OUTER HOUSE, COURT OF SESSION

[2017] CSOH 113

P41/17

OPINION OF LORD BOYD OF DUNCANSBY

In the petition

WILDLAND LTD and THE WELBECK ESTATES

Petitioners

against

SCOTTISH MINISTERS

Respondents

Petitioners: Findlay, A Sutherland; Brodies
Respondents: Crawford QC, Barne; Scottish Government Legal Directorate

30 August 2017

[1] As part of its commitment to tackling climate change the Scottish Parliament passed the Climate Change (Scotland) Act 2009. That Act set out targets for reducing greenhouse gas emissions to an interim target of 42% by 2020 and an 80% target by 2050. One of the main ways of achieving these targets is the replacement of carbon emitting energy generation with renewable sourced energy. The Scottish Government has set a target of providing 30% of overall energy demand from renewable sources by 2020. A significant proportion of this will come from both offshore and onshore wind. However the development of wind power brings its own environmental challenges as turbines can have significant impacts on natural habitats, birds, landscape and scenic values. The resolution of

these conflicts can raise issues of fine judgement and generate significant controversy as the number of cases involving wind farms in this court can testify.

[2] This petition seeks to reduce a decision of the Scottish Ministers dated 17 October 2016, to grant consent under section 36 of the Electricity Act 1989 and deemed planning consent under section 57(2) of the Town & Country Planning (Scotland) Act 1997 for the Creag Riabhach Wind Farm on the Altnaharra Estate in Sutherland.

[3] The development comprises 22 wind turbines with a maximum tip height of 125 metres and a generating capacity in excess of 50MW. The site lies 6.5km southwest of Altnaharra and runs along the western side of Strath Vagastie. Ben Klibreck is approximately 4km east of the site and Ben Hee approximately 10km west.

Environmental Designations

[4] With the exception of the Wild Land Area referred to below the site is not subject to any environmental designations. However, there are a variety of designations within the immediate and wider surrounding area. Immediately west and south of the site is the "Cnoc an Alaskie" Site of Special Scientific Interest (SSSI). This forms part of the Caithness and Sutherland Peatlands – Special Area of Conservation (SAC), Special Protection Areas (SPA) and Ramsar Site. Ben Klibreck SSSI lies to the immediate east of the River Vagastie. To the north, north-west and west of the site there are three National Scenic Areas (NSAs) including Kyle of Tongue, North West Sutherland and Coigach & Assynt. There are two Special Landscape Areas (SLAs) located to the east including Ben Klibreck and Loch Choire SLA and Bens Griam and Loch Nan Clar SLA.

[5] At the time the application was submitted and prior to publication of the National Planning Framework 3 (NPF3) and Scottish Planning Policy 2014 (SPP 2014), both in June

2014, the proposed wind farm was situated between the Ben Hee Search Area of Wild Land (SAWL) to the west and the Ben Klibreck SAWL to the east. SPP 2014 incorporated into Scottish Planning Policy Scottish Natural Heritage's 2014 map of Wild Land Areas (the SNH Map). The SNH Map revised the geographic extent of the previous search areas. Following the introduction of the SNH Map, and at the time of the decision, the site of the wind farm was situated between Area 35 Ben Klibreck – Armine Forest (WLA 35) and Area 37 Foinaven – Ben Hee (WLA 37). Five of the turbines are within WLA 37. The distance from the centre of each of these turbine bases to the edge of the WLA ranges from 14 metres to 348 metres.

Relevant Policy

[6] NPF3 provides as follows:

> "3.23 Onshore wind will continue to make a significant contribution to diversification of energy supplies. We do not wish to see wind farm development in our National Parks and National Scenic Areas. Scottish Planning Policy sets out the required approach to spatial frameworks which will guide new wind energy development to appropriate locations, taking into account important features including wild land.
>
> 4.4 Scotland's landscapes are spectacular, contributing to our quality of life, our national identity and the visitor economy. Landscape quality is found across Scotland and all landscapes support place-making. National Scenic Areas and National Parks attract many visitors and reinforce our international image. We also want to continue ougr strong protection for our wildest landscapes – wild land is a nationally important asset."

