 5(2)(c) and (f) of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, which provided that it must contain *inter alia* a description of 'any measures envisaged to avoid, prevent, reduce and, if possible, offset any identified significant adverse effects on the environment', together with certain other information relevant to the specific characteristics of the development and to the environmental features likely to be affected, as specified in Schedule 4 to the Regulations. Paragraph 7 of that Schedule required a description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements, which should explain the extent to which significant adverse effects on the environment were to be avoided, prevented, reduced or offset, covering both the construction and operational phases. While the petitioners did not agree with much of the content of the EIA report in the present case, they accepted that it had been prepared in accordance with the requirements of the 2017 Regulations.

[15] Regulation 5(2)(c) reflected, to some extent, the mitigation hierarchy set out in NPF4, but it lacked the hierarchical element which was explicitly a part of the new approach. It was a simple list, which did not on its face prefer avoidance to offset; indeed, one reading of the words 'if possible' in that Paragraph might be taken to indicate a preference for offset. The mere fact that 'avoid' appeared in the sentence before the word 'offset' did not imply a hierarchical approach; nor was there a direct requirement on reporters to adopt such an approach. Even if the 2017 Regulations could be said to imply a hierarchical approach to mitigation, they applied only to the party preparing the EIA report and did not bind the decision-maker. Rather, they simply provided a mechanism whereby environmental impacts were brought to the attention of a decision-maker, who then had to decide matters of weight and, ultimately, what the decision should be. There was no requirement for a decision-maker independently to assess whether the mitigation measures proposed in an EIA report should be weighted further in favour of avoidance rather than mitigation. The EIA report was a matter for the reporter to take into consideration, and to that extent the reporter would have regard to the mitigation hierarchy, but there was no obligation to apply it.

[16] By contrast, NPF4 was a national document which reporters had to have regard to and had to apply directly. It was a document which fell to be read as a whole. Its approach to the mitigation hierarchy did not simply parrot that in the 2017 Regulations dealing with the provision of information to the decision-maker, but extended Policy to embrace more deeply the whole concept of a hierarchy of mitigatory measures. Policy 1 required significant weight to be given to the global climate and nature crises in considering all development proposals. The latter such crisis was particularly relevant in the present case. Policy 3 required, in essence, development proposals to contribute to the enhancement of

biodiversity. Policy 3(b) stated that development proposals for national or major development, or for development that required an Environmental Impact Assessment would only be supported where it could be demonstrated that the proposal would conserve, restore and enhance biodiversity. That was to include future management. To inform those requirements, best practice assessment methods should be used. Proposals within the identified groups would demonstrate how they had met all of a list of five criteria which were then set out. One of those criteria was set out in sub-Paragraph (iii), requiring the provision of an assessment of potential negative effects which should be fully mitigated "in line with" the mitigation hierarchy prior to identifying enhancements. The mitigation hierarchy referred to was set out in Annex F to NPF4, and indicated the order in which the impacts of development should be considered and addressed. These were: (i) Avoid – by removing the impact at the outset; (ii) Minimise – by reducing the impact; (iii) Restore – by repairing damaged habitats and (iv) Offset – by compensating for the residual impact that remains, with preference to on-site over off-site measures. A diagram in the form of a pyramid was also set out in the Annex, with Avoid at its base, followed sequentially by Minimise, Restore and Offset, described as being set out in decreasing preference as one ascended the pyramid. The mitigation hierarchy was a concept referred to seven times in total in NPF4. For example, Policy 5, concerning soils, stated that development proposals would only be supported if they were designed and constructed "in accordance with" the mitigation hierarchy by first avoiding and then minimising the amount of disturbance to soils on undeveloped land. There was no difference between the phrases "in line with" and "in accordance with". The former was also used in Policy 6, concerning forestry, woodland and trees, which noted that development proposals would not be supported where they would result in fragmenting or severing woodland habitats, unless appropriate mitigation

measures were identified and implemented "in line with" the mitigation hierarchy. The role that the mitigation hierarchy played in NPF4, at least in Policy 3(b)(iii), was much more significant than that which it played in Regulation 5(2)(c) of the 2017 Regulations, which contained no order of priority or weighting. By contrast, NPF4 made it clear that there was an order of priority and weighting, by way of the requirement on the decision maker to apply the mitigation hierarchy.

