OUTER HOUSE, COURT OF SESSION

[2015] CSOH 163

P843/14

OPINION OF LORD JONES

In the Petition

THE JOHN MUIR TRUST

Petitioner;

for

Judicial Review of a Decision of the Scottish Ministers dated 6th June, 2014 to grant consent under Section 36 of the Electricity Act 1989 to Scottish & Southern Energy Renewables for the erection of 67 wind turbines at Stronelairg, Garrogie Estate, Whitebridge, Fort Augustus together with deemed planning permission under Section 57(2) of the Town and Country Planning (Scotland) Act 1997

Petitioner: Sir Crispin Agnew of Lochnaw Bt. QC; Cameron, advocate; Drummond Miller LLP
Respondents: Mure QC; Byrne; Scottish Government Legal Directorate
Interested Parties: Wilson QC; Gill; CMS Cameron McKenna LLP

4 December 2015

Introduction

[1] The petitioner ("the trust") describes itself as an environmental charity. One of its principal objectives is "… to conserve and protect wild places with indigenous animals, plants and soils for the benefit of present and future generations". The respondents are the Scottish Ministers ("the Ministers"), one of whose departments is the Energy Consents and

Deployment Unit ("ECDU"). SSE Generation Limited ("SSEG") and SSE Renewables Developments (UK) Limited ("SSER") have joined the proceedings as interested parties.

[2] On 29 June 2012, SSEG applied for consent under section 36 of the Electricity Act 1989 for the construction and operation of an 83 turbine wind powered electricity generating station at Stronelairg, Garrogie Estate, Whitebridge, Fort Augustus. SSER has acted as development agent for SSEG and has managed the environmental impact assessment and decision-making processes on behalf of SSEG. SSEG and SSER are referred to interchangeably in this opinion as "the developers". On 6 June 2014, the Ministers granted consent for the construction of 67 turbines, together with deemed planning permission under section 57(2) of the Town and Country Planning (Scotland) Act 1997 ("the consent"). In these proceedings, the trust seeks reduction of the consent.

[3] In their decision letter of 6 June 2014, the Ministers intimated that they had determined not to hold a public local inquiry. Under the heading "*Consideration of a Public Local Inquiry (PLI)*", they stated that they had taken into account a total of 96 objections "and all material considerations". (Number 6/1 of process) They expressed the view that there were no significant issues which had not been adequately considered "in the application, Environmental Statement and Supplementary Environmental Information, consultation responses and third-party representations and that they have" sufficient information to be able to make an informed decision on the Application without the need for a PLI."

[4] The consent is challenged on the grounds, put shortly, that:

1. the Ministers acted unlawfully and/or unreasonably in granting the consent without the supplementary environmental information ("SEI"), referred to in the decision letter, being advertised and/or being consulted on;

2. the Ministers acted unlawfully and/or unreasonably in granting the consent, notwithstanding Scottish Natural Heritage's ("SNH") objection in principle to the windfarm on the ground of its impact on wild land, and failed to give adequate reasons for not following SNH's advice; and

3. the reasons for their consent which were given in the decision letter are inadequate.

The location of the proposed windfarm

[5] The site of the proposed windfarm lies to the east of the Glendoe reservoir in the Monadhliath Mountains, within an area of land bounded by the A9 and A82 roads. The area was designated by SNH on 25 April 2013 as a core area of wild land ("CAWL"), having been designated as a search area for wild land ("SAWL") in 2002. (Numbers 6/41 and 6/45 of process) SNH rates "wildness" from low to high, and, according to the trust, the site was rated high. (Number 6/13 of process) As a result of the consent, the wild land designation was removed from the area. (Number 6/42 of process)

Key events

[6] By email, dated 9 July 2012, the Energy Division of the Scottish Government's Energy and Climate Change Directorate requested SNH's advice on the Stronelairg windfarm application. SNH responded by letter, dated 18 September 2012, which ran to 15 pages of text. In summary, its advice was that the proposed development would cause significant adverse effects on the Monadhliath SAWL "such that the SAWL would no longer be considered wild land." For that reason, SNH objected in principle to the siting of a

windfarm in that location "as it raises natural heritage issues of national interest." (Number 6/5 of process)

[7] Following email correspondence between the ECDU and SNH in November 2012, SNH provided further landscape advice in respect of the proposed development, by letter dated 7 December 2012. That advice concerned the Cairngorms National Park and was to the effect that the proposed development would result in landscape, visual and cumulative impacts around parts of the south western boundary of the national park. SNH reiterated its objection in principle to the proposed development. (Number 6/6 of process)

[8] On 24 January 2013, The Highland Council ("THC") wrote to the developers, noting that THC had had a number of meetings with them over the preceding few weeks, during which THC asked for "a range of amendments" to be made to the scheme. (Number 7/12 of process) Appended to the letter was a table, outlining the revisions that THC had requested and asking the developers to confirm that they were minded to accept these changes. By letter, dated 25 January 2013, the developers did so. (Number 7/13 of process)

[9] On 6 February 2013, THC's head of planning and building standards signed off a 62 page report to the council's South Planning Applications Committee ("SPAC"), which was due to meet on 19 February. The report recommended that THC should raise no objection to the proposed development, subject to a number of amendments, and suggested that conditions be submitted to the Scottish Government for its consideration. (Number 6/7 of process, "the THC report") I say more about the content of the report later in this opinion. On 18 February, the trust lodged with THC a document entitled "Critique for Members' Consideration", in which it expressed its strong opposition to the proposed development and its reasons for that opposition. (Number 6/9 of process).

[10] By letter, dated 2 May 2013, THC advised the Scottish Government that, at its meeting on 19 February 2013, the SPAC decided to defer determination of the application, pending a site visit. (Number 11/3 of process) The site visit took place on 8 April 2013, and the application was considered at a special meeting of the SPAC later that day. The decision of the meeting was to agree with the recommendations in the report, subject to minor amendments and additional conditions. (Number 11/3 of process)

[11] On 7 June 2013, the Scottish Government wrote to West Coast Energy Ltd, intimating refusal of consent and deemed planning permission by them for the construction and operation of a proposed electricity generating station at Dunbeath Estate, Caithness, following a public inquiry which was held in July 2011. (Number 6/32 of process)

[12] In a document entitled "Core Areas of Wild Land 2013 Map Scottish Natural Heritage's Advice to Government – March 2014", SNH advised, among other things, that a new map, entitled "Wild Land Areas 2014", should replace the CAWL 2013 map. (Number 6/48 of process) SNH proposed that the term "Wild Land Areas" should replace the name "Core Areas of Wild Land", explaining that the latter had caused confusion. A "key conclusion" of the advice was that the map of wild land areas should be considered a useful and important strategic tool in decision-making. SNH advised that the application of the map would be enhanced by two further pieces of work that would be developed during 2014 and 2015. In Annex C to the advice, entitled "Key issues noted for identified wild land areas", the description of area 17, "Monadhliath", included the proposed development site. The wild land areas map was published on 15 April 2014, and was sent to the Scottish Government on 19 May 2014, together with SNH's advice. (Numbers 6/49 and 6/54 of process)

[13] On 8 May 2014, a 227 page report to the Ministers was issued by a reporter appointed by them, in respect of a proposed 43 turbine windfarm development at Glenmorie. (Number 6/33 of process) The reporter concluded, among other things, that the proposed development "would have a significant and adverse impact on wild land to the west of the proposed site, currently identified as a Search Area for Wild Land." (Paragraph 7.36) She recommended that consent under section 36 of the Electricity Act 1989 should be refused.

[14] In a report, dated 16 May 2014, addressed to the Minister for Enterprise, Energy and Tourism, the ECDU recommended that the Ministers should grant consent for the construction of 67 turbines at Stronelairg, subject to mitigation conditions being imposed. (Number 6/2 of process) As we have seen, such consent was given by decision letter, dated 6 June 2014. As a consequence, a revised wild land areas map was produced on 11 June 2014, and revised SNH advice to government was issued on 16 June 2014, both showing the removal of the proposed development site's wild land area designation.

The statutory scheme

[15] The trust contends that, in the decision-making process, the Ministers breached certain provisions of The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 ("the EIA regulations" or the "Scottish regulations", depending on the context). It is convenient to say something about these regulations now.

[16] There was general agreement among the parties that the EIA regulations fall to be construed sympathetically with the Environmental Impact Assessment Directive 2011/92/EU ("the EIA directive"). Recital 7 of the preamble to the directive declares that development consent for public projects which are likely to have significant effects on the environment

should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. The assessment should be conducted on the basis of appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question. The view is expressed that effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. (Recital 16) Participation by, among others, non-governmental organisations promoting environmental protection should be fostered. (Recital 17)

[17] Article 6(4) provides that "the public concerned" shall be given early and effective opportunities to participate in environmental decision-making procedures and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority before the decision on the request for development consent is taken. The "public concerned" is defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in article 2(2). For the purposes of that definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. (Article 2(e)) Article 8 provides, among other things, that the information gathered pursuant to article 6 "shall be taken into consideration in the development consent procedure".

[18] Paragraph 1 of article 11 requires member states to ensure that, in accordance with the relevant national legal system, members of the public concerned (a) having a sufficient

interest, or alternatively (b) maintaining the impairment of a right where administrative procedural law of a member state requires this as a precondition, have access to a review procedure before a court of law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the directive. The interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purposes of article 11(1)(a). The trust is such a body.

[19] Turning to the EIA regulations, regulation 4(1) requires an applicant for a section 36 consent "which relates to EIA development" to submit an environmental statement which includes certain information as specified in schedule 4. An applicant may, on his own initiative, provide information to supplement the environmental statement. Such information becomes part of the environmental statement. (Regulation 2(1)) Regulation 13 empowers the Ministers to require the applicant to provide "such further information as may be specified concerning any matter which is required to be, or may be, dealt with in the environmental statement." Such further information provided to the Ministers becomes part of the environmental statement. (Regulation 2(1)) Regulation 4(2) prohibits the Ministers from granting a section 36 consent which relates to EIA development unless: (a) they are satisfied that the applicant has complied with his obligations under paragraph (1); (b) they have taken into consideration "the environmental information"; and (c) the procedures laid down in certain specified regulations, including regulation 14A, have been followed in so far as they are applicable. The term "environmental information" is defined to mean the sum of (a) the environmental statement prepared pursuant to regulation 4 (which will include any supplementary information supplied by the applicant on his own initiative and any further information that the Ministers may require to be provided), together with (b) "additional

information", and (c) any representations made by any consultative body or any other person about the likely environmental effects of the proposed development. Regulation 2 provides, again so far as is relevant to this case, that "additional information" means "substantive information relating to the environmental statement" which is provided by the applicant or a consultative body to the Ministers, after the date of receipt by them of the environmental statement, and is not information falling within paragraphs (b) or (c) of the definition of "environmental statement". Information falling within these paragraphs is information coming to the Ministers from the applicant, which the applicant provides (i) on his own initiative to supplement information already provided pursuant to regulation 4 or (ii) pursuant to a requirement made by the Ministers. "Consultative bodies" is defined to include the planning authority for the area where the land is situated, in this case THC.

[20] Regulation 14A provides that, where additional information is made available to the Ministers, they shall, among other things, serve a copy of the additional information on the relevant planning authority and notify the applicant that that has been done. (Regulation 14A(1)) On the first occasion on which the applicant is notified of the service of additional information, the applicant shall, among other things, publish a notice in the Edinburgh Gazette and one or more local newspapers, stating, among other things, that requests for copies of the additional information may be sent to the Ministers and that any person may make representations to the Ministers in relation to the additional information, by a specified date. (Regulation 14A(2), (3) and (4)) The Ministers are prohibited from determining the application until the later of two specified dates, both of which fall after publication of the notice. (Regulation 14A(6))

[21] The provisions of the EIA regulations which are relevant to this case may be summarised as follows. An applicant for a section 36 consent which relates to EIA

development must submit an environmental statement. The applicant may, on his own initiative, provide information to supplement the environmental statement. That information becomes part of the environmental statement. The Ministers may require the applicant to provide "further information", which becomes part of the environmental statement. The applicant or a consultative body may provide "additional information" to the Ministers. "Additional information" is "substantive information relating to the environmental statement", other than information provided by the applicant on his own initiative to supplement the environmental statement or any further information submitted by the applicant pursuant to a requirement by the Ministers. "Additional information" must be publicised, and an opportunity given to any person to make representations in relation to it. The Ministers must not grant consent unless they have taken into consideration the environment statement, additional information and any representations made by any consultative body or any other person about the likely environmental effects of the proposed development. They must not grant consent unless the procedures laid down in regulation 14A, concerning publication in relation to additional information, have been followed.

Submissions for the trust: ground of challenge a

[22] The action came before the court for a hearing on 11, 12 and 13 February 2015. Sir Crispin Agnew of Lochnaw Bt. QC, who appeared for the trust, opened his submissions by looking at some of the key events which are set out above, and then invited consideration of relevant policy documents. In the Scottish Government's "National Planning Framework for Scotland 2" ("NPF2"), under the heading "Landscape and Cultural Heritage", at paragraph 97, Scotland's landscapes are described as "a national asset of the highest value".