[7] In 2002, SNH issued a policy statement entitled "Wildness in Scotland's Countryside". Attached to the statement was a map showing Search Areas for Wild Land (SAWLs). A description of the evolution of policy from then up to the adoption of SPP 2010 is set out in the Opinion of Lady Wise in *Glenmorie Wind Farm Ltd* v *Scottish Ministers* 2016 CSOH 34 at paragraphs 3 to 6. SPP 2014 included a new national policy on the issue of wild land with designated Wild Land Areas (WLA) which superseded SAWLs. SPP 2014

categorises WLAs as "Areas for significant protection" and "nationally important mapped environmental interest" (Table 1: Spatial Frameworks, p39). Paragraph 200 provides as follows:

> "Wild land character is displayed in some of Scotland's remoter upland, mountain and coastal areas, which are very sensitive to any form of intrusive human activity and have little or no capacity to accept new development. Plans should identify and safeguard the character or areas of wild land as identified on the 2014 SNH map of wild land area."

[8] Paragraph 215 provides as follows:

> "In areas of wild land (see paragraph 200), development may be appropriate in some circumstances. Further consideration will be required to demonstrate that any significant effects on the qualities of these areas can be substantially overcome by siting, design or other mitigation."

[9] The petition quotes the Planning Minister, Derek Mackay as commenting that SPP 2014 "strengthened the protection of wild land". The answers give a fuller comment from the Minister as follows: "We have taken steps to ensure that no wind farm developments can go ahead in our cherished National Parks and National Scenic Areas, and we have strengthened the protection of wild land, with new maps and inclusion directly in the SPP and NPF3."

[10] The local plan also includes relevant policies but these are not important for these purposes.

The decision-making process

[11] The application was made on 19 December 2013. In accordance with the Electricity Works (Environmental Impact Assessment)(Scotland) Regulations 2000 the applicant submitted an Environmental Statement (ES) analysing the effects of the proposed development. In accordance with their obligations under Schedule 8 to the Electricity Act

and the Electricity (Applications for Consent) Regulations 1990 Scottish Ministers required to notify the local planning authority, the Highland Council (THC) and consult with Scottish Natural Heritage (SNH) and the Scottish Environmental Protection Agency (SEPA). THC's Head of Planning and Building Standards submitted a report to the Council dated 4 August 2015. The report took into account *inter alia* the environmental statement and the views of SNH, noted below. Following consideration of the report THC decided not to object. Scottish Ministers decided that it was not necessary to hold a public local inquiry.

[12] Scottish Ministers received 707 public representations of which 210 were taken as objections to the development. The first petitioner was one of the objectors. Other significant objectors included the John Muir Trust and the Mountaineering Council of Scotland (now Mountaineering Scotland).

[13] SNH responded to the consultation by letter dated 14 March 2014. They objected to the development on the basis of the effect that it would have on wild land. In addition they gave advice on the landscape and visual impact of the proposal. In summary SNH concluded that the development would significantly detract from the distinctive character of the Sutherland landscape and people's experience of it; have a significant adverse effect on the "Distinctive Mountains" and "Extensive Views from Peaks and Summits' special qualities identified for the Ben Klibreck and Loch Choire SLA as well as raising three specific issues in respect of landscape character and three in respect of visual amenity.

[14] There was a further consultation following the adoption of SPP 2014 to which SNH responded by letter dated 14 April 2016. The objection on the basis of wild land was maintained.

The decision letter

[15] The decision letter records the details of the proposal, the application history and the decision not to hold a public local inquiry. Under environmental matters it records that Ministers are satisfied with the ES. This section concludes:

> "Ministers have fully considered the environmental impacts of the proposed development and have taken into consideration the environmental information, including the Environmental Statement, and representations from consultative bodies, including SNH, SEPA and Highland Council, and from third parties and conclude that any impacts which may remain are outweighed by the benefits the development will bring."