[17] The Reporter had dealt with the effects on wildcat of the proposed development at Chapter 4 (Ecology) of her initial report, acknowledging at 4.23 that the Scottish wildcat population at Clashindarroch Forest was a matter of national and international conservation significance and common concern which, in accordance with a suite of national and international obligations, should be preserved. She had dealt with the EIA report provided in terms of the 2017 Regulations and had noted at Paragraph 4.41 that the list set out in regulation 5(2)(c) was not hierarchical, critically noting that "There is no indication in the Regulations of a weighting in favour of avoidance measures or the lesser value of 'offset' measures". That was a correct reflection of the effect of the regulations, but it also differed from what was now contained within Policy 3(b)(iii). That approach was carried through to her detailed consideration of the proposed mitigation measures. At Paragraph 4.65 she had noted that the Regulations had no expectation that all adverse effects, significant or otherwise, required to be avoided from the outset of the project design, and that there was no standard or threshold that set out the minimum extent that avoidance of significant effects should be applied to the development project. At Paragraph 4.67 she had opined that, although avoiding all significant adverse effects from the outset of a project was desirable, it was clearly not the intention of the Regulations or the EIA process, and that consequently the limited use of avoidance techniques in preference to other approaches did

not undermine the conclusions of the EIA report. It was clear that on that basis the reporter came to the view in her initial report that the proposed mitigation measures, upon which she placed considerable emphasis, were satisfactory and *inter alia* rejected the petitioner's line of argument to the contrary; whilst she declined to recommend the grant of consent on other grounds, she was of the view that the proposed approach to managing the impact on wildcats in Clashindarroch Forest was acceptable.

[18] In her further report, the reporter discussed the changes brought about by NPF4, in particular the emphasis on the climate change crisis, and explicitly referred to Policy 3, without, however, making any specific mention of Policy 3(b)(iii). Likewise, whilst she recorded at paragraphs 2.23 and 2.24 that the petitioners had made submissions, both generally in relation to the urgency and magnitude of the nature crisis and the increasing importance which the change in emphasis in NPF4 placed on the protection and conservation of wildcat, and specifically that the assessment of the potential negative effects and the application of the mitigation hierarchy was inadequate in terms of Policy 3(b)(iii), she did not deal with those submissions. Rather, she stated she did not disagree with the observation of the petitioners in connection with NPF4 Policies 3 and 4 that changes to the biodiversity of the forest habitat would interfere with essential habitat for wildcat to the detriment of that important protected status, but went on to say that she stood by her conclusions in her original report that the residual impacts on wildcat and other species would not be significant. Her discussion of Policy 3 did not consider the mitigation hierarchy beyond an observation (at Paragraph 2.63) that, *inter alia*, the criterion in 3(b)(iii), which she referred to simply as "the mitigation of negative effects", had been addressed. Her initial report had explicitly discounted a hierarchical approach to the assessment of mitigation measures. She had adopted her earlier reasoning when considering Policy 3 of

NPF4 and continued to apply an approach which provided no weighting in favour of avoidance measures or the lesser value of 'offset' measures, contrary to the approach required by NPF4 Policy 3(b)(iii).

[19] The reporter had accordingly erred in her application of the policies of NPF4. She ought to have had proper regard to the mitigation hierarchy — that is to say, she ought to have started by considering whether the anticipated negative impacts of the development could be avoided or minimised, before moving to consider whether the proposals to offset the impacts were acceptable. Had she done so, she might have come to a different view of the acceptability of the mitigation measures and, hence, the proposed development. The fact that the further report reached the opposite ultimate conclusion to that of the initial report was an indication that the decision was one that was in a fine balance. While it was true that the assessment of the mitigation hierarchy was a matter for the decision-maker's planning judgement, the assessment nevertheless had to be carried out on a proper basis. The Reporter had not changed her approach to assessment, despite the advent of NPF4 Policy 3(b)(iii), which required a weighting to be applied, and the use of the sequential approach urged on her by the petitioners. She had originally recommended refusal of the application, and only changed her advice after concluding that the policies of NPF4 supported it: had she properly assessed the proposed mitigation measures in accordance with the mitigation hierarchy, she might well have concluded that the policies of NPF4 did not support the development, or at least did not support it to the extent necessary to overcome her earlier determination that the development ought not to proceed.