(Number 6/14 of process) It is noted that areas considered of national significance on the basis of their outstanding scenic interest are designated as National Scenic Areas. At paragraph 99, the view is expressed that some of Scotland's remote mountain and coastal areas possess "an elemental quality from which many people derive psychological and spiritual benefits." The authors comment: "Such areas are very sensitive to any form of development or intrusive human activity and great care should be taken to safeguard that wild land character."

[23] In a publication, dated February 2010, entitled "Scottish Planning Policy" ("SPP"), which describes itself as "the statement of the Scottish Government's policy on nationally important land use planning matters", the following text appears at paragraphs 125 and 128:

> "125. Scotland's landscape and natural heritage are internationally renowned and important, underpinning significant industries such as the food, drink and tourism industries, and are a key component of the high environmental quality which makes Scotland an attractive place in which to live, do business and invest. Improving the natural environment and the sustainable use and enjoyment of it is one of the Government's national outcomes. Planning authorities should therefore support opportunities for enjoyment and understanding of the natural heritage.
>
> …
>
> 128. The most sensitive landscapes may have little or no capacity to accept new development. Areas of wild land character in some of Scotland's remoter upland, mountain and coastal areas are very sensitive to any form of development or intrusive human activity and planning authorities should safeguard the character of these areas in the development plan." (Number 6/15 of process)

[24] Counsel next invited attention to the consultation document "Main Issues Report and Draft Framework" of the third National Planning Framework ("NPF3"), which was published by the Scottish Government in April 2013. (Number 11/29 of process) At page 13 of that document, under the heading "Onshore wind", reference is made at paragraph 2.18

to a map which is described as showing "our finest and most iconic landscapes - National Parks and National Scenic Areas." The text continues: "The draft Scottish Planning Policy makes clear that the Scottish Government does not wish to see new windfarms in these areas. In addition to our nationally important, most scenic, landscapes, we also want to continue our strong protection for our wildest landscapes." Paragraphs 2.19, 2.20 and 2.21 read as follows:

> "2.19 Scottish Natural Heritage has for many years advised planning authorities and developers on the landscape and natural heritage issues to be considered when planning for new windfarm development. In keeping with Scottish Planning Policy, it has consistently advised against windfarm development which would adversely affect the character of our wildest landscapes. Its map of 'search areas for wild land' (SAWLs) developed in 2002, has informed this advice.
>
> 2.20 SNH has been updating its wild land mapping using modern GIS tools to provide a more objective approach to understanding wild land. Based on a number of attributes like naturalness of the land cover, ruggedness, remoteness from roads and the visible lack of modern man-made structures, SNH has published an updated map showing the 'core' areas of wild land in Scotland.
>
> 2.21 Ministers do not intend to legislate for new environment designations in Scotland, and core areas of wild land would not be designated under statute. However, we think the SNH mapping can inform future planning for windfarm development."

[25] These passages are followed by the question: "How can we provide better spatial guidance for onshore wind?" The authors explain that Scottish planning policy already safeguards areas of wild land character, and the consultees are asked: "Do you agree with the Scottish Government's proposal that we use the SNH mapping work to identify more clearly those areas which need to be protected?"

[26] Counsel submitted that, seen in the context of the Scottish Government's policy, the decision-making process in this case was unfair. In October 2013, the Scottish Government

asked SNH to advise on the CAWL 2013 map and, in particular, on whether it effectively identified wild land and whether it was fit for the purpose of supporting the policy intentions set out in the draft SPP and NPF3. SNH provided that advice to the government on 19 May 2014. It explained that, in preparing its advice, it had undertaken a significant consultation process about the SAWL map, which it presented to the government on that date. It expressed the view that the general approach and method applied to produce the CAWL 2013 map was valid, and provided a sound basis for identifying areas of wild land considered important in the national context at a strategic level and that the robustness of its work, and confidence in the map and any potential policy application, had been strengthened by further refining aspects of the approach in using up-to-date and new data to reflect the current position in 2014.

[27] On receipt of that advice, said counsel, the Ministers became aware that the proposed windfarm lay within what SNH had identified as a wild land area. They already knew from SNH's letter of 18 September 2012 that its advice was that there would be "significant adverse effects on the Monadhliath… SAWL such that the SAWL would no longer be considered wild land", should the development take place. That loss "would affect the wider landscape character of the Monadhliaths". The Ministers were informed that SNH objected "to the principle of the windfarm in this location as it raises natural heritage issues of national interest." (Number 6/5 of process) In its Main Issues Report, the Scottish Government had declared that Scottish planning policy already safeguarded areas of wild land character. The Ministers would know that the NPF3 and SPP, which were issued on 23 June 2014, contained what counsel described as "stronger advice" on wild land. In NPF3, for example, the government declared: "We also want to continue our strong protection for

our wildest landscapes – wild land is a nationally important asset." The SPP contained the following declaration:

> "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 of areas of wild land as identified on the 2014 SNH map of wild land areas."

[28] In these circumstances, contended counsel, the Ministers acted unfairly. He argued that the new documents that came out in June 2014 gave "stronger protection" to the wild land. They took that into account and "rushed ahead" to issue their decision before the new map came out. The general public, including the trust, were not aware of the new policy. Had the Ministers taken their decision after the new map was published, the area containing the proposed windfarm would have been protected from development. The decision having been taken before publication, the area of the proposed windfarm was removed from the map at the request of the Ministers. (Numbers 6/17 6/42, 6/43 and 6/55 of process) That was "sharp practice" on their part.

[29] Looking at numbers 6/5 and 6/6 of process, counsel noted the precise terms in which SNH had expressed its objection in principle to the proposed development. He contended that the ECDU's advice, dated 16 May 2014, to the responsible minister did not accurately reflect SNH's objection "and accordingly the Ministers were misled as to SNH's objection and, therefore, failed to take account of a material factor." (Number 6/2 of process)

Ground of challenge a(i) - Failure to advertise and consult on SEI

The Ministers state that regard was had to SEI in the decision letter and now deny having regard to SEI

[30] Sir Crispin next addressed his first main ground of challenge. As is noted earlier in this opinion, in their decision letter the Ministers stated that they had taken into account, among other things, "Supplementary Environmental Information". (Number 6/1 of process) Counsel submitted that the consent should be reduced, because the SEI had neither been advertised nor consulted on. Counsel noted that the Ministers have since explained that there was no SEI. They say that the decision letter was based on a template which contains a reference to SEI as standard. The reference should have been deleted. Counsel submitted that the Ministers are not entitled now to deny the existence of SEI.

[31] If the Ministers are entitled to say that they did not take SEI into account, argued Sir Crispin, "then that amounts to an error of fact appearing on the face of the decision letter and that amounts to an error of law, sufficient for reduction of the decision." In support of that submission, Sir Crispin referred to two authorities, the first being *E* v *The Secretary of State for the Home Department* [2004] QB 1044 (*E*), in which an issue to be resolved concerned the powers of the Immigration Appeal Tribunal ("IAT") and the Court of Appeal to review a determination of the IAT, where an important part of its reasoning was based on ignorance of or mistake as to the facts. Counsel relied, in particular, on a passage in the judgment of the court, delivered by Carnwath LJ, at paragraph 64, in which his Lordship expressed the opinion that a planning authority has a public interest in ensuring that development control is carried out on the correct factual basis. At paragraph 66 of the judgment, his Lordship said that the time had now come "to accept that a mistake of fact giving rise to unfairness is

a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result."

[32] The second authority relied on by the trust was *ML (Nigeria)* v *The Secretary of State for the Home Department* [2013] EWCA 844 Civ (*ML*). In that case, an appeal from the Upper Tribunal (Immigration and Asylum Chamber), the question that arose was as to what the approach, either of the Upper Tribunal or the Court of Appeal, should be to a case "where there (have) been substantial errors in the recollection and record of the facts that were advanced in the case, and of the procedures and processes by which arguments were advanced in favour of the asylum-seeker." The judgment of the court was delivered by Moses LJ who said, at paragraph 13, that a series of material factual errors can constitute an error of law, "if they are significant to the conclusion". Counsel relied, particularly, on his Lordship's view that "to take into account that which did not exist, for example a written skeleton argument [which had been done by the immigration judge in that case], again is plainly an error of law." In this case, argued Sir Crispin, the Ministers took into account "supplementary environmental information which we are now told did not exist. So that comes in as an error of law." Counsel went on to note that the Court of Appeal regarded the "essential question" as being whether the appellant had the fair hearing to which she was entitled before adverse findings on credibility could be made. If, contrary to counsel's submissions, the Ministers are now entitled to say that they did not take into account SEI, "then that amounts to an error of fact appearing on the face of the decision letter and this amounts to an error of law sufficient for reduction of the decision."

Ground of challenge a(ii)

In any event, THC's decision requiring changes to the layout was in itself "SEI"

[33] Counsel submitted that THC's "non-objection to the application contingent on the removal of 16 turbines, the repositioning of two anemometer masts, the reduction in height of 10 turbines and the repositioning and lowering of a further turbine was new or supplementary environmental information" that needed to be advertised in terms of the EIA regulations. Alternatively, the change to the layout, including its impact on energy production and economic benefits, was so material that the Ministers ought to have re-advertised and consulted on it. In support of these contentions, Sir Crispin advanced detailed submissions on the terms of the EIA regulations and the EIA directive, about which I say more, later in this opinion.

Ground of challenge a(iii)

The significant changes to both the size and design of the development and in consequence the significant reduction in energy and economic benefits required further SEI

[34] Sir Crispin submitted that, given what he described as "the significant changes" to both the size and design of the development and, in consequence, "the significant reduction in energy and economic benefits" that resulted from accepting THC's proposed changes, the Ministers ought to have called for SEI. That was particularly so, because SNH had commented that the landscape and visual impact assessments ("LVIA"), which had been produced by the developers as part of the environmental statement, were of poor quality. They ought to have required further information, such as new LVIA, under regulation 13 of the EIA regulations, and a re-assessment of the energy and economic benefits.

[35] The amended scheme amounted to a reduction of about 23 percent of the original proposal. No new LVIA of the amended scheme were made available to the public or advertised. No "wirelines" as used by landscape professionals were produced. Without these tools, no rational assessment of the landscape and visual impact of the amended scheme could be made. The court has, and the Ministers had, no idea of what the consequences were for what is described in the decision letter as the energy and economic benefits. The Ministers could not, therefore, assess whether these benefits would outweigh the safeguarding of wild land, if it was open to the Ministers to overturn the wild land policy. In support of these submissions, counsel cited: *Bernard Wheatcroft Ltd* v *Secretary of State for the Environment* (1982) 43 P & CR 233 (*Wheatcroft*); *Breckland District Council* v *Secretary of State for the Environment* (1993) 65 P & CR 34; *Walker* v *Aberdeen City Council* 1997 SCLR 425; *R (on the application of Baker)* v *Bath & North East Somerset Council* [2009] Env LR 27; *R (Baker)* v *Bromley London Borough Council* [2007] 1 AC 470; and *Forbes* v *Aberdeenshire Council* [2010] CSOH 1.

Submissions for the Ministers: ground of challenge a

[36] In response to the trust's submissions on the "additional information" point, it was submitted on behalf of the Ministers that the EIA regulations are not intended to be a legal obstacle course, and should be interpreted as a whole and in a common sense way. Reference was made to *R (on the application of Blewett)* v *Derbyshire CC* [2004] Env LR 29 (*Blewett*) *per* Sullivan J at paragraphs 41 and 42. Further, judgments such as whether the EIA legislation applies, whether the environmental assessment is sufficient, or whether an altered proposal is covered by an existing environmental assessment, are matters for the relevant authority, and not for the reviewing court. Such judgments are subject only to

Wednesbury review. In that regard, counsel relied on *R* v *Rochdale MBC ex parte Milne* (2001) 81 P&CR 27 (*Rochdale*) *per* Sullivan J at paragraphs 97 to 110; *R (Loader)* v *Secretary of State for Communities and Local Government* [2013] PTSR 406 (CA); and *R (on the application of Evans*) v *Secretary of State for Communities and Local Government and others* [2013] JPL 1027 (CA) (*Evans*).

Ground of challenge a(i) - Failure to advertise and consult on SEI

The Ministers state that regard was had to SEI in the decision letter and now deny having regard to SEI

[37] Mr Mure submitted that, as explained more fully in the affidavit of Mr Coote, head of the ECDU and the author of the decision letter, the two references to "Supplementary Environmental Information" in the decision letter were made in error. (Number 11/13 of process) The Ministers did not require or receive any "further information" nor did they receive "additional information". In any event, the trust does not identify the content of any SEI, nor explain why the developers would require to publicise it. On the trust's approach, this challenge lacks any practical purpose. Mr Mure invited the court to conclude that to reduce the decision on the basis of an erroneous reference to SEI, which the trust fails to identify, which did not exist, and upon which no reliance could, therefore, have been placed, would serve no practical purpose. In support of that contention, counsel referred to *Conway* v *Secretary of State for Scotland* 1996 SLT 689 at 690F. The court should, therefore, refuse to reduce the decision on that basis. Contrary to the authorities relied on by the trust, in the present case any error could not and did not contribute to the reasoning of the decision, or form a material part of it. The trust has failed to establish any unfairness to it in these circumstances.