[16] The letter then sets out the main determining issues as follows:

> "• the impact of the proposed development on the environment, in particular wild land and other landscape and natural heritage interests:
>
> • the extent to which the proposed development accords with and is supported by Scottish Government policy:
>
> • the amount of renewable energy produced, its contribution to renewable energy targets and its carbon payback; and
>
> • the estimated net economic benefits of the proposed development."

The letter then sets out the policy context at some length before moving on to consider each of the determining issues.

[17] The decision letter deals first with the issue of wild land. It records that the SNH wild land maps were developed from a model based on the presence of five physical attributes and the perceptual responses they evoke as follows:

Physical Attributes	**Perceptual Responses**
A high degree of perceived naturalness in the setting, especially in its vegetation cover and wildlife, and in the natural processes affecting the land.	A sense of sanctuary and solitude.

The lack of modern artefacts or structures.	Risk, or for some visitors, a sense of awe or anxiety, depending on the individual's emotional response to the setting.
Little evidence of contemporary human uses of the land.	Perceptions that the landscape has arresting or inspiring qualities.
Landform which is rugged, or otherwise physically challenging.	Fulfilment from the physical challenge required to penetrate these places.
Remoteness and/or inaccessibility.	

The letter records the consultations undertaken, the location and applicant's view. It then sets out SNH's view at some length followed by that of THC. The site visits by officials and the relevant Minister are recorded. The Ministers' considerations in respect of wild land against the individual attributes set out above are recorded at some length. Ministers accept SNH's advice in respect of wild land but are mindful that only five of the turbines are within WLA 37 and "that significant impacts on the physical attributes of the wild land area will be limited in extent relative to the scale of the wild land areas." Consideration is given to whether in respect of the five turbines the significant effects can be substantially overcome by further re-design or re-siting of the turbines and which would then remove SNH's objection. Ministers conclude that the effects cannot be overcome by such measures. The letter notes that in granting consent Ministers recognise that in respect of these turbines situated in WLA 37 this runs contrary to the particular policies in SPP. They conclude on this issue that it is for Ministers to balance the benefits and the impacts of the development as a whole, in the context of different and competing policies.

[18] Under the heading "Landscape and Visual Impact – Impact on Residential Amenity and Tourism" the letter considers a number of particular viewpoints. They record THC's view that although climbers of the many hilltops in Sutherland are experiencing an increasing cumulative effect of onshore wind energy projects there is no evidence to suggest that the development would adversely impact on climbing or walking generally. They consider THC's view of the impact on the SLA and the qualities for which the area had been designated. The letter then records:

> "Although not the basis for their objection SNH advised in their response that there would, in their opinion, be an adverse effect on the appreciation of views from a number of popular mountain summits (including Ben Klibreck, Ben Hee, Beinn Sgiereach and Ben More Assynt). They consider that the proposal will introduce a prominent new feature into the wider landscape where the current focus is on expansive views."

The views of the Mountaineering Council for Scotland are also specifically recorded. This section concludes:

> "Ministers concur with Highland Council's appraisal that, although there will be an impact on (*sic*) from the development, many of the key viewpoints are largely protected or unaffected including large parts of the SLA. On balance, the development from a landscape and visual impact perspective is acceptable."

[19] The next section in the letter deals with the renewable energy produced and the contribution to targets and carbon payback. The letter records that Ministers are satisfied that the wind farm will make a significant contribution to reducing CO_2 emissions. Under net economic benefit the letter acknowledges that whilst it is difficult to precisely quantify overall net economic benefits Ministers are satisfied that the development has the potential for a substantial positive net economic benefit. They agree with THC that the investment opportunities are important to an area which is regarded as fragile, given the aging and declining population.

[20] The letter then sets out at length the conclusions in which Ministers reprise the foregoing issues. They note that Ministers have had to balance potentially conflicting policy aspirations when making a determination in this case. They note in particular the fact that five of the turbines lie within WLA 37 and the effects cannot be mitigated but conclude that the significant impacts on the physical attributes of the wild land area will be limited in their extent. They also take into account the contribution to renewable energy targets and net economic benefits. They conclude that in all the circumstances and in the context of competing policy considerations the balance of benefit is in favour of the grant of consent in this case.