[20] It was accepted that the court could refuse to grant a remedy if satisfied that there was no real possibility of a different outcome being arrived at if the reporter's error had not occurred (*Tesco Stores Ltd* v *Dundee City Council* [2012] UKSC 13, 2012 SC (UKSC) 278 at [31],

Kaagobot Ltd v *City of Edinburgh Council* [2023] CSOH 10, 2023 SLT 243 at [165]). However, there had in the present case been a very significant failure to appreciate the difference in approach required by NPF4 and a consequent lack of weighting to the mitigation measures considered. There was in these circumstances at the very least a prospect of the correct approach having impacted upon the reporter's decision in what was evidently a finely-balanced matter.

Respondents' submissions

[21] On behalf of the respondent Scottish Ministers, senior counsel submitted that the court should refuse to grant any of the remedies sought by the petitioners.

[22] The petitioners accepted that the EIA report had been properly prepared in accordance with the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 and that those regulations required a description of the 'measures to avoid, prevent or reduce, and if possible, offset likely significant adverse effects'. The petitioners further accepted that the mitigation hierarchy, in that context at least, was intended to be flexible; that there was no requirement for a developer to avoid all negative effects; that the mitigation hierarchy did not dictate the mitigation measures for any specific location, time, circumstances or application; and that its application was a matter for planning judgement.

[23] The petitioners maintained that the reporter was obliged to consider whether the proposed mitigations set out in the EIA complied with the terms of Policy 3(b) of NPF4, in particular whether the anticipated negative effects of the proposed development would be mitigated in line with the mitigation hierarchy; and that she was required first to consider whether the anticipated negative impacts could be avoided or minimised, before moving on to consider alternatives. They maintained that she had failed to do so, and rather appeared

to have maintained the approach she set out in her initial report, and had taken no, or at least no adequate, account of the need to consider options which would avoid or minimise the impacts, as directed by Policy 3(b)(iii) of NPF4.

[24] The petitioners' challenge was fundamentally flawed for a number of reasons. Properly construed, Policy 3(b)(iii) only required a developer to identify potential negative effects on biodiversity from the impact of development and how it had fully mitigated those effects. It was then for the decision-maker to determine whether what had been identified as to the full mitigation of the effects in line with the mitigation hierarchy was acceptable or not. What had to be considered was the residual effects of the impact of the development after mitigation. If the proposed mitigation measures produced an acceptable residual effect on biodiversity, then it did not matter whether the means of arriving at that effect were avoidance, mitigation or off-setting. On a proper reading of the reports, the relevant Policy had been identified and taken into account correctly.

[25] The legal principles set out by the petitioners were not in dispute. In particular, it had to be remembered that planning policies were not to be construed as if they were statutes or contracts. Excessive legalism was to be avoided. Reference was made to the fourth principle set out by Lindblom LJ in *St Modwen Developments* at [6], and to the observations of Lord Carnwath at [25] in *Secretary of State for Communities and Local Government* v *Hopkins Homes Ltd* [2017] UKSC 37, [2017] 1 WLR 1865.

[26] The legal (as opposed to policy) context in which the decision was taken comprised the Electricity Act 1989 and the 2017 Regulations. The EIA report afforded a proper basis to inform the respondent in respect of the desirability of the matters in Schedule 9, Paragraph 3(1)(a) to the 1989 Act and the extent to which the interested party had complied with its duty under Paragraph 3(1)(b) thereof. Amongst other things, a properly-prepared