Ground of challenge a(ii)

In any event, THC's decision requiring changes to the layout was in itself "SEI"

[38] Counsel submitted that THC's representations recommended deletions from the proposed development, and reductions in its environmental impacts. In the proper exercise of their planning judgment, so ran the argument, the Ministers reasonably considered that the proposal as so amended would not entail environmental impacts not already addressed by the various relevant elements of the developers' environmental statement and appendices. They reasonably considered that the representations were not "additional information" within the definition of "environmental information". Mr Mure quoted from the third last paragraph on page 2 of the decision letter which is in the following terms:

> "Ministers are of the view that a reduced development of this specification is still covered by the environmental information considered with this Application, and that the reduction of the development would not result in any new or unconsidered issues and in particular would not give rise to any environmental impacts other than those already identified."

[39] Mr Mure contended that the decision letter clearly recognises that the amendments give rise to the reduction and mitigation of visual and landscape impacts. The decision letter contains this passage: "Ministers however consider that further mitigation measures – as sought by THC – can and should be taken which reduce the visual and landscape impacts of the development…" Furthermore, he argued, considering the impact on wild land, the author of the decision letter addresses the proposed amendments in the following terms:

> "… Ministers have taken into account the fact that the development will be significantly shielded from surrounding land by topography, sitting as it does in a natural hollow surrounded by high ground. Ministers therefore consider that the development is well designed to minimize the impact on the surrounding areas of wild land, and the changes requested by The Highland Council are designed to further ensure that the windfarm is well contained within the bowl shaped landform

> surrounding the site and will therefore result in a reduction in the overall prominence and visibility of the turbines."

[40] In any event, argued counsel, the court should refuse to provide the trust with a remedy in relation to this challenge because the trust (a) has failed to identify what plausible further environmental impact the changes would cause; (b) has failed to identify any prejudice to the trust; (c) had, or could have obtained, access to the report to the SPAC and the documents referred to therein; and (d) would have known from the notes to the meeting of the SPAC the mitigation measures that were proposed, and failed to take the opportunity to make any representations on any matter of substance relating to the environmental impact of the proposed changes.

[41] The trust's earlier petition for judicial review, which is number 6/4 of process, demonstrates that the trust was aware in the summer of 2013 of the representations made to the Ministers by THC and of the committee minutes lodged with the petition. The letter from THC, dated 2 May 2013, was made available to the public on THC's website from 2 May 2013. Those 11 documents and the responses from SEPA and SNH were further made available to the public under and in terms of The Environmental Information (Scotland) Regulations 2004 (SSI 2004 No. 520). Despite the availability of all this environmental information, the trust makes no averments of further representations made by it to the Ministers. In any event, submitted Mr Mure, the trust had sight of the report to THC's SPAC, dated 6 February 2013 (which refers by name to relevant background papers) and provided comments to the council on two occasions. Counsel referred to numbers 6/9 and 6/10 of process.

Ground of challenge a(iii)

The significant changes to both the size and design of the development and in consequence the significant reduction in energy and economic benefits required further SEI

[42] Mr Mure summarised this ground as a contention that, in light of the amendments to the development arising from THC's representations, the project had "altered substantially" and that therefore "supplementary environmental information" was required. The question whether the development was substantially altered is a question of fact for the planning judgment of the respondent. The respondent was entitled to conclude that the amendments did not require the applicant to provide "further information" in terms of regulation 13 of the EIA regulations. The only type of information mentioned by the trust, as information which the Ministers should have required, is "new LVIA". For the reasons already outlined, and as explained in the decision letter, the Ministers reasonably judged that the landscape and visual impacts of the amended scheme fell within the impacts described in the environmental statement and its relevant technical appendices, including: the planning statement, dated June 2012, which accompanied the environmental statement; paragraphs 8 and 9 of the environmental statement, volume 1, non-technical summary; the environmental statement at volume 2, chapters 8 and 9; assorted figures, wirelines and photomontages at volumes 3 and 3A of the environmental statement; and technical appendices in volume 4 of the environmental statement, including (i) Appendix 4.1 (Design Statement), Appendix 8.1 (Wild Land Assessment), Appendix 8.2 (Cumulative Landscape Impact Tables), Appendix 9.1 (Visual Impact Tables) and Appendix 9.2 (Cumulative Visual Impact Tables). The public, including the trust, was properly informed of the environmental statement, and had every opportunity to make representations – as the trust did. The original application, to which SNH and the trust (among others) objected in principle, was amended by the

deletion of various turbines, and the reduction in the height of others, but did not change in character or substance. In *Wheatcroft*, Forbes J explained, at page 241:-

> "The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation."

[43] Counsel submitted that it is clear from the case law that the Ministers' judgment on this matter is only reviewable on *Wednesbury* grounds. In the present circumstances, it is also clear that neither SNH nor SEPA (who were able to compare the original and the existing turbine layouts at nos. 11/16 and 11/17 of process) considered that the proposed deletion of turbines rendered the existing environmental statement inappropriate or inadequate. The report to the minister, and the final decision letter, reflect the energy benefits attributable to the reduced number of turbines: see. e.g. pages 5 and 12 of the decision letter. At page 13, the letter refers to the economic benefits originally predicted by the developers, and the writer observes that, while these will be reduced as a result of the reduction to 67 turbines, they "still serve to demonstrate the significant economic benefits of the development". It was reasonable for the decision-maker to treat these matters in this way in the decision letter.

Submissions for the developers: ground of challenge a

[44] Miss Wilson QC, who appeared for the developers, submitted that the THC revisions resulted in "further mitigation of assessed impacts." In the context of that contention, she submitted that the correct approach to the interpretation and application of the EIA regulations is to be found in a series of decisions of the English courts, related to analogous regulations implementing the EIA directive. Amongst these are what counsel described as the "important decisions" of *Blewett* and *Rochdale. Blewett,* she submitted, was expressly approved by the House of Lords in *R (on the application of Edwards)* v *Environment Agency (No 2)* [2008] UKHL 22, [2008] Env LR 34, *per* Lord Hoffman, at paragraph 38, and *Rochdale* was expressly approved by the Court of Appeal in *Smith* v *Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262, [2003] Env LR 32, *per* Waller LJ, at paragraphs 29 and 32.

[45] The decisions of Sullivan J in *Blewett* and *Rochdale* have been followed most recently in *Alternative A5 Alliance's Application for Judicial Review* [2013] NIQB 30, [2014] NI 96 (*Alternative A5*) and *R (on the application of Evans) v Basingstoke and Deane BC* [2013] EWHC 899 (Admin) (*Evans*). Separately, the correct approach to the meaning of "any other information" (the term used in other regulations, which is analogous to "additional information" in the EIA regulations) has recently been considered in *R (Corbett)* v *Cornwall Council* [2013] EWHC 3958 (Admin), [2014] PTSR 727 (*Corbett*).

[46] Miss Wilson submitted that the decisions in these cases vouch the following propositions:

(i) The Court should not take an unduly legalistic approach to the requirements of the EIA regulations, which should be interpreted as a whole and in a common sense way. Their requirements are not intended to obstruct development but to ensure

that planning decisions which may affect the environment are made on the basis of environmental information that provides the decision-maker with as full a picture as possible.

(ii) What is meant by the term "additional information" in the EIA regulations is the substantive information provided by the applicant to ensure that the decision-maker is provided with the information required for inclusion in an environmental statement, and nothing else.

(iii) It is for the decision-maker and not the court to determine whether information is "environmental information" or "additional information" under the EIA regulations. That determination depends upon the exercise of planning judgment and is based upon a proper understanding as to the nature of the proposed development. It is subject to review only on *Wednesbury* grounds.

Ground of challenge a(i) - Failure to advertise and consult on SEI

The Ministers state that regard was had to SEI in the decision letter and now deny having regard to SEI

[47] Miss Wilson emphasised the point that the references in the decision letter to SEI were mistaken. The Ministers did not, in fact, have regard to any such information. She submitted that the trust's argument that the Ministers are not entitled to rely on the true factual position is untenable. Further, the error cannot, as a matter of law, result in a breach of the EIA directive or the EIA regulations if, as a matter of fact, no SEI was taken into account by the Ministers in reaching their decision.

Ground of challenge a(ii)

In any event, THC's decision requiring changes to the layout was in itself "SEI"

[48] Counsel characterised the trust's argument in support of this ground of challenge as being that THC's decision not to object to the application in light of the acceptance of its proposed revisions to the layout and reduction in height of specified turbines, was in itself new or supplementary environmental information. She pointed out that, in their decision letter, the Ministers expressed the view that, in effect, the amended development was not "additional information". At page 8, they wrote that the reduced development was covered by the environmental information already submitted.

[49] Miss Wilson submitted that the question whether THC's representations amounted to "additional information" under the EIA regulations was a matter for the Ministers to determine, as the decision-maker. In the absence of *Wednesbury* unreasonableness, it is not a matter for this court. The trust does not, and could not, argue that it was *Wednesbury* unreasonable for the Ministers not to regard the representations from THC as "additional information". It was not unreasonable or otherwise unlawful for the Ministers to treat the representations as environmental information, whilst not treating them as additional information. The principal changes to the proposed development were all within the parameters of the original assessment in the environmental statement, and the Ministers concluded that they did not give rise to environmental impacts that had not been considered. The advice of SEPA and SNH confirmed to the Ministers that no additional impacts were created as a result of the changes proposed by THC. Both consultees made reference to a reduction in impacts. On the basis of that advice, it was reasonable for the Ministers not to regard THC's representations as additional information. In any event, the representations were not, in fact, "additional information". They did not amount to

"substantive information provided by the applicant to ensure that the [decision-maker] is provided with the information required for inclusion in an environmental statement." (*Corbett*, paragraph 71)

[50] In these circumstances, submitted counsel, the decision is not vitiated by any failure to follow the procedures on publicity and consultation laid down in regulation 14A, in respect of the representations from THC. The Ministers were, therefore, entitled to grant section 36 consent and, in doing so, acted in accordance with the requirements of regulation 4(2)(c).

Absence of prejudice

[51] In any event, argued Miss Wilson, even if THC's representations, with or without the further advice from SNH and SEPA, fall within the definition of "additional information" available to the Ministers, the trust suffered no prejudice as a result of the failure to advertise and consult on that information under regulation 14A of the EIA regulations. In this case, it is clear that the trust was fully aware of the reduction to the proposed development. The THC planning officer's report, Number 6/7 of process, and the full set of revised visualisations were available on its website before both the committee meetings. The "red and blue booklets", which are numbers 7/19 and 7/20 of process, were also available on the THC website. (I explain what they are, later in this opinion.) The trust took every opportunity to make representations to the members of the committee. Having complained about the absence of "visualisations" for the amended development in its initial critique, number 6/9 of process, it did not make any representations on the photomontages in its updated critique, number 6/10 of process. No representations were made in the updated critique as to the assessment by THC of the reduction in impacts resulting from the

revisions to the layout for the proposed windfarm or reduction in the height of specified turbines. As the trust was fully informed about the assessment in relation to the reduction in impacts and made no representations specific to that issue, it can have suffered no prejudice as a result of any alleged failure to advertise and consult in relation to the changes proposed by THC.

[52] The purpose of the requirement for advertisement and consultation under regulation 14A is to allow the public the opportunity to make representations in relation to the additional information before the application is determined. It is well established that the court will not interfere in judicial review if a decision-maker's error is one which caused no prejudice to the person challenging it, and that person has suffered no real injustice. Counsel referred to *R* v *Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, *per* Lloyd LJ, page 192B; *R* v *Liverpool Magistrates' Court, ex p Ansen* [1998] 1 All ER 692 at page 699D; and *R (Garg)* v *Criminal Injuries Compensation Authority* [2007] EWCA Civ 797, at paragraph 44.

[53] In particular, Miss Wilson contended, the court will not interfere if a defect in advertisement relating to a planning application does not "frustrate the relevant objective of giving the public an opportunity to make representations about the proposed development". In support of that proposition, counsel cited *R (Ghadami)* v *Harlow District Council* [2004] EWHC 1883 Admin, [2005] 1 P&CR 19, at paragraph 73, and *R v South Northamptonshire DC ex p Crest Homes Plc* [1994] 3 PLR 47 (Court of Appeal), where the court refused a remedy because there was "nothing to suggest that there [had] been any prejudice to any objecting party caused by the irregular […] consultation".