The Issues

[21] The petitioners aver that Scottish Ministers failed to give proper adequate and intelligible reasons in two particular respects; first, in respect of the rejection of SNH's advice in respect of landscape and visual impact and secondly, in relation to the special protection to be afforded to areas of wild land and the circumstances in which development is acceptable.

[22] Counsel provided notes of argument and these were supplemented by oral submissions. Where necessary, I will refer to those in giving the reasons for my decision.

Preliminary Points

[23] It is important to remember the role of the court in determining these issues. In *The RSPB* v *Scottish Ministers* 2017 CSIH 31 Lord Carloway LP, giving the decision of the court quoted with approval the judgement of Lindblom J in *R(Prideaux)* v *Buckinghamshire County Council* [2013] Env LR 32 at para 130:

> "It is not the role of the court to test the ecological and planning judgement made in the course of … the decision making process. Assessing the nature extent and acceptability of the effects that a development will have on an environment is – apart from the limited scope for review on public law grounds – exclusively a task for the planning decision-maker."

Lord Reed in *Tesco Stores* v *Dundee City Council* 2012 SC 278 at paragraph 19 reinforces this point when he commented that development plans are often full of broad statements many of which are mutually irreconcilable so that in a particular case one must give way to another. Such matters, he said fall within the jurisdiction of planning authorities and their judgement can only be challenged on the ground that it is irrational or perverse.

Lack of reasons for rejecting SNH advice in respect of landscape and visual impact

[24] Mr Findlay submitted that the special position of SNH as the statutory adviser to Scottish Ministers, meant there was a particular obligation on Scottish Ministers to give "clear and cogent" reasons for rejecting their advice; *The RSPB* v *Scottish Ministers* 2017 CSIH 31 at paragraph 228 per Carloway LP. He expanded on that submission under reference to the following cases; *North Lanarkshire Council* v *Scottish Ministers* 2016 CSIH 69 at paragraphs 27 to 28; *South Bucks* v *Porter (No 2)* [2004] 1 WLR 1953 per Lord Brown at paragraph 36; *R (on the application of CPRE Kent)* v *Dover DC* [2016] EWCA Civ 936 per Laws LJ at paragraphs 18 to 23; *Karen Louise Oakley* v *South Cambridgeshire District Council* [2017] EWCA Civ 71 per Elias LJ at paragraphs 58 to 65 and Sales LJ at paragraphs 77 to 82.

Discussion

[25] The obligation of a decision maker to give reasons and the circumstances in which that obligation may arise is one which is now well established in administrative law. In *North Lanarkshire Council* v *Scottish Ministers* 2016 CSIH 69 at paragraphs 27 to 28

Lord Drummond Young examined the extent of that obligation in the planning context. He quoted the classic statement of the form of reasoning that is required; *Wordie Property Company* v *Secretary of State for Scotland* 1984 SLT 345 per Lord Emslie LP at 348 as follows:

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

While Lord Carloway in the *RSPB* v *Scottish Ministers* used the phrase "clear and cogent", I do not think that this was an attempt to reformulate that statement. Indeed Lord Carloway quotes the *dicta* of Lord Emslie with approval; paragraph 226. In considering the adequacy of reasons it is necessary to take into account the nature of the decision in question, the context in which it has been made, the purpose for which the reasons have been given and the context in which they are given. Nevertheless there has to be a sense of proportion and the court should not impose on decision makers a burden which is unreasonable; *North Lanarkshire Council* v *Scottish Ministers,* per Lord Drummond Young at paragraph 27, quoting Lord Reed in *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219. In *Moray Council* v *Scottish Ministers* 2006 SC 691 Lord Gill LJC said that the process does not require the decision maker to deal with every issue raised by the parties; he is entitled to confine himself to the determining issues; paragraph 30.