EIA report (as, for example, one drawn in accordance with the guidelines of the Chartered Institute of Ecology and Environmental Management) would identify the impact of the proposed development without mitigation as well as its residual effect with mitigation. None of the matters relevant to such considerations could be assessed in a formulaic manner. It was for the decision-maker to determine whether, and if so to what extent, to accept the relative content of the EIA report and to assess its sufficiency. NPF4 formed part of the development plan by dint of section 24(1) of the Town and Country Planning (Scotland) Act 1997; cf. *William Grant & Sons Distillers*, but Policy 3(b)(iii) did not innovate on the EIA process; rather, it was consistent with it. The Policy simply represented another way of expressing the means by which a decision-maker would be informed of the way in which it was proposed fully to mitigate the impact of development, so that the overall acceptability of that mitigation could be assessed. The mitigation hierarchy indicated the order in which developers should address their proposed mitigation, but the extent to which the proposed full mitigation was acceptable, either in its individual elements or as a whole, was for the decision-maker to weigh and determine, without the Policy being in any way prescriptive about those matters. A similar approach could be seen in Policies 5, 6 and 11 of NPF4. That was in accordance with the fact that the development plan was a material consideration in the determination of an application for consent under section 36 of the 1989 Act. The weight accorded to a material consideration, and its application to the facts, was a matter of planning judgement and only challengeable on public law grounds: *Tesco Stores* v *Dundee City Council* at [17] – [23] and *Hopkins Homes Ltd* at [22] – [26] and [73] – [74]. The petitioners stated no such challenge.

[27] Clearly adequate consideration had been given to the mitigation hierarchy and the issue of avoidance. The mitigation hierarchy, in terms, "indicates the order in which the

impacts of development should be considered and addressed". It was a well-established approach to the consideration and assessment of the effects of adverse impacts. The EIA report set out the avoidance that was considered and built into the design of the windfarm, and consideration had been given to matters such as the felling of trees outside of breeding season, bearing in mind that the windfarm was to be situated in commercial woodland which was felled cyclically in any event. In particular, the EIA report recorded in terms that the mitigation hierarchy was considered, that appreciable reduction or avoidance of potential impacts had been achieved through the windfarm design process, and that those changes had been incorporated into the proposed development at an early stage. The reporter had made express reference to the mitigation hierarchy and the consideration of avoidance in her initial report at paragraphs 4.58 to 4.67 and 6.23. She had set out and considered the relevant aspects of the EIA report, the evidence she had heard, and the submissions made to her. In her further report, she made express reference to the petitioners' submissions earlier in the procedure to the effect that Policy 3(b)(iii) had not adequately been considered and to the constituent elements of the mitigation hierarchy, but recorded at paragraph 2.62 that she adhered to her earlier conclusion that the residual impacts on wildcat and other species would not be significant. The Ministers in turn agreed with that conclusion, noting at page 13 of their decision letter that while significant adverse effects on the wildcat population at Clashindarroch were predicted, the proposed mitigation measures (including species protection and on-site and off-site habitat improvements) would render the residual effects negligible to minor. All of that represented a proper and lawful approach to the impact of the proposed development and how they were to be dealt with in accordance with Policy 3(b)(iii).

[28] The petitioners overstated how each level of the mitigation hierarchy required to be applied. A developer was not required to avoid all negative effects. If that were the requirement, there would be no need for the remainder of the hierarchy. The hierarchy itself was described as a preference within NPF4 and was intended to be flexible albeit with the goal of full mitigation in mind. It was therefore not absolute in its nature; the consideration and assessment of the mitigation hierarchy was a matter for the decision-maker's planning judgment and no set approach was either required or desirable, so long as the determining issues were addressed: *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33, 1998 SLT 120. There were, inevitably, effects of developments which could not be avoided and those were the effects which were subsequently to be mitigated so as to ensure that biodiversity was not significantly detrimentally effected. The reporter made clear in her further report that, after the mitigation hierarchy had been considered, the effect on wildcat would not be significant. Therefore, negative effects had been assessed as having been fully mitigated. In any event, the further report included a recommendation that no work should commence without various conditions being satisfied, which recommendation had been accepted. These conditions included a requirement for a Construction Environmental Management Plan, dealing *inter alia* with the identification of biodiversity protection zones and the location and timing of sensitive works to avoid harm to biodiversity features. A Habitat Management Plan was also required, to include *inter alia* "measures to be undertaken in order to prevent the destruction or disturbance of the habitats of protected species, including Wildcat". A Species Protection Plan was a further requirement. It was clear that avoidance was properly considered by the reporter. The decisions of the reporter and the Scottish Ministers were decisions they were entitled to reach in all the

circumstances. Neither betrayed an error of law nor an irrational use of a discretion, and the petition should accordingly be refused.