[54] Counsel argued that this reasoning is reflected in decisions of relevance to compliance with EIA procedures that have been adopted in national law to implement the

requirements of the EIA directive. In *McGinty* v *Scottish Ministers* [2013] CSIH 78, 2014 SC 81, the court said this:

> "Even where there has been breach of a requirement derived from a European directive and intended as a means of environmental protection, the court, in exercising its supervisory jurisdiction, having considered the merits and assessed where the balance is to be struck, retains its common law discretion to refuse to grant a remedy (*Walton v Scottish Ministers*, Lord Hope, para 155, agreeing with Lord Carnwath, paras 103 *et seq*). Lord Carnwath put it this way in *Walton* (para 139):
>
> > 'Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.'" (Paragraph [55])

[55] Counsel contended that the courts have consistently held that there should not be an unduly legalistic approach to the requirements of the EIA regulations that implement the publicity and consultation requirements contained in article 6(4) of the EIA directive. Although not foreshadowed in the petition, the trust seeks to garnish support for its unduly legalistic approach to the requirements of the EIA regulations, by advancing an argument that the trust's interpretation of the EIA regulations reflects the requirements of articles 6 and 8 of the EIA directive. The changes proposed by THC did not constitute "another option to the main application" as the trust argues. Article 6(4) relates to the EIA procedures to be implemented by Member States and gives rise to no more than an obligation to ensure that the public is given an early and effective opportunity to participate in the environmental decision-making procedures. The trust had such an opportunity and availed itself of it. The trust chose not to make any representations on the layout of the scheme or the changes proposed by THC. The obligation contained in article 8 is intended to ensure

that the information gathered through the EIA process, including consultation responses, is taken into account by the decision-maker.

Ground of challenge a(iii)

The significant changes to both the size and design of the development and in consequence the significant reduction in energy and economic benefits required further SEI

[56] Miss Wilson disputed the trust's contention that the agreed revisions to the layout for the proposed windfarm and reduction in height of specified turbines gave rise to a requirement for supplementary environmental information and that the Ministers were obliged to request such information from the applicant in respect of the changes proposed by THC. The only supplementary environmental information that it is averred that the Ministers were obliged to call for from the applicant, she argued, were new LVIA and a reassessment of the energy and economic benefits. The trust contends that this additional information was required because the project had altered substantially.

[57] Counsel submitted that the trust's argument is based on a misunderstanding of the factual position. It is predicated on the belief that SNH had criticised the whole of the LVIA as being of poor quality. Counsel contended that it is clear from the consultation response from SNH that its concern related to the quality of the photographs used for the photomontages and not to the whole of the LVIA. Moreover, the Ministers had the benefit of the assessment by THC as to the reduction in impacts that would result in relation to the changes proposed by THC, as regards the predicted landscape and visual impacts. Further, notwithstanding the reduction in the number of turbines from 83 to 67, the energy and economic benefits were still evaluated as being significant, having regard to the fact that a windfarm comprising 67 turbines, with an installed capacity substantially above 50MW

(242MW reduced from 300MW), remained a large scale renewable energy proposal of national importance and would result in a significant reduction in carbon dioxide over its life. In relation to economic benefits, the Ministers did not require a revised quantitative estimate for the purposes of reaching their conclusion as to the overall balance of economic benefits. The trust has itself described the consented windfarm comprising 67 turbines as "the largest-ever windfarm approved in the Highlands". (Number 11/10 of process, paragraph 2) Counsel submitted that, in those circumstances, and having regard to the trust's acceptance that the amended scheme remained the largest-ever approved scheme in the Highlands, the trust's proposition that the Ministers had no idea of the economic and energy benefits that could be delivered from such a large scale windfarm is untenable.

[58] Miss Wilson reiterated that the changes proposed by THC did not result in a materially different project which gave rise to additional significant effects. Consequently, in the absence of any positive obligation arising under regulation 13 of the EIA regulations, it was a matter of judgment for the Ministers as to whether or not the environmental information available to them prior to taking a decision on the section 36 application was adequate for the purposes of the EIA regulations. The terms of the decision letter clearly disclose that the Ministers were satisfied as to the adequacy of the information available for the purposes of schedule 4 to the EIA regulations, and, did not require further information from the applicant for the purposes of considering the representations from THC.

Ground of challenge a: decision and reasons

Ground of challenge a(i) - Failure to advertise and consult on SEI

The Ministers state that regard was had to SEI in the decision letter and now deny having regard to SEI

[59] It is clear from the evidence before me that the reference to SEI in the decision letter was a mistake. Sir Crispin asserted that it is not open to the Ministers now to say that the decision-maker did not take SEI into account. Counsel did not seek to support that proposition by reference to any principle of law. In my opinion, the correct approach for the court to take is to accept that the decision-maker was wrong to record in the decision letter that SEI had been taken into account when it had not, and to consider whether the error vitiates the decision. In my judgment, it does not.

[60] As is noted in paragraph [31] of this opinion, in *E*, the first case relied on by the trust in support of its submissions on this part of the challenge, Carnwath LJ made it clear that a mistake of fact may be a separate head of challenge in an appeal on a point of law if the "mistake of fact (can be regarded as) giving rise to unfairness". (*E*, paragraph 66) As his Lordship put it at paragraph 63, the ground of review that was under consideration was "based on the principle of fairness". In *ML*, Moses LJ, with whom Maurice Kay LJ and Sir Stanley Burnton both agreed, expressed the view that "factual errors, if they are significant to the conclusion, can constitute errors of law." What his Lordship described as "the essential question" was "whether this appellant had the fair hearing to which he was entitled". (Paragraph 13) In *ML,* the appellant succeeded in the Court of Appeal on the view that the procedure by which the judge in the first instance tribunal reached his conclusion was "so flawed" that "it was plainly an error of law because this claimant had no proper or fair hearing at all." (Paragraph 15)

[61] Nowhere in his note of argument or in the course of his oral submissions did Sir Crispin identify any unfairness suffered by the trust as a result of the decision-maker's error. It does not appear to me that any unfairness was suffered. This ground of challenge, therefore, fails.

Ground of challenge a(ii)

In any event, THC's decision requiring changes to the layout was in itself "SEI"

[62] The trust contends that THC's report to Ministers, together with the amended LVIA, constitute "additional information" which ought to have been the subject of a notice, giving the public an opportunity to make representations to the Ministers in relation to it, and prohibiting determination of the application by the Ministers until a later date.

[63] In order to determine whether the THC report and visualisations were "additional information" within the meaning of regulation 2, it is helpful to understand the nature, content and scope of the environmental statement which an applicant must produce. Part II of schedule 4 to the EIA regulations comes under the general heading of "Content of an Environmental Statement" and provides as follows:

> "1. A description of the development comprising information on the site, design and size of the development.
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible remedy significant adverse effects.
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
> 4. The main alternatives studied by the applicant and the main reasons for his choice, taking into account the environmental effects.
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

The developers' environmental statement

[64] The environmental statement prepared by the developers in this case comprises 18 chapters, contained in six volumes. Chapter 2 is entitled "EIA Process and Methodology". (Number 7/9 of process) At Table 2.1, the applicant sets out the information which the EIA regulations require to be included in an impact assessment and identifies where that information is to be found within the environmental statement. Chapter 8 is entitled "Landscape Character" and chapter 9 is entitled "Visual Amenity". (Number 11/22 of process) In volume 1, the non-technical summary, the applicant records that the purpose of the landscape character assessment was to determine the extent of potential impacts on the landscape character of the area, resulting from the proposed development. The developers' conclusion was that, although there would be some localised significant adverse impacts upon a small number of areas within a "detailed study area" of 15 kilometres, the impact of the development on the landscape character resource of the wider study area, when taken as a whole, was not significant. (Number 11/8 of process, paragraphs 8.1.1 and 8.4.5)

[65] In the executive summary of chapter 9, it is explained that the chapter provides an assessment of potential impacts on the visual amenity of the area, resulting from the introduction of the proposed development. The assessment was prepared with reference to the Guidelines for Landscape and Visual Impact Assessment (Second Edition) 2002, published by the Landscape Institute and the Institute of Environmental Management and Assessment and involved a combination of desk-based and field-based appraisal. The initial desk-based review included the production of Zone of Theoretical Visibility ("ZTV") diagrams, in order to identify the theoretical extent of the visual envelope and any potential visual receptors within this. (It is explained at paragraph 9.5.6 that, for there to be a visual impact, there is the need for a viewer. Views experienced from locations such as buildings,

recognised routes and popular viewpoints used by the public were included in the assessment. These locations are known as "receptors".) Field assessment was then carried out. The extent to which the existing view from each viewpoint and receptor would be altered by the development was evaluated, resulting in a rating of the magnitude of change. An evaluation of the level of impact was then carried out with reference to the identified sensitivity to change and magnitude of change. It is further recorded in the executive summary that a series of 22 viewpoints had been selected, and the results of the investigation are summarised.

[66] At paragraph 9.5.3, it is stated that there were four key stages to the assessment: establishment of the baseline; appreciation of the development; consideration of variation of the impacts over time; and assessment of impacts. The last of these is described at paragraph 9.7. It is recorded that, of the 22 viewpoints selected within the overall study area, 10 were found within the 15 kilometre detailed study area and, of these, seven were predicted to receive "significant impacts". These were viewpoints 9, 10, 11, 13, 14, 15 and 18. In their "Statement of Significance" the developers conclude that, although there would be some localised significant adverse impacts on a small number of receptors and viewpoints within the 15 kilometre detailed study area "the impact of the Development upon the visual amenity of the study area when taken as a whole is not considered to be significant."

[67] As part of their environmental statement, the developers submitted a number of visualisations, illustrating how the proposed development would appear from various viewpoints.

The THC report

[68] It is clear from the THC report that officials at THC did not agree with the conclusions of the developers as expressed within the visual amenity chapter of their environmental statement. The THC report bears to have been prepared by THC's head of planning and building standards for the information of members, in advance of the SPAC meeting scheduled to take place on 19 February 2013, which is referred to earlier in this opinion. Under the heading "Design, Landscape & Visual Impact", the author expresses the view that chapters 8 and 9 of the environmental statement are "fundamental to assessing both landscape and visual impact of the layout" of the proposed development, along with their associated figures and appendices, which together comprise the LVIA element of the environmental impact assessment. (Paragraph 8.84) It is explained that the purpose of the LVIA is to identify and record the potential significant effects of the proposed development on the receiving environment. Impacts are assessed both in terms of the proposal itself and cumulatively with other consented proposed developments within a 35 kilometre radius and, to a more detailed extent, within 15 kilometres of the site. (Paragraph 8.85) The author identifies "the two key landscape considerations" as being the impact of the proposed development in isolation and its impact cumulatively with other development in the area, and expresses the following view: "It is considered that, with the agreed amendments outlined later in this report, the individual impacts of the development have been reduced and are not so significant as to warrant refusal." (Paragraph 8.99)

[69] The author reports that, following a review of the visualisation work, "a number of key issues relating to impacts disclosed by the visualisations" were identified by planning officials and SNH. In all cases, revisions to the scheme were considered necessary. These concerned eight of the viewpoints identified in the developers' environmental statement,

viewpoints 1, 5, 11, 13, 14, 15, 18 and 21. (Paragraphs 8.106 and 8.107) There then follows a detailed assessment of the impact from each of these eight viewpoints. With reference to viewpoint 1, the author concludes that, as this is a popular viewpoint, served both by the Great Glen Way and a Forestry Commission car park (with woodland centre), it is considered to have a higher sensitivity than that expressed in the developers' environmental statement. Accordingly, it was necessary to lower the tower heights of four turbines and remove seven others. In the developers' environmental statement, viewpoint 1 is not one of those "predicted to receive significant impacts" from the proposed development, and, consequently, no information about it is provided.

[70] Viewpoint 5 is reported by the head of planning as being a popular hill, with seasoned and recreational walkers alike. Its close proximity to the Great Glen Way means that it is regularly visited by tourists to the area, as well as local walkers. It is noted that the developers' environmental statement discounts the viewpoint from detailed assessment because it lies outwith the detailed study area. In the view of the author of the report, however, it is nonetheless one of the most important and easily accessed viewpoints at height within the Great Glen. Following a visit, it was clear that there was "potential for significant and undesirable visual impact to occur at this location, both individually and cumulatively with other developments." That position was said to be supported by SNH. The proposed development "disclosing more turbines to view than is desirable or necessary, would undoubtedly detract from the quality and strength of views available." With these concerns in mind, the author reports that five turbines would benefit from being lowered and the removal of two turbines was necessary. Viewpoint 5 is said not to be one of those "predicted [by the developers] to receive significant impacts" from the proposed

development, and, consequently, no information about it is provided in the developers' environmental statement.

[71] Viewpoint 11 is identified in the developers' environmental statement as suffering from "Substantial Adverse" impacts from the proposed development. The THC report goes further and concludes that, unless removed from the scheme, four identified turbines "will adversely affect the perception of the development within its landscape setting and viewed from this Corbett". Viewpoint 13 is assessed by the developers as resulting in "Moderate Adverse" impacts. The factual basis for that assessment is as follows: "Although partially screened by interim topography, the Development would appear as a relatively prominent feature in the landscape." The THC report records that, from that location, "there are some **particularly** prominent turbines which **unnecessarily** increase visual impact". (My emphasis) The report recommends that three turbines should be deleted from the scheme, along with others mentioned in relation to other viewpoints. In respect of viewpoint 14, agreement is expressed with the conclusion in the developers' environmental statement that visual impacts on that ridgeline would be "Substantial Adverse". The developers' description of the viewpoint is said to be "sparse", and "in close proximity to and at a slightly higher elevation than the Development, which would therefore appear as a very prominent element in the view." By contrast, THC's assessment is that nine identified turbines "creep up the slopes of Carn Donnachaidh Beag, Cairn Ewen and Carn na Criche towards the watershed, increasing the footprint and spread of the windfarm, and, depending on the angle of view, are likely to be perceived as outliers and/or as being particularly prominent and dominant features." THC acknowledges that visual impact cannot be removed from that location, but states that removal of these nine turbines "does provide better separation between the development and ridgeline and will also improve

perception of the development's physical proximity when viewed from the CNP [Cairngorms National Park] boundary."