[26] When it comes to differing from advice given to the decision maker Lord Drummond Young said that where the reasons in issue deal with the planning authority's decision to reject the views of a reporter it can be expected that these views will be relatively detailed and they will explain clearly and in some detail why the authority differs from the reporter: *North Lanarkshire Council* v *Scottish Ministers,* at paragraph 27. So far as specialist advice is concerned Lord Carloway in *The RSPB* v *Scottish Ministers* (paragraph 228) said this:

> "A decision maker ought to afford the views of a statutory consultation body considerable weight (*R (Morge)* v *Hampshire County Council* [2011] 1 WLR 268, Lady Hale at para 45). He is, nevertheless, not bound by those views (*Sustainable Shetland* v *Scottish Ministers* 2015 SLT 95, Lord Carnwath at para 31). The obligation is to take them into account and, where the ultimate decision does not follow the advice, to give clear and cogent reasons for the advice not being followed (see eg *R (Akester)* v *Department for Environment, Food and Rural Affairs* [2010] Env LR 33 Owen J at para 112)."

[27] It is important to recognise the context in which these remarks are made. The statutory consultation bodies referred to were SNH and JNCC (Joint Nature Conservation Committee). The complaint was that the respondents had not followed their advice and not given "cogent and compelling" reasons for not doing so. The nature of the advice was to do with cumulative impacts on seabird species from collision with wind turbine blades. The advice was based on highly technical evidence in an area within the specific expertise of these bodies. Despite that background the Inner House held in the circumstances of that case that there was no breach of the obligation to give reasons. It may also be noted that the case of *R (Akester)* v *Department for Environment, Food and Rural Affairs*, referred to by Lord Carloway, similarly involved a technical assessment of the impact on threatened habitats and species in a Special Areas of Conservation (SAC).

[28] There is also a distinction to be drawn between cases where the decision-maker is disagreeing with a planning judgement made by a reporter or inspector and specialist advice on an issue which would form a material consideration. In the first case there may well have been evidence at a public local inquiry or written submissions which the reporter has required to weigh up and assess. The reporter will be assumed to have considered all the material considerations and the advice that is given to Ministers is a planning judgement based on the evidence. This point is well enunciated by Laing J, quoted by Laws LJ in *R (on the application of CPRE Kent)* v *Dover DC* [2016] EWCA Civ 936 at paragraph 19, albeit that

Laws LJ goes on to distinguish it in that case. Where Ministers wish to disagree with that advice, then it is incumbent upon them to give reasons why they reach a different conclusion. *North Lanarkshire Council* is an example of one such case where a reporter made a recommendation following on written submissions. The court held that the Scottish Ministers' decision letter did not meet the standard of intelligibility required for the overturning of the clear and reasoned recommendation of the reporter.

[29] Pulling these strands together it seems to me that when one comes to consider the obligation to give reasons for departing from the advice of a statutory consultee one has to look at the nature of the advice, the context in which it is given and the relationship with the determining issues. It is also necessary to have regard to the other evidence which may be before the decision maker. In *The RSPB* v *Scottish Ministers* the respondents had before them the appropriate assessment carried out by Marine Scotland Licensing Operations Team and Marine Science Scotland. Finally decision letters need to be read as a whole; *Save Britain's Heritage* v *Number 1 Poultry Limited* [1991] 1 WLR 153, per Lord Bridge of Harwich at 165.

[30] Turning to the facts of this case SNH gave advice on the impact of the development on wild land and also on landscape and visual impact. It dealt with those two issues in slightly different ways. Their position on wild land was framed as, and taken by Scottish Ministers as, an objection to the development. Scottish Ministers dealt with that in detail in their decision letter (see below). Having objected on the basis of wild land, SNH then went on to give advice on the environmental statement and on other landscape issues. That advice is in relatively short compass taking just over a page of A4.

[31] In the decision letter Ministers make specific reference to only one aspect of the advice as noted above. The question is whether, in not making specific reference to the other aspects of SNH's advice on this issue, Ministers failed to leave the informed reader,

and the court, in no real and substantial doubt as to what the reasons for the decision were and the material considerations which were taken into account in reaching it.