[29] If, contrary to the respondents' submissions, there had been a public law failure to consider and apply Policy 3(b)(iii) of NPF4 in the manner contended for by the petitioners, the evidence before the reporter and the respondents clearly demonstrated that the wildcat species would be adequately protected. Equally, the Policy considerations in favour of the proposed development were very powerful indeed. In such circumstances, any breach of legal rights was one of form and not of substance. Had the Reporter framed her report in the manner suggested by the petitioners, there was no realistic possibility of a different recommendation been made by her, or of a different decision being reached by the respondent: cf. *Kaagobot* at [165], *Tesco Stores Ltd* v *Dundee City Council* at [31]. The criticisms made by the petitioners could have made no conceivable difference to the outcome: *Amid* v *Kirklees Metropolitan Council* [2001] EWCA Civ 582 at [20]; cf. *SM, Petitioner* [2023] CSOH 52 at [53]. Remedies in judicial review proceedings were at the discretion of the court, and no orders were necessary in these circumstances in order to remedy any breach.

Interested party's submissions

[30] On behalf of the interested party, Vattenfall Wind Power Ltd, senior counsel submitted that the petition should be dismissed.

[31] The interested party had considered the potential impacts of the project on any wildcat population in its EIA report and produced a Schedule of Mitigation setting out in detail the mitigation measures proposed. From the outset of the design, the potential presence of wildcat was considered as a restraint on the project. The ecology and

biodiversity chapter had set out in detail the results of the ecological surveys, the potential effects of the project and the proposed mitigation measures. It had identified the status of the species, the guidance followed for the purposes of the assessment, and the consultation that had taken place with (amongst others) NatureScot and Scottish Wildcat Action. Within the section on the assessment of effects, the general approach was explained, along with the overall loss of forest habitat from proposed felling and construction, and the estimated mortality risk. Mitigation during felling and construction was set out. It described wildcat mitigation for the operational phase and summarised the plans for further monitoring and management, and provided an outline Species Protection Plan and an outline Habitat Management Plan.

[32] The concept of a mitigation hierarchy was long established in both law and guidance as a sequential process involving a preferred hierarchy of mitigation measures from avoid to reduce and offset, for example at Regulation 5(2)(c) of, and paragraph 7 of Schedule 4 to, the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017; Chapter 6 "Avoidance, Mitigation, Compensation and Enhancement" in the "Guidelines for Ecological Impact Assessment in the UK and Ireland" (Chartered Institute of Ecology and Environmental Management; 2018 v1.2 April 2022); the "Environmental Impact Assessment Handbook" (NatureScot; 2018 v5); and the Planning Advice Note 1/2013 at Paragraph 4.30 and Figure 2.

[33] The EIA report followed such regulations and guidance, including the mitigation hierarchy. It addressed the avoidance of significant adverse environmental impacts at an early stage and throughout the development of the project, so far as the site and the nature of the proposed development permitted. Reduction of such impacts was also addressed, along with restoration, restocking and replanting. The EIA report also set out mitigation

measures to offset predicted impacts, including additional wildcat monitoring during the lifetime of the development and funding for a wildcat officer, together with the appointment of a suitably experienced and qualified Ecological Clerk of Works. In summary, potential negative effects were assessed and mitigation fully addressed in accordance with the mitigation hierarchy, including the hierarchy referred to in Policy 3(b)(iii) in NPF4. NatureScot had advised that the proposed mitigation measures were a suitable response to the predicted effects.

[34] As NPF4 stated, it should be read as a whole. The intent of each of its 33 policies was set out and could be used to guide decision-making. The submissions of the Scottish Ministers as to the role played by NPF4 in the process of presentation of material to the decision-maker relating to the impact of development and how it was proposed fully to mitigate that impact in line with the mitigation hierarchy, rather than as seeking to constrain the making of that decision itself, were correct. The petitioners' submissions amounted to a claim that NPF4, as policy, had effected a change to the law, and a very substantial and unheralded change at that. That was not a correct view of what had been intended, or effected, by NPF4. Conflicts between policies were to be expected. Factors for and against development would be weighed up in the balance of planning judgment. The weight to be attached to any material consideration, and all matters of planning judgment, were traditionally matters for the decision-maker alone: see *NLEI Ltd* v *Scottish Ministers* [2022] CSIH 39, 2023 SLT 149 at [62] – [63]; *St Modwen Developments Ltd* per Lindblom LJ at [6(3)], and that position persisted after the introduction of NPF4.