[72] Viewpoint 15 is a Munro which lies on the boundary of the CNP. Impacts from that viewpoint are said to be broadly similar to those that would be experienced at viewpoint 14. At that location, the land slopes up gradually, which means that the physical containment found elsewhere within the site is not so effective. The stated revisions would reduce the perception of dominance, albeit not remove it entirely. Finally, of viewpoint 18, it is reported that "the visualisations outlining probable impacts from this VP do give rise to significant concerns." Consequently, "significant changes" were required in relation to that viewpoint, amounting to the removal of eight turbines and the reduction in height of one other at the western centre of the site, and the removal of 10 turbines at the east of the site. The effect of these changes is explained. (Paragraphs 8.133 to 8.136) Viewpoint 18 was not one identified by the developers as one of those predicted to receive significant impacts, and, consequently, no information about it is provided in the developers' environmental statement.

[73] Provided to councillors with the THC report was a booklet containing a number of visualisations and photomontages as originally submitted with the application for consent, together with a booklet containing revised viewpoints and photomontages, showing the proposed development as revised in conformity with THC's requirements. (Number 7/15 of process) These are referred to as "the red and blue booklets", respectively. (Numbers 7/19 and 7/20 of process) Taking viewpoint 14 as an example, fewer turbines are shown on the revised version than on the version forming part of the environmental statement. Further, the distance from the receptor to the nearest turbine is shown in the THC viewpoint 14 as

2.2 kilometres, whereas that distance is shown as 1.6 kilometres in the environmental statement version.

[74] Whilst THC resolved to raise no objection to the application, that was subject to amendments to it and the imposition of conditions. 16 turbines were to be removed, two anemometer masts were to be repositioned, 10 turbines were be reduced in height by 10 metres and one turbine was to be repositioned and reduced in height. It is important to notice that THC asserts that the changes that it proposes to the scheme will have an ameliorating effect on adverse environmental impacts.

[75] THC wrote to the Ministers on 2 May 2013, referring them to the report and its conclusion that no objection be raised, subject to amendments and conditions. The Ministers were directed to the location of the report online. (Number 11/3 of process) The viewpoints shown in the red and blue booklets formed part of the full set of amended visualisations which show the amended layout recommended by the planning officer and were also made available to the Scottish Government online. (Number 7/26 of process, affidavit of Jonathan Soal, SSER project manager for the development of the windfarm, paragraph 4)

[76] Mr Mure accepted that THC's decision and representations which were communicated to the Ministers under cover of the letter of 2 May 2013 were "environmental information" as defined by regulation 2, on the view that they were "representations duly made by (a) consultative body … about the likely environmental effects of the proposed development." (Regulation 2(c)) Consequently, the Ministers were prohibited from granting consent unless they had taken into consideration that information. As counsel for the Ministers submitted, it is clear from the decision letter that they did take the contents of the THC report into consideration. The author of the letter of 2 May pointed out that, if the

amendments and conditions did not form part of the Scottish Government's decision, THC's position should be read as one of raising objections.

[77] It can be seen from the foregoing analysis of the THC report, however, that it contained not only representations about the likely environmental effects of the proposed development as recorded by the applicant, but also a substantial amount of factual information about the visual impacts of the proposed development, which emerged as the result of THC's own investigations, aided by SNH. Certain parts of the factual material provided by THC are not to be found in the developers' environmental statement. THC provided environmental information on viewpoints 1, 5, and 21 in its report, whilst the developers provided no environmental information on these viewpoints in the text of chapter 9 of its statement. Taking viewpoint 1 as an example, the information provided by THC is that it is a popular viewpoint, served both by the Great Glen Way and a Forestry Commission car park (with woodland centre). That is factual information which is absent from the environmental statement. It can be seen that the environmental information on the viewpoints other than 1, 5 and 21, the visual impacts on which were considered by both the developers and THC, differs in the THC report from the information in the environmental statement. The report included a description of the reduced development as proposed by THC, including "information on the site, design and size" of the proposed development. The report also described the measures which THC "envisaged in order to avoid, reduce and if possible remedy significant adverse effects." That is information of a type which an applicant must include in his environmental statement, in terms of regulation 4 of and Part II of schedule 4 to the EIA regulations.

[78] In my opinion, therefore, the report contained "substantive information relating to the environmental statement". That information was provided by a consultative body to the

Ministers, after receipt by the Ministers of the developers' environmental statement and before determination of the application. On that analysis, the report constituted "additional information". Consequently, it was incumbent on the Ministers to comply with the provisions of regulation 14A. That would have led to the publication of notices as required by regulation 14A(3). That then would have entitled "any person (to) make representations to the Scottish Ministers in relation to the additional information."

[79] Both the Ministers and the developers rely on the conclusion in the decision letter that the reduced development "is still covered by the environmental information considered with this Application" and "would not give rise to any environmental impacts other than those already identified". (Decision letter, number 6/1 of process, page 2) These words appear in the section of the letter dealing expressly with the THC report. If the environmental impacts "already identified" is intended to be a reference to such impacts as described in the environmental statement, it is clear, in my opinion, that the Ministers were wrong. The environmental impacts identified in the THC report are different from those "already identified" in the developers' environmental statement as I have explained.

[80] As has been seen, the Ministers contend that judgments such as whether the EIA legislation applies, whether the environmental assessment is sufficient, or whether an altered proposal is covered by an existing environmental assessment, are matters for the relevant authority, and not for the reviewing court. Such judgments, they argue, are subject only to *Wednesbury* review. In this case, they submit, they were entitled to, and did conclude that THC's "representations" were not "additional information", within the definition of "environmental information". Similarly, the developers argue that the question whether THC's representations amounted to "additional information" under the EIA regulations was

a matter to be determined by the Ministers, as the decision-maker. In any event, they say, THC's representations did not constitute "additional information".

The authorities relied on by the Ministers and the developers

[81] In support of these contentions, reliance is placed on the decisions in *Corbett*, *Blewett*, *Rochdale*, *Alternative A5*, and *Evans*. The decision in *Corbett* turned on the construction of the phrase "any other information" within the meaning of regulations 2(1) and 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the English regulations"). Mr Mure submits that the various categories of environmental information are explained by Lewis J in *Corbett*, at paragraphs 50 to 78, "in the closely analogous context of the" English regulations. Miss Wilson, to the same effect, argues that the meaning of "any other information" in the English regulations "is analogous to 'additional information' in the Scottish EIA regulations". As is recorded at paragraph [46], she contends that "additional information" is "substantive information provided by the applicant to ensure that the decision-maker is provided with the information required for inclusion in an environmental statement, and nothing else." Miss Wilson's definition comes directly from paragraph 71 in the judgment of Lewis J in *Corbett*, to which I now turn.

[82] Mr Corbett brought judicial review proceedings, challenging the local planning authority's decision to grant planning permission for the erection of wind turbines, a development which was subject to the environmental impact assessment regime. In his fourth ground of claim, he asserted that, prior to the decision, the authority had failed to publicise and disclose specified documents relating to the environmental statement and to make them available to the public, as environmental information that was required to be

provided in terms of the English regulations. The information in question included (i) correspondence between the developer and third parties relating to the concerns of third parties and copied to the local authority, (ii) information and studies provided by the developer to address the concerns of particular local authority officers who were advising the local authority on the application, (iii) information submitted by third parties to the local authority, and (iv) information generated by the local authority itself. Lewis J held that none of that information fell within the definition of "any other information" and, consequently, it was not subject to the publication requirements of regulation 19 (the equivalent of regulation 13 in the Scottish regulations).

[83] The judge noted that the English regulations make provision in respect of three sets of information. There is the "environmental statement" which is compiled and supplied by the applicant. There is "further information", as defined by regulation 19(1), which is information required by the planning authority in order to ensure that the environmental statement contains the required information, and which is supplied by the applicant. There is also "any other information", which is defined in regulation 2(1) as "any other substantive information relating to the environmental statement and provided by the applicant or appellant as the case may be". (Paragraph 67) These three sets form part of what is described as "environmental information", which is defined in regulation 2(1) to mean "the environmental statement, including any further information and any other information, any representations made by any body required by these regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development… " (Paragraph 68)

[84] On the question whether the information at issue constituted "any other information" for the purposes of regulation 19, so as to require its public notification,

Lewis J held that information was "any other information" and subject to the public notice requirements, if it was "substantive information provided by the applicant for planning permission to ensure that the local authority is provided with the information required for inclusion in an environmental statement as required by Schedule 4" to the regulations. (The requirements of schedule 4 to the English regulations are in terms very similar to the requirements of schedule 4 to the Scottish regulations.) The judge also held that, if the original document comprising the environmental statement was considered not to include all the information required, additional information provided by the applicant at the direction of the local authority to make the statement an environmental statement would be "further information" within regulation 19(1). If such information were provided voluntarily by the applicant, it would be "any other information". Conversely, the phrase "any other information" did not include comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or local authority officers, nor did it include documents submitted by third parties or generated by the local authority. Such information was not subject to the notification requirements of the regulations. (Paragraph 71)

[85] During the course of his oral submissions, Mr Mure submitted that Lewis J was dealing with the same issues as fall to be addressed in the case before me. I disagree. The information with which this case is concerned is that provided by THC to the Ministers, in the context of a scheme which differs from the English regulations in at least two important respects. The first is that, in the Scottish regulations, the environmental statement which is to be submitted with an application for section 36 consent must include (i) the information referred to in Part II of schedule 4 and (ii) such of the information referred to in Part I of schedule 4 as is reasonably required to assess the environmental effects of the development

etc. (Regulation 4(1)) In regulation 2, however, "environmental statement" is defined as (a) the statement prepared pursuant to regulation 4(1), together with (b) any information provided to the Ministers by the applicant "in order to supplement the statement referred to in paragraph (a)"; and (c) any further information submitted by the applicant pursuant to a requirement under regulation 13(1).

[86] In the interpretation regulation of the English regulations, "environmental statement" is defined to mean only a statement which includes (a) such of the information referred to in Part I of schedule 4 as is reasonably required to assess the environmental effects of the development etc. and (b) at least the information referred to in Part II of schedule 4. The types of information which Lewis J was considering in *Corbett* as part of the "environmental information" which the decision-maker had to consider, therefore, differ in content from the types of information provided for by the Scottish regulations. In an application for consent under the Scottish regulations, if, having provided a regulation 4 statement, an applicant considers that it does not include all the information required and he voluntarily provides supplementary information, that information will become part of the "environmental statement" as defined in regulation 2, and considered by the Ministers as part of the environmental information. In the context of the Scottish regulations, therefore, "additional information" must be something other than what Lewis J construes "any other information" to mean in the context of the English regulations.

[87] The second important respect in which the Scottish regulations and English regulations differ is that, in the English regulations, information qualifies as "any other information" only if it is provided by the applicant. In the Scottish regulations, "additional information" qualifies as such if it is provided either by the applicant, or by a consultative body. The recognition of that difference is important in understanding why it is

inappropriate to read over Lewis J's construction of the phrase "any other information" when applying the Scottish regulations. Where additional information is provided by a consultative body, such as THC, that body cannot be regarded as voluntarily providing information that the Ministers could require to be provided in terms of regulation 13. Only the applicant can be required to provide further information in terms of regulation 13. Further, additional information provided by a consultative body can never be for the purpose of ensuring that the decision-maker is provided with the information required for inclusion in an environmental statement as required by Schedule 4. The only person who can provide information for inclusion in the environmental statement, in either jurisdiction, is the applicant. Further, whilst information provided to the Ministers by the applicant to supplement the regulation 4(1) statement, and any further information submitted by the applicant pursuant to the regulation 13 requirement, become part of the "environmental statement" as defined in regulation 2(1), additional information does not. Lewis J's gloss on the statutory definition of "any other information" is, therefore, inapposite when construing the phrase "additional information".

[88] The conclusion that the THC report was additional information in terms of the EIA regulations does not give rise to what Lewis J describes as the "odd or absurd consequences" which would flow from the interpretation of "any other information" contended for by the claimant in *Corbett.* The THC report contained factual information relevant to, and assessments of, the impacts which the proposed development would have on the environment. Borrowing the terminology of the directive, it was information provided by an authority which "supplemented" the environmental information supplied by the developers. It is that type of information that members of the public need to be aware of if they are to be sufficiently well-informed properly to "participate in the environmental

decision-making procedures". (EIA directive, article 3(4)) If they are not sufficiently well-informed, the value of their entitlement "to express comments and opinions when all options are open… before the decision on the request for development consent is taken" is diminished. The opportunity that article 3(4) requires the public concerned to be given to participate in the environmental decision-making procedures will not be "effective" if the decision-maker has before him additional information relevant to the decision that has to be made, of which the public is ignorant.