[32] In my opinion, looking at the letter as a whole it cannot be said that Scottish Ministers have failed to give proper, adequate and intelligible reasons for reaching their conclusion in respect of landscape and visual impact. It is dealt with over the 15th and 16th pages of the decision letter. Ministers say explicitly that they agree with the appraisal made by THC. That is contained in the report to the Council by the Head of Planning and Building Standards dated 4 August 2015. The report takes into account *inter alia* the environmental statement and the views of SNH. The appraisal itself starts at paragraph 8.27 and continues on for another 20 paragraphs. In contrast to the advice from SNH, it is detailed and comprehensive. Mr Findlay submitted that THC's appraisal did not conclude that the impacts were acceptable – that was the Ministers' conclusion. It is true that there is no specific conclusion to that effect but the tenor of the report, while acknowledging the impacts, particularly on the SLA, is that the effects are localised and limited. Individual impacts are clearly assessed and either put into a wider context or minimised. The recommendation was that THC should raise no objection.

[33] The appraisal deals with some of SNH's views in more detail. For example, SNH made reference to significant adverse effects on those travelling north along the A836. They said simply that the wind farm will be dominant where other modern features do not dominate the view. THC deal with that in paragraph 8.45. The report acknowledges that the impact will be significant. It goes on to consider the ES and the relevant viewpoints (VPs). It concludes that while the significance of the impact at VP1 and 17 is a subjective judgement, the diminishing effect of the impact of the development is evident.

[34] SNH also highlight adverse impacts on views from a number of popular mountain summits. It says that the proposal will introduce a prominent new feature into the wider landscape where the current focus is on expansive views. These summits, it says, attract walkers who want to experience these wild land qualities. THC deals with this in more detail at paragraph 8.46. It is only the impacts from VPs 6 and 7, Ben Klibreck and Ben Hee that are assessed as being major and the appraisal concludes that these views would only be experienced by relatively small numbers of physically fit walkers and climbers. The decision letter records both views, but it is clear that the Ministers prefer the assessment from THC, noting that Ben Klibreck is one of the remotest Munros with a relatively small number of dedicated walkers.

[35] Mr Findlay submitted that it was not open to Scottish Ministers to rely on THC's views over those of SNH pointing out that SNH was the statutory body charged with advising Ministers on such issues. It is of course true that SNH are the statutory advisers, but under section 2 of the Electricity Act 1989, the planning authority is given a special position in the decision-making process. If the planning authority objects, and that objection is not withdrawn, Scottish Ministers must cause a public inquiry to be held and consider the objection with the report of the person who held the inquiry. Thus, the fact that THC did not object, is a consideration for ministers in reaching their decision. The planning officer's report upon which the Council based their decision is also materially significant. Ministers are then entitled to look at the advice that they have received from both SNH and the planning authority along with the ES. While the assessment of landscape and visual impact has a technical component it does not require the level of technical expertise that was required in the assessment of impacts in *The RSPB* v *Scottish Ministers* or *R (Akester)* v *Department for Environment, Food and Rural Affairs.* There is a subjective element to the

appraisal. Ministers preferred the detailed assessment of THC and that is evident from the decision letter.

[36] In my opinion the fact that ministers have preferred the views and opinion of THC to those of SNH cannot be a matter of criticism, provided that ministers have given proper, adequate and intelligible reasons in reaching their decision. Given the relatively brief nature of the advice from SNH, the fact that their views were taken into account in THC's appraisal, the comprehensive nature of that appraisal and the clear and cogent terms of the decision letter I am not satisfied that there was in this case any obligation to separately set out reasons for not accepting the advice from SNH. Accordingly the petitioners have failed to establish this ground of review.

Wild land

[37] SNH objected to the development by letter dated 14 March 2014. That was before the adoption of the new SPP 2014. The objection was maintained in a letter of 14 April 2016 in much the same terms but relating to WLAs rather than SAWLs. The objection is in the following terms:

> "We maintain our objection to the Creag Riabhach windfarm due to the significant adverse effects on the qualities of the Ben Hee WLA (37) and Ben Klibreck WLA (35). In terms of SPP para 215 we advise that it has not been demonstrated that the significant effects on the Ben Hee WLA in which the proposal partially lies can be substantially overcome by sighting, design or other mitigation."

[38] That advice was specifically accepted by Scottish Ministers (page 13 of the decision letter). They nevertheless decided to grant permission.