[35] This court had summarised what a report to Scottish Ministers required to present in cases such as these: see *NLEI Ltd* at [53] – [54]. The reports in the present case clearly met

those requirements. In construing such reports, courts applied the seven established principles summarised in the judgment of Lindblom LJ in *St Modwen Developments* at [6].

[36] In particular, the reporter properly addressed the submissions made to her and considered the requirements of NPF4. In her further report, she summarised the petitioners' complaint about *inter alia* mitigation measures under reference to Policy 3(b)(iii). She correctly found that the new NPF4 was a significant material consideration and concluded "that the residual impacts on wildcat and other species would not be significant" and that "with the implementation of mitigation measures there would be no significant residual effects". She made those findings following a rigorous examination of the EIA report and related evidence. She had summarised the submissions and evidence lodged by the petitioners and the interested party in relation to wildcat, as well as the consultation responses from NatureScot, and set out her conclusions in detail. Her further report referred back to her initial report, in which she discussed at length the mitigation measures set out in the EIA. She was entitled to come to her view that the interested party had adequately addressed mitigation, including the mitigation hierarchy as set out in NPF4. Her findings in relation to mitigation measures adequately described and referenced the EIA's content in that regard, including steps to avoid, prevent, reduce, restore and offset likely significant adverse effects. She was entitled to conclude, as she had, that the proposed mitigation measures would render the residual effects on the wildlife population negligible to minor; to find that the proposals would comply overall with NPF4; and to recommend that no work should commence until a Habitat Management Plan had been submitted and agreed.

The court had recently stressed that it retained the power to refuse the remedy of reduction in a case where the petitioner failed to demonstrate that he or she, or the public interest, had suffered substantial prejudice; or where there was no realistic possibility that a different

decision might be reached if proper procedures had been followed: see *NLEI Ltd* at [59]; *Douglas* v *Perth and Kinross Council* [2017] CSIH 28, 2017 SC 523 at [45] – [47]. If the court should find that the reporter, and thus the Scottish Ministers, failed adequately to consider and apply Policy 3(b)(iii) of NPF4 in the manner in which they respectively expressed their reports and decision, it should withhold the grant of any remedy. On the basis of the EIA and the evidence summarised by the reporter, it was perfectly plain that neither the petitioners nor the public interest in the protection of the wildcat species had suffered or would suffer substantial prejudice from the grant of section 36 consent. On the basis of the evidence before the reporter, there was no realistic prospect of the Scottish Ministers reaching a different decision were the existing decision to be reduced and the application determined anew.

Decision

[37] This petition for judicial review raises, as counsel for the petitioners submitted, a short point. If the reporter and in turn the Ministers failed to understand the true import of NPF4, and in particular Policy 3(b)(iii) thereof, then the decision complained of would be at least susceptible to reduction (see, for example, *St Modwen Developments*, principle 4). If, on the other hand, the policy was properly understood, then that decision could be challenged only on the basis that it was not a rational decision based on relevant grounds (see *St Modwen*, principle 2) , or on the related basis that the reasons advanced for it failed to meet the requisite standard. No criticism is advanced on either of these latter bases.

[38] The petitioners in essence submit that the effect of Policy 3(b)(iii) is to require the decision-maker to adopt a sequential and specifically-weighted approach to consideration of mitigation measures, in accordance with the mitigation hierarchy. The respondents and the

interested party in turn maintain that that policy highlights how developers should set out their proposed mitigations in a way which will enable relevant information to be presented in a helpful way for decision-makers, but that it provides no particular constraint on how and whether a decision-maker should determine the extent to which the proposed full mitigation is acceptable, and does not materially innovate on the existing legal requirements for the content of an EIA report.

[39] It is for the court to determine the true interpretation of the policy, bearing in mind that that task is not to be conducted in any peculiarly legalistic manner, but rather (bearing in mind the broad nature and purpose of policy documents of the kind in question) objectively, in accordance with the language used viewed in its proper context: eg *St Modwen*, principle 4.