[89] Counsel for the Ministers and for the developers cited the decision in *Blewett* in support of the contention that the EIA regulations "are not intended to be a legal obstacle course". The claimant in that case applied for judicial review of a decision to grant planning permission for the third phase of a landfill project. He argued, among other things, that an environmental statement which accompanied the application in accordance with the English regulations was inadequate, because it did not include an assessment of the potential impact of the use of the proposed landfill on groundwater. Instead, the applicant had left those matters to be assessed after planning permission had been granted, by assuming that complex mitigation measures would be successful. That approach, the claimant contended, had been unlawful. Sullivan J described the claimant's approach as "unduly legalistic". The requirement that an EIA application must be accompanied by an environmental statement is, he said, not intended to obstruct development. The purpose of the statement is to ensure that planning decisions which may affect the environment are made on the basis of full information. It is an unrealistic counsel of perfection, said the judge, to expect that an applicant's environmental statement will always contain full information about the environmental impact of a project, and the regulations are not based upon "such an unrealistic expectation". They recognise that an environmental statement may well be

deficient, and provision is made through the publicity and consultation processes for any deficiencies to be identified so that the resulting ''environmental information'' provides the local planning authority with as full a picture as possible. (Paragraph 41)

[90] In this case, the ground of challenge is that the Ministers failed to do what the EIA regulations expressly required them to do. There is, in my view, nothing "unduly legalistic" about that.

[91] In *Rochdale,* the question at issue was whether the developer had provided a sufficient description of the development as required by the applicable regulations. Sullivan J expressed the view that, under the regulations, it is for the decision-maker to decide whether the information provided by the applicant about the site, design, size or scale of the proposed development is sufficient. The issue is not one for the court to decide, as a question of primary fact. The judge held that the decision-maker's decision is subject to review only on *Wednesbury* grounds.

[92] The issue for the court in *Alternative A5* concerned a decision as to the adequacy of an environmental statement. Stephens J considered that the decision was for the decision-maker, subject to *Wednesbury* unreasonableness. During the course of his judgment, Stephens J expressed the view that the environmental statement must be prepared by the developer "and should contain sufficient information about the impacts of the development upon the environment." Thereafter, it is for the decision-maker to make an assessment of those impacts and the sufficiency of all the environmental information gathered as result of the environmental impact assessment and, in doing so, determine whether it requires more information to be able to make an assessment. That, said the judge, was a matter for the decision-maker's own judgment, subject to *Wednesbury* review.

[93] Nowhere in Sir Crispin's note of argument, the petition, or the notes of the trust's submissions advanced during the hearing does the trust appear to challenge the adequacy of the environmental statement submitted by the developers as required by regulation 4(1). The question at issue in this branch of the case is different – did the THC report constitute "additional information" within the meaning of the Scottish EIA regulations? The decision in neither *Rochdale* nor *Alternative A5* provides assistance in addressing that question.

[94] In *Evans*, Stadlen J held it was for the decision-maker to determine whether a document described as "the addendum" constituted "further information" within the meaning of regulation 19(1) of the English regulations. At first sight, that finding might appear to be relevant to the issue to be determined in this branch of this case, and it is necessary, therefore, to consider the question which Stadlen J had to decide.

[95] A company seeking planning permission for a development submitted an environmental statement in terms of the English regulations. The decision-maker sought further information in terms of regulation 19(1), and that was provided by the applicant in the form of an addendum to the environmental statement. The fact that further information in relation to the environmental statement was available for inspection was advertised, in terms of regulation 19(3), after which 15 letters of objection were received by the decision-maker, reiterating previous objections and asserting that the additional information did not address the inadequacy of the environmental statement in respect of certain matters. Following the granting of consent, the claimant, who was one of the objectors, sought judicial review of the decision. In those proceedings it was argued, among other things, that the environmental statement and the addendum were inadequate in that they failed to address the likely effects, including indirect effects, of the proposed development. (Paragraph 162) The claimant also contended that the addendum was not an adequate

response to the regulation 19 request such as to constitute "further information", and that the issue was a matter for the court to determine. In response, the decision-maker argued that the question was one for the decision-maker to decide in the same way and subject to the same requirements as held by Sullivan J in *Blewett* to apply in the case of environmental statements. (Paragraph 216) It was in that context that Stadlen J held that the question whether the addendum constituted "further information" within the meaning of regulation 19(1) was a matter for the decision-maker to decide, again subject to judicial review on *Wednesbury* grounds, and not for the court.

[96] It is not difficult to understand why the adequacy both of an environmental statement and of further information is a matter of planning judgment to be determined by the decision-maker. When the decision-maker considers the terms of the environmental statement, he is given the power, if thought appropriate, to require the applicant to provide additional information. In terms of the English regulations, he may exercise that power if he is "of the opinion that the statement should contain additional information in order to be an environmental statement". That phraseology, and particularly the use of the word "opinion", points firmly away from the proposition that the adequacy of an environmental statement is a question of law to be determined by the court. As Stadlen J puts it, at paragraph 290 of his judgment, the conclusion that it is for the decision-maker to determine the adequacy of the additional information "is further supported by the fact that the additional information… is defined not objectively but by reference to the subjective opinion of the local planning authority as to what information is required." It would be anomalous, the judge said, if the nature of the additional information required is defined by reference to what the decision-maker considers necessary in order to render the environmental statement compliant with the requirements of the regulations, "but the question whether additional

information in fact supplied pursuant to such a request satisfies that requirement is a matter for the court to decide".

[97] I respectfully agree with the English judges that whether or not information is to be regarded as sufficient or adequate is a matter of judgment, and the person best able to exercise that judgment is the decision-maker, unless, as observed by Sullivan J in *Blewett*, an environmental statement is so inadequate that it cannot be called an environmental statement at all. Although the Scottish regulations make no reference to the opinion of the decision-maker in regulation 13, he is given a discretion as to whether or not to require the applicant to provide further information and as to what is to be provided: "The Scottish Ministers… may in writing require the applicant to provide such other information as may be specified concerning any matter".

[98] This case, however, is not about adequacy or sufficiency of information. It is about the character of information. The question to be determined by the decision-maker is different in each case. Where the issue concerns the adequacy of information, the question for the decision-maker is whether the information provided in the environmental statement is sufficient to enable him to make an informed decision. If the information is not sufficient, he has the discretionary power to require further information to be provided. The same question arises for consideration when such information is provided. These are clearly matters of planning judgment, which the decision-maker, and not the court, is better able to exercise.

[99] Where substantive information relating to the environmental statement is provided by a consultative body to the Ministers, they are required by regulation 14A to do a number of things. In determining whether or not the terms of regulation 14A apply when the Ministers receive information in any particular case, they have to decide whether the

information is substantive, and whether it relates to the environmental statement. In my opinion, these questions are not apt to be decided by the exercise of planning judgment. If they were, it would mean that one decision-maker would be at liberty to exercise his planning judgment in one way such that information provided is not publicised, and another decision-maker, in receipt of precisely the same information, would be at liberty to exercise his planning judgment in another way, such that the information is publicised. On the arguments presented by both Mr Mure and Miss Wilson, provided that, in each case, the decision maker's judgment did not stray into the territory of *Wednesbury* unreasonableness, neither decision would be challengeable. That is not a result that can have been intended by the legislature. The question whether information provided by a consultative body is additional information is not one of judgment, but of fact, and it is resolved by applying the clear statutory definition provided in regulation 2 for determining whether information is additional information within the meaning of regulation 14A.

[100] In any event, if I were wrong about that, the THC report and associated documents are so clearly additional information within the meaning of the regulations that, even if its character fell to be determined by the application of planning judgment, I would hold that no reasonable decision-maker could regard it as anything other than additional information as defined.

[101] Although counsel for the Ministers sought to rely on the decision in *Wheatcroft* in support of his argument in response to the trust's ground of challenge a(iii), it is appropriate to consider that case in this context. The question for the court concerned the powers of the Secretary of State in a planning appeal. The applicants had applied to the local planning authority for permission for a housing development of a particular size. The authority refused permission and the applicants appealed to the Secretary of State. Before the opening

of the inquiry, the applicants advised the local planning authority that they were proposing to put forward at the inquiry an alternative proposal for a smaller scheme. That alternative proposal was to be considered only if the scale of development was deemed to be an issue which was critical to the determination of the appeal. At the inquiry, the planning authority contended that the Secretary of State could not legitimately reduce the area of the appeal site and had power only to deal with the application as submitted. In his report, the inspector concluded that, if the appeal was restricted to consideration of the application as first submitted, it should, on the planning merits, be dismissed, but if it were permissible to reduce the size of the development as proposed by the applicants, planning permission should be granted.

[102] In his decision letter, the Secretary of State expressed the view that, where an appeal results from an application for permission to build a specified number of dwellings without any indication of the size of the dwellings or of the individual plots, the proposed development was not severable, and it would be improper to purport to grant permission in respect of part of the site, or for a lesser number of houses. The appeal was, accordingly, dismissed.

[103] Forbes J quashed the Secretary of State's decision. He held that the true test was not whether the application was severable but whether the effect of a condition restricting the size of the development would be to allow development that was in substance not that for which permission had been applied. In deciding whether there is a substantial difference, said the judge, the decision-maker will be exercising a judgment, one which the courts will interfere with only if it is *Wednesbury* unreasonable. In my opinion, the judge was clearly right to hold that the decision whether or not the proposed reduced development was "in substance" not that which permission had been applied was a matter of judgment. The

difference between that case and this is that, for the reasons that I have given, regulation 14A of the EIA regulations is concerned with matters of fact, not judgment.

[104] It follows from what I have said so far that the Ministers reached their decision to grant consent in breach of the obligations placed on them by the terms of regulation 14A of the EIA regulations.

Absence of prejudice

[105] Both Mr Mure and Miss Wilson submitted that, in the event that I held that the Ministers were in breach of regulation 14A when they made their decision, I should refuse the remedy that the trust seeks, because it has suffered no prejudice. I accept that reduction is a discretionary remedy and that, therefore, it may be open to the court to refuse it. It is important, however, to recognise that, in this application for judicial review, the trust is not asking the court to vindicate a private right. Rather, it invites the court to intervene in defence of the rule of law. (See, generally, *AXA General Insurance Company Ltd* v *Lord Advocate* 2012 SC (UKSC) 122 (AXA), at paragraphs 162 and, 169) That the trust has sufficient interest to do that both in terms of the common law and of the directive is not the subject of controversy in this case. (*AXA*; article 1(2) of the directive) Its interest is in the environmental decision-making procedures provided for by the EIA regulations. Article 11 of the directive requires member states to ensure that members of the public concerned, having a sufficient interest, have access to a review procedure to challenge the substantive or procedural legality of decisions subject to the public participation provisions of the directive. (Article 11(1)) The interest of any non-governmental organisation, such as the trust, is deemed sufficient. The question, therefore, is not whether the trust was prejudiced, but whether members of the public were prejudiced.

[106] It is important to bear in mind that the Ministers had received 96 objections to the proposed development. THC was of the view that the scheme as presented was environmentally unacceptable. In terms of the directive, the public concerned were "entitled to express comments and opinions" on the amended scheme, while "all options" remained open to the Ministers. (EIA directive, article 4) In consequence of the Ministers' breach of regulation 14A, members of the public were effectively denied the opportunity to do so. Had they been given the opportunity to make representations, as provided for by regulation 14A(4)(e), it would have been open to them to contend that, even with the amendments to the proposed scheme that had been agreed by the developers, and notwithstanding THC's views on the acceptability of the amended scheme, it remained environmentally unacceptable, for reasons which the public concerned would have been entitled to advance. In the whole circumstances, I reject the contention that I should exercise my discretion to refuse the remedy of reduction.

Ground of challenge a(iii)

The significant changes to both the size and design of the development and in consequence the significant reduction in energy and economic benefits required further SEI

[107] When the Ministers came to determine the application, they had before them environmental information which included the THC report. As has been demonstrated, that report contained significant substantive information relating to the environmental statement. For the reasons given in paragraphs [98] and [99], it was for the Ministers to determine the sufficiency of the environmental information which they had, subject to *Wednesbury* unreasonableness. The trust does not contend that it was unreasonable in that

sense for the Ministers not to require further information in terms of regulation 13, nor does it appear to me to have been so. This ground of challenge, consequently, fails.