[39] The petitioners submit that Scottish Ministers failed to recognise the extent to which SPP 2014 strengthened the protection of wild land and the weight that should be afforded to an objection by its statutory landscape adviser, SNH. Alternatively they submit that

Ministers left a material consideration out of account. Moreover, in purporting to balance the negative effect of the windfarm on wild land, they failed to distinguish the circumstances of this case from other cases. This is the first time that Scottish Ministers have granted permission for commercial scale wind turbines within wild land. The petitioners pointed to the decisions taken in respect of *Glen Morie*, *Limekiln*, *Allt Duine, Glencassley* and *Sallachy*. They submitted that there was a need for consistency in decision-making; *JJ Gallagher Ltd* v *The Secretary of State for Transport, Local Government and the Regions* [2002] 4 PLR 32 at paragraph 56 and 57. They submit that they have been unable to understand why in this case Scottish Ministers did not follow the advice of SNH and granted the application.

Discussion

[40] There has been an ongoing development in policy on wild land culminating in SPP 2014. It seems clear that the policy contained in SPP 2014 is more rigorous in the protection of wild land than previous policy. It is not, however, an absolute protection against any development.

[41] Whether or not a policy is "strengthened" or weakened by the adoption of a new policy may, of course, be of interest in helping to understand its application. However, the issue for the court is not a qualitative assessment of present against historic policies but whether or not the decision-maker has applied the policy in force at the time.

[42] Mr Findlay submits that the decision is inconsistent with decisions on other applications for wind farm developments. He relied on the judgment of Deputy Judge Bartlett QC in *JJ Gallagher Ltd* v *Secretary of State for Local Government Transport and the Regions*. However, that case is very different to the situation here. In *JJ Gallagher*, the

claimant relied on an inconsistency between the decision under review and an earlier decision. The Deputy Judge accepted that there was an inconsistency which was not explained as there was no mention of it in the decision letter. The application under review was for a non-food retail park on a 10ha site. The earlier decision, which was said to be inconsistent, was for class A1 retail development on 3.94ha of the same site.

[43] In my opinion, while the Deputy Judge's decision may be correct I disagree with his reasoning. The issue was not whether the decision was inconsistent with another decision but whether the respondent had left out of account, a material consideration, namely the previous decision. In that case, there was no evidence to show that the decision-maker had regard to the earlier decision, even although it involved part of the same site and the planning inspector had apparently mentioned the decision no less than 33 times in his report.

[44] In this case, in my view, the issue is not whether there is an inconsistency or not, but whether or not the other decisions were material considerations for Scottish Ministers to take into account when reaching their decision in this case. Apart from pointing out that the earlier decisions were refusals and that this was the first one where permission had been granted, where there had been considerations of wild land, the petitioners have not put forward any particular reason for suggesting that these decisions were material considerations in this case. The earlier decisions all relate to windfarms and, without reading each in detail, it appears that the issue of wild land is one of the determining issues. However, the developments are of different sizes, in different locations, each with their own location specific issues and environmental statements. The impact on wild land will differ one from the other and the potential benefits of the developments will also no doubt differ. It is not for the court to make assessments as to why decisions on individual applications

might reach different results. These are planning judgements for ministers on the facts of each case applying the policy in force at the time.

[45] Mr Findlay submitted that his clients were left in significant doubt as to the reasons why this application gained consent from the Scottish Ministers and in what circumstances consent may be granted in future on wild land areas. I cannot accept that submission. The reasons for granting permission are set out at length in the decision letter. Ministers acknowledged the conflict with wild land policy, limited as it was, and struck a balance with other competing policies. In doing so they appraised the negative impacts against the benefits they perceived flowing from the development. Having gone through that process, Ministers reached a planning judgement taking into account all material considerations. In my opinion, there is no error of law either in the way in which they reached their decision or expressing their reasons for it. In short the petitioners' position appears to be that no windfarm development whatsoever should be allowed on designated wild land areas. That may be, but that is a political decision and not one for the courts.

Decision

[46] For the foregoing reasons I shall sustain the respondents' pleas in law, repel the petitioners' and refuse the petition. I shall reserve the question of expenses.