[40] Approaching matters in that light, the interpretation postulated by the respondents and interested party is to be preferred, for the following three related reasons, set out in order of importance:

[41] Firstly, the language of the policy already set out indicates clearly that certain development proposals, including that in issue in the present case, will be supported only upon a demonstration of their positive effects upon biodiversity, and that one of the criteria upon which the sufficiency of that demonstration will turn is the provision of "an assessment of potential negative effects which should be fully mitigated in line with the mitigation hierarchy prior to identifying enhancements". In other words, the developer is enjoined by the policy to provide an assessment of potential negative effects and how it is proposed to mitigate them fully in line with the mitigation hierarchy. The decision-maker's view of whether those effects will indeed be fully mitigated in line with the mitigation hierarchy will then form one of the five criteria upon which a decision will be made as to

whether a development proposal has demonstrated a positive effect on biodiversity and thus may be supported on that ground. However, there is nothing in the language of the Policy which suggests that the decision-maker's determination of the sufficiency of the proposed mitigation, or whether it does indeed correspond adequately to the mitigation hierarchy in the particular circumstances of the proposal, is to be constrained by anything other than the implicit requirement that it be a rational one based on the indicated matters.

[42] Secondly, there is nothing in the context in which NPF4 sits which might suggest that any alternative interpretation of the words of Policy 3(b)(iii) from that which at first blush appears should be favoured. The interpretation urged by the petitioners would effect a considerable change in the significance of the mitigation hierarchy for the determination of the grant of consent for national or major development, or for development requiring an EIA. Counsel for the petitioners was unable to suggest that any intention to make such a change could be seen as having being heralded in any *travaux préparatoires*, policy discussion papers or consultation exercises, etc., leading up to the introduction of NPF4. Further, the minimum legal requirements for the provision of information about the environmental impact of this particular proposed development remain those set out in the 2017 Regulations, which all parties accept do not require the adoption of a hierarchical approach to mitigation. While I accept that it is possible that the 2017 Regulations may not have been tweaked to conform more closely with what is said by the petitioners to be the correct interpretation of Policy 3(b)(iii) in NPF4 for a variety of reasons, the disconnect which would exist between that interpretation and the legal requirements for the provision of information in the regulations is, at the very least, not something which suggests that that interpretation is one of which the context surrounding the policy is supportive.

[43] Thirdly, it should not be overlooked that the status of NPF4 is that it forms part of the development plan by dint of section 24 of the 1997 Act, and is thus a material consideration to be taken into account when considering an application under section 36 of the 1989 Act. The conventional view is that the weight (if any) to be attached to material considerations in the context of any particular application is, up to the point of irrationality, a matter entirely for the decision-maker (e.g. *St Modwen*, principle 3; *Tesco Stores Limited* v *Secretary of State for the Environment*). Again, while I appreciate that a policy document such as NPF4 must be properly understood by a decision-maker, its very nature renders it an unlikely repository for such a stringent requirement as that for which the petitioners contend.

[44] Despite the strenuous efforts made to persuade me otherwise, had I concluded that the material before me indicated that the reporter, and thus the Ministers, had proceeded upon a material misunderstanding of the import of Policy 3(b)(iii), I would have been unable to conclude that there was nonetheless no real possibility of the ultimate decision being different had it been made without such a misapprehension. The grant of consent plainly depended upon a careful balancing of many issues and the exercise of planning judgment on them, and I would have been diffident in the extreme in predicting what the outcome of the application would have been in the event that certain considerations required to be given far greater significance than had been understood in the process of making the extant decision. Such an exercise would – at least in the context of this case – require the deployment of knowledge and skills which the court does not possess.

[45] It is clear that many interested individuals, as well as the petitioners, entertain reasonable and serious concerns about the effect of the proposed development on the wildcat population at Clashindarroch. However, it has not been established that the

decisions made by the reporter and ultimately by the Ministers were attended by any error of law. In those circumstances there is no room for intervention by the court.

Conclusion

[46] For the reasons stated, I shall sustain the first pleas-in-law for the respondents and the interested party respectively, repel the petitioners' pleas, and dismiss the petition.