Submissions for the trust: ground of challenge b

Ground of challenge b(i)

The Ministers misunderstood and misapplied their policy, and so failed to have regard to a material consideration

(i) The proper approach to the consideration of the decision letter

[108] It was submitted by counsel for the trust that, because the terms of the EIA directive applied to the decision-making process, the normal "planning judgment" approach does not apply. In the European Union context, the court is an emanation of the state and, therefore, has to look behind the decision at the facts, to be clear that the competent authorities made a correct assessment of the issues, and complied with EU law. Counsel referred to the following cases in support of that proposition: *Sweetman* v *An Bord Pleanála* C-[2013] CMLR 16 (*Sweetman*), the opinion of the Advocate General at paragraphs 34 and following, 76 and 83, and the judgment of the court at paragraph 44; and *Abraham and Others* v *Region of Wallonia and Others* C2/07, 2008 ECR 1-01197 (*Abraham*), judgment of the court at paragraphs 38 and 39.

[109] It was accepted on behalf of the trust that a decision letter has to be read in the context that it is addressed to the informed reader. It has to be read as a whole, it need only refer to the main issues in the dispute, and it does not have to mention every material consideration. It should be read in a straightforward manner. Reference was made to the following cases: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at page 348; *South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953 ("*South Bucks*"), at

paragraphs 35 and 36; and *Moray Council* v *Scottish Ministers* 2006 SC 691 ("*Moray Council*"), at paragraphs [30] and [31]. However, in this ground of challenge, the trust's case is that:

- the Ministers misunderstood and misapplied their policy and so erred in law by applying the wrong policy background;
- the Ministers misunderstood SNH's advice and so failed to have regard to a material factor;
- in considering the policy context, the Ministers failed to have regard to the fact that EU law does not establish any priority between the EU's environmental policy and its energy policy, and indeed the energy policy required them to have regard to the need to preserve and improve the environment;
- in any event, the Ministers acted unreasonably in granting the consent, having regard, in particular, to the approach they took to wild land issues in (i) the Dunbeath decision (numbers 6/31 and 6/32 of process) and (ii) the Glenmorie decision (numbers 6/33 and 6/34 of process).

Error in interpreting the policies

[110] At the time of the decision, the Ministers had available to them the wild land maps which were created by SNH with their concurrence, according to an agreed methodology. (Numbers 6/17 and 6/48 of process) In particular, they had the CAWL Map 2013 (number 6/41 of process), the version of the Wild Land Map 2014 provided by SNH in May 2014 (numbers 6/51 and 6/20 of process), and the map of "Relative wildness of Scotland" produced in April 2014 (number 6/46 of process). Counsel submitted that, by the time when the decision was taken, the area of wild land in which the proposed development was to be located had become a matter of agreed fact, from which the Ministers could not

depart in applying the policy to safeguard wild land. Number 6/46 of process shows the Glendoe reservoir in the middle of an area graded "high" wildness. Counsel referred, also, to email correspondence passing among SNH, the developers and the Scottish Government in May 2013. (Number 6/55 of process)

[111] The relevant "wild land" policies at the time of the decision, said Sir Crispin, were the following:

- NPF2 (2009), number 6/14 of process, at paragraphs 97 to 99;
- SPP (2010), number 6/29 of process;
- NPF3 Main Issues Report, number 6/16 of process; and
- SNH's Wild Land Maps, numbers 6/12, 6/13, 6/41, 6/45, 6/50 and 6/51 of process.

The decision letter

[112] Counsel noted that, on the fourth page of the decision letter, the Ministers "clearly considered it an important material determining issue that the windfarm 'accords with, and is supported by, Scottish government policy' and that would include wild land." However, said Sir Crispin, a number of statements in the decision letter are not in line with the Government's policy on wild land as stated in the NPF and SPP. These are:

- the NPF states that "great care should be taken to safeguard their wild land character";
- SPP requires that "planning authorities should safeguard the character of these [wild land] areas";
- NPF3 Main Issues Report states that "Scottish Planning Policy already safeguards areas of wild land character".

On the fifth page of the decision letter, the Ministers say: "the design of the windfarm has gone to considerable lengths to safeguard the area's wild land character in so far as possible", which is not what the policy requires. Further, there is no mention that SNH had said that this area of wild land was a matter of "national interest".

[113] Sir Crispin also criticised a number of statements on the ninth page of the decision letter. Under the heading "Wild Land", the first sentence reads: "SPP sets out that areas of wild land character in some of Scotland's remoter upland, mountain and coastal areas are very sensitive to any form of development or intrusive human activity." That is a quote from paragraph 128 of the SPP, but it is incomplete. The sentence continues: "planning authorities should safeguard the character of these areas in the development plan." NPF2 states: "great care should be taken to safeguard their wild land character". In the "Wild Land" section of the decision letter, said counsel, there is no recognition of the obligation to "safeguard" wild land areas.

[114] Further, it was not open to the Ministers to express the view "that the application site itself is not an area of pristine wild land". SNH has included the area of the proposed development in the SAWL and later CAWL maps over a number of years. The Ministers knew that the area was to be on the 2014 wild land map. The maps had been created following a detailed methodology, agreed with the Ministers. Reference was made to numbers 6/17, 6/49 and 6/48 of process. Sir Crispin submitted that, in any event, it was irrational for the Ministers to dismiss the careful methodological work of SNH in identifying this area as wild land, notwithstanding the hydro development at Glendoe, and giving it the "High" wildness rating in 2013, on the basis of a "one liner" reason. (Numbers 6/13 and 6/55 of process) The Ministers required to give clear and compelling reasons for not following SNH's advice, which they have not done: *R (Hart DC)* v *Secretary of State for Communities and*

Local Government [2008] [2008] 2 P & CR 16; *R (Akester)* v *Department for the Environment, Food and Rural Affairs* [2010] Env LR 33; *R (Jones)* v *Mansfield DC* [2004] 2 P & CR 14.

[115] Counsel observed that, in analysing the "impact on surrounding wild land", the Ministers note that the development is*:* "well-designed to minimise the impact on surrounding areas of wild land" and "areas at the southern end of the SAWL will be impacted by views of the Development", and submitted that the endeavour "to minimise the impact" does not accord with the policy obligation to "safeguard" wild land, particularly where the southern end of the SAWL is impacted as well. Sir Crispin contended on behalf of the trust that the Ministers' approach to the impact on wild land was also irrational, when regard is had to the way they approached the policy in the Dunbeath decision, which was decided on the basis that, with a windfarm near to wild land, "there would be no safeguarding of the nearby Wild Land resource in this area". (Number 6/32 of process)

[116] In the decision letter, the Ministers accept that the development "will still have a significant impact on the wildness qualities of that SAWL." Counsel submitted that such acceptance means that the Ministers ought to have applied the policy to safeguard the wild land resource. It is irrational, he argued, to have allowed the windfarm against that finding, having regard to the policy obligation to safeguard wild land. None of the policies on wild land allow for any balancing of energy or economic benefits against the obligation to safeguard wild land.

[117] The Ministers concluded that:

> "… the landscape and visual impact on the SAWL is a primary determining issue and a matter of concern. However, given the very considerable renewable energy and economic benefits this large development will bring, considering the design which has gone to some lengths [to] minimise the impacts, and considering that there are few other significant environmental impacts from the development, Ministers are

> of the view that the impact on wild land does not on this occasion warrant refusal of consent".

Counsel submitted that this conclusion fails to have regard to the fact that EU law does not give priority to energy law over environmental law.

[118] On environmental matters, which are addressed at page 3 of the decision letter, Sir Crispin contended that the Ministers have given an inadequate explanation of why they consider that the developer has had regard to preserving the natural beauty of the place, when SNH maintained their objection to the effect that, if the project went ahead, the area would no longer be considered wild land; it would affect the wider landscape character of the Monadhliaths, raising natural heritage issues of national interest. The Ministers have, therefore, misinterpreted the relevant policy and, consequently, the decision is unlawful. The correct legal interpretation of a policy is a matter of law for the courts, argued counsel, relying on: *Tesco Stores Ltd* v *Dundee City Council* 2012 SC (UKSC) 278, (*Tesco* v *Dundee*) Lord Reed at [18], [19] and [31] and Lord Hope of Craighead at [35]; and *R (on app Timmins)* v *Gedling BC* [2015] EWCA Civ 10.

Ground of challenge b(ii)

The Ministers acted unreasonably having regard to the approach they took to wild land issues in the Dunbeath decision and the Glenmorie decision.

[119] Counsel submitted that, having regard to the terms of the decision letter in the context of the reasons for (i) the Dunbeath decision (numbers 6/31 and 6/32 of process), and (ii) the Glenmorie decision (numbers 6/33 and 6/34 of process), and the advice from SNH (numbers 6/48 and 6/49 of process), the Ministers' decision is unreasonable.

[120] There should be a consistent approach to policy in the decision-making process, contended counsel. Where the approach adopted in one instance is contradictory of the approach taken in others, that indicates either: (i) a misunderstanding of the policy or; (ii) the decision-maker has acted unreasonably. Sir Crispin submitted that the approach adopted by the Ministers in respect of the Stronelairg application was different from that which they took in respect of both the Dunbeath and Glenmorie applications.

[121] The decision on the former was issued on 7 June 2013. The proposal was for the erection of 17 turbines. The proposed windfarm was not within a SAWL but was located 1 kilometre from the SAWL. In his report to the Ministers, dated 11 October 2012, under the heading "*Impact on Search Area for Wild Land (SAWL)*", the reporter wrote:

> "I conclude on this issue that the proposed development would have significant effects, in landscape and visual terms, on the eastern parts of the SAWL, extending inwards well beyond the periphery of the SAWL. The presence of the turbines at the edge of the SAWL would erode the experience of wildness; that would not safeguard the wild land resource of the area." (Number 6/31 of process, paragraph 11.42)

In their decision letter, the Ministers said this:

> "The Reporter's assessment considered… the impact on nearby Wild Land… The overall conclusions confirm that... there would be no safeguarding of the nearby Wild Land resource in the area if this development was approved… The Scottish Ministers accept and agree with the Reporter's detailed conclusions in this regard. Scottish Ministers have also considered carefully the Reporter's findings, reasoning, conclusions and recommendations thereon. Scottish Ministers, other than to the extent that they are inconsistent with the views expressed above, adopt the Reporter's findings, reasoning and conclusions, and agree with the Reporter. Accordingly they determine that consent under section 36 of the Electricity Act 1989 should be refused…" (Number 6/32 of process, pages 4 and 7)

Counsel noted that, even where the proposed development was on the edge of a SAWL, both the reporter and the Ministers emphasised the importance of "safeguarding" wild land.

[122] The decision on the Glenmorie application, a proposal for the erection of 34 turbines, was issued on 21 August 2014. On the subject of wild land, in her report, dated 8 May 2014, the reporter noted the national policy on wild land, and concluded as follows:

> "The individual and cumulative impact of the proposed development on the character of the surrounding remote, upland landscape would be significant and adverse. Government policy recognises that remoter mountain areas are very sensitive to any form of development or intrusive human activity. The impact on part of the Fannichs, Beinn Dearg and Glencalvie Special Landscape Area would be significantly detrimental and there would be an adverse impact on the integrity of the Ben Wyvis Special Landscape Area designation as a whole. The proposed development would have a significantly detrimental impact on the wildness qualities of a significant proportion of the adjacent Search Area for Wild Land and its approval would not safeguard the wild land resource of the area." (Number 6/33 of process, paragraph 7.128)

In their decision letter, the Ministers said this:

> "The area of this Development now sits largely on Wild Land Areas as shown on the 2014 SNH map of these areas, where previously it was adjacent to the Search Areas for Wild Land (SAWL). The Reporter highlighted the significant detrimental impact the proposed development would have on the wilderness qualities of wild land in the area around the development. Ministers have considered the Reporter's conclusions regarding the impact on the wilderness qualities of the area, which remain relevant, in the context of the new SPP and the fact that the prospective site now sits largely in a Wild Land Area in SNH's 2014 map. Ministers have concluded that, if anything, the wild land impacts are of greater concern in the context of the new map and SPP than they were in the context of the previous SPP and map of SAWLs, and therefore that these considerations only lend weight to a decision to refuse the Development." (Number 6/34 of process, pages 5 to 6)

In the result, the application was refused. (Number 6/34 of process, page 6)

[123] Noting that the Stronelairg decision was "sandwiched between" the Dunbeath decision and the Glenmorie decision, counsel submitted that the Stronelairg decision is unreasonable for the following reasons:

(i) Stronelairg is in the middle of a SAWL and CAWL and not on the edge. Consequently it deserved to be safeguarded as contended for by the reporter in the Dunbeath application and accepted by the Ministers;

(ii) The reporter in Glenmorie said: "Existing policy protects wild land and, going forward, windfarms are not to be permitted by Ministers in areas of wild land as defined by the 2013 Scottish Natural Heritage mapping." That, argued counsel, was accepted by the Ministers in the decision letter. On that approach to policy, therefore, Stronelairg ought to have been safeguarded. Stronelairg would have been in the new wild land map, but for this decision. The Ministers knew that, and ought to have protected Stronelairg in the same way that they protected Glenmorie because "the wild land impacts are of greater concern in the context of the new map and SPP than they were in the context of the previous SPP and map of SAWLs";

(iii) In the Stronelairg decision letter, the Ministers express the view that the proposed design has gone to considerable lengths to safeguard the wild land "insofar as possible". That, however, is not what the policy says;

(iv) The Ministers accept "that there will be some impact on wild land surrounding the site". The wildness character of the area is not, therefore, safeguarded;

(v) It is irrational to state that the area "is not an area of pristine wild land" when the area was in the SAWL map, the CAWL map and would have been in the new 2014 wild land map;

(vi) It is accepted that the southern end of the SAWL will be impacted;

(vii) The Ministers accept: "Despite a design which has successfully limited the extent of impacts on surrounding wild land to mostly high ground near the site,

Ministers are of the opinion that because of the size of the Development, and the fact that it sits centrally within the Monadhliath Search Area for Wild Land (SAWL), it will still have a significant impact on the wildness qualities of that SAWL". Given that the Ministers do not safeguard the wild land, their decision is irrational in the policy context, particularly when compared to how they dealt with Dunbeath and Glenmorie;

(viii) The Stronelairg proposal contains 67 turbines; Dunbeath contains 17; and Glenmorie contains 34, yet the larger development is seen as having less effect on a CAWL than the smaller turbine clusters. That is irrational.

[124] For all the foregoing reasons, submitted counsel, the decision is irrational, having regard to the strong policy on wild land set out in NPF2 and SPP, the way that the Ministers have interpreted the policy in the Dunbeath and Glenmorie decisions, and the advice from SNH.

[125] Further, Sir Crispin argued that it is notable that the Ministers failed to provide copies of the wild land areas 2014 maps to the public before the Stronelairg decision was taken. That constituted a breach of natural justice and hence was unlawful. The maps had been provided to the Ministers at the time of their decision, and were clearly taken into account by them. Nevertheless, the Ministers proceeded to make a decision on the Stronelairg windfarm proposal, notwithstanding the wild land designation at the time and the fact that they then asked SNH for the maps to be changed.

Ground of challenge b(iii)

Ministers misunderstood SNH's advice and so failed to have regard to a material factor

[126] It is submitted on behalf of the trust that, at page 2 of the decision letter, the Ministers note: "SNH maintained an objection due to the impacts the development would have on wild land." It is argued that that is not an accurate reflection of SNH's objection and fails to record that:

- the objection is one of principle to a windfarm in this location;
- that natural heritage issues of national importance were involved; and
- that if consent were given, there would be significant adverse effects on the Monadhliath SAWL such that the SAWL would no longer be considered wild land.

Indeed, contends Sir Crispin, that statement does not even reflect the advice to Ministers which itself was deficient.

Ground of challenge b(iv)

Failure to have regard to a material factor, i.e. that EU law does not establish any priority between the EU's environmental policy and its energy policy

[127] Counsel submitted that EU law does not establish any priority between its environmental policy and its energy policy, and indeed the energy policy requires to have regard to the need to preserve and improve the environment. Article 194(1) of TFEU provides:

> "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: [do certain things]".

[128] In support of this submission, the trust cites *Azienda Agro-Zootecnica Franchini sarl etc* v *Regione Puglia* C- 2/10 [2011] ECR 1-06561, and refers, in particular to the opinion of the Advocate-General at paragraph 47 and the judgment of the court at paragraphs 55 and 56. It is accepted on behalf of the trust that the *Azienda* case is in the context of the Habitats Directive, but it is submitted that the principle applies to all environmental issues where there is a conflict between energy policy and environmental policy.

[129] The EIA directive, at Annex III paragraph 2(c)(viii) and Annex IV paragraph 3, requires an assessment of the impact on landscape and this was done in the environmental statement in this case. Therefore this case comes within the principle. However, submitted Sir Crispin, it is clear from the decision letter that the Ministers always favour energy generation over environmental protection, contrary to what is said in *Azienda*. Counsel pointed, in particular, to pages 5, 7 to 9.

Submissions for the Ministers: ground of challenge b

Ground of challenge b(i)

The Ministers misunderstood and misapplied their policy, and so failed to have regard to a material consideration

[130] On behalf of the Ministers, Mr Mure argued that, when making planning decisions, the Ministers have to consider a range of competing policies, and have to balance them using their planning judgment. SPP and NPF2 must be read and considered as a whole. The trust contends that, within NPF2 and SPP, there is no room for balancing wild land against the benefits of the development, citing NPF2 at paragraph 99 and 128 of the SPP, to support that approach. Paragraph 99, however, identifies wild land as simply one, albeit an important, consideration to be weighed up in evaluating the desirability of proposed

developments. The decision in this case is entirely consistent with an appreciation of the sensitivity and value of wild land, which was a primary competing consideration for the decision-maker. Similarly, paragraph 128 of the SPP does not bear the interpretation that the trust places upon it: paragraph 131 envisages that the decision-maker may have to balance the competing interests of development with the impact on landscape. The policy at paragraph 131 notes that, even in the instance of statutory natural heritage designations (to which SPP gives greater importance than it does to wild land), they constitute important considerations but do not imply a prohibition on development. At paragraph 182 of the SPP the importance of renewable energy is underlined.

[131] Mr Mure argued that SNH itself does not regard wild land as immune from development, or immune from the balancing exercise inherent in planning judgments, nor does it consider that its own judgments on wild land areas are authoritative when it comes to development management decisions. For example:-

- SNH accepts the "inherent subjectivity of the concept" of wildness: paragraph 11(v) on page 3 of number 6/17 of process; paragraphs 2.2 to 2.4 on page 7; and paragraph 2.9 on page 8.
- SNH's Policy Statement 02/03 makes clear that, in 2002, the issue of a preliminary search map for areas of wild land had as its purpose "not to delimit wild land, but to act as a starting point for review of where the main resource of wild land is likely to be found". (Number 7/4 of process, Annex 1, paragraph 13) The map was not intended to be authoritative, but was "prepared for debate with stakeholders": paragraph 2.10 on page 8 of number 6/17 of process.
- SNH's advice in its Policy Statement 02/03 described the proposal first made in 2013 to afford policy protection to wild land areas identified on a map, for which SNH's

2013 CAWL map might provide a basis: see paragraph 1.1 on page 4. That shows the novelty of the policy, argued counsel.

- While the new 2014 Wild Land Areas map (effective as policy from 23rd June 2014) can most effectively be used as a strategic planning tool, it lacks detail for development management decisions: "Consideration of individual proposals and their potential effect on wildness and areas of wild land will require individual field assessment.": number 6/17 of process, at paragraphs 5.2 and 5.3. There are many gradations of "wildness".
- At paragraph 2.7 on page 7, SNH states: "It is important to emphasise SNH's view that wild land does not denote 'no human management or development' as suggested by some Ministers who considered that such a label would restrict all future development options."
- In SNH's advice to government, dated 16 June 2014, it is noted that the June 2014 map shows a net reduction in wild land considered to be important in the national context. SNH explains: "Whilst some of this reflects a degree of change on the ground since the analysis was prepared, much of the change simply reflects refinements to parts of the methodology and use of new and more recent data." One example of this was the belated acceptance that the Glendoe development did detract from the wild land quality of part of the Monadhliath SAWL: numbers 6/17, 6/41 and 6/55 of process.

[132] Counsel further contended that the trust's interpretation of the draft NPF3 is misconceived, because the advice is that wild mapping should only "inform" future planning for windfarm development. Clearly, Mr Mure argued, even the draft policy did not preclude windfarm development. In any event, the draft NPF3 was not a material and

relevant consideration when the decision which is under challenge was made, because it had not come into force and, as a draft, it was open to change. That was explained in a letter, dated 3 May 2013, sent by the chief planner to all convenors and heads of planning throughout Scotland, in which the author wrote: "I write to remind planning authorities that until the documents are finalized, the current National Planning Framework 2 and Scottish Planning Policy 2010 remain the Scottish Government's suite of national planning policy for decision-making purposes". The Scottish Government's position on the draft SPP was explained in the Position Statement dated January 2014, and makes clear that the issue of a potential policy on wild land remained unresolved at that time. The proposed NPF3 made no reference to wild land. Planning law and practice generally requires that applications are determined in accordance with those policies in force at the time the decision is taken. While the consent procedure under section 36 of, and Schedule 8 to, the 1989 Act is not a determination under the planning acts, and it leaves considerable discretion to the Ministers, it was not "sharp practice" to determine this application in accordance with the policies in force on 6 June 2014. The relevant provisions were described by Lord Malcolm as a self-contained code in *Wm Grant and Sons Distillers Ltd* v *Scottish Ministers* 2013 SCLR 19 at paragraphs 17.

[133] Counsel contended that it is clear from the decision letter that the impact on wild land was an important consideration to which the Ministers gave due weight: "Ministers recognise that the impact of the development on wild land was a major cause of concern during the consultation and accept that there will be some impact on wild land surrounding the site" (page 9); and "Scottish Ministers consider that the landscape and visual impact on the SAWL is a primary determining issue and a matter of concern". (Page 10) It cannot be suggested, therefore, that the Ministers did not have regard to the impact on the SAWL.

Moreover, argued Mr Mure, the relevant policies founded on by the trust cannot be read as precluding all development that would impact on any landscape interests. The Ministers were required to balance those impacts against the strong economic, energy and environmental benefits represented by the development, and which were supported by applicable policies. It is not possible to find in the relevant policies any suggestion that wild land shown on any map is exempt from the balancing exercise inherent in planning judgments.

Ground of challenge b(ii)

The Ministers acted unreasonably having regard to the approach they took to wild land issues in the Dunbeath decision and the Glenmorie decision.

[134] Mr Mure submitted that the trust's reliance on the reports and decisions in the Dunbeath and Glenmorie cases is misconceived. These decisions serve to emphasise that decision-makers determine applications on the basis of the appraisal of different facts and circumstances of differing proposed developments. Moreover, the style of a report following a public local inquiry is necessarily different from that of a decision statement under regulation 10(3A) of the EIA regulations. With reference to Dunbeath, where the reporter's conclusions on landscape and visual impacts are found at paragraphs 11.122 to 11.126 in number 6/31 of process, the following distinguishing points are made:-

(i) Unlike at Stronelairg, significant adverse impacts were found on a Special Landscape Area, and on residential and recreational receptors and on road users.

(ii) Significant cumulative impacts were found with other windfarms.

(iii) The proposal was found to be contrary to the development plan, national planning policy and guidance.

(iv) Consent would have been inconsistent with Schedule 9 to the 1989 Act.

(v) The proposed mitigation measures were found to be inadequate.

[135] With reference to Glenmorie, where the reporter's overall conclusions on this point are at paragraphs 7.128 and 7.129 in number 6/33 of process, the following distinguishing points are made:-

(i) Significant adverse impacts were found on Special Landscape Areas, and also on a significant proportion of the adjacent SAWL.

(ii) The proposal would also have had significant adverse visual impacts on residents and others involved in recreation.

(iii) The proposal would be contrary to the local development plan and to national planning policy.

Ground of challenge b(iii)

Ministers misunderstood SNH's advice and so failed to have regard to a material factor

[136] Citing the judgment of Laws LJ in *R (Khatun)* v *Newham LBC* [2005] QB 37 *(Khatun)*, at paragraph 35, Mr Mure submitted that, where a statute confers discretionary power and provides no specification of the matters to be treated as relevant by a decision-maker, it is for the decision-maker and not the court to conclude what is relevant, subject only to *Wednesbury* review. It is also for the decision-maker, and not the court, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such. In this case, therefore, it was for the Ministers to identify the material considerations, and to decide on the manner and intensity of enquiry.

[137] Counsel contended that the documents show that the Ministers were clearly aware of the nature of SNH's objection, and he referred to Annex 3 to the decision letter and to the

terms of the letter, dated 16 May 2014, requesting determination of the application. Further details of the relevant documents are set out in paragraph [175] below.

Ground of challenge b(iv)

Failure to have regard to a material factor, i.e. that EU law does not establish any priority between the EU's environmental policy and its energy policy

[138] Counsel for the Ministers described the trust's proposition that EU law does not establish any priority between the EU's environmental policy and its energy policy as misconceived. He submitted that the *Azienda* case was concerned with the habitats and birds directives, and the court merely observed, at paragraph 56 of its judgment, that the TFEU states that EU energy policy must have regard for the need to preserve and improve the environment. Where energy and environmental policies are both in play, contended counsel, decision-makers must balance what may be competing interests.

Submissions for the developers: ground of challenge b

[139] It was submitted on behalf of the developers that none of the trust's arguments in support of ground of challenge b is well founded.

[140] Miss Wilson contended that there is a distinction between the question of whether something is a material consideration and the weight which it should be given. The weight to be attached to a relevant consideration is a question of planning judgment and is entirely for the decision-maker, provided it does not lapse into *Wednesbury* irrationality. In support of that argument, counsel cited *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 (*Tesco v SSE*), *per* Lord Hoffmann, at page 780F-H.

[141] There is no "universal prescription" for the method to be adopted by the decision-maker in assessing a material consideration. If the decision-maker fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application, that is an error of law. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse. For that proposition, Miss Wilson relied on *Edinburgh City Council* v *Secretary of State for Scotland*, 1998 SC (HL) 33 (*Edinburgh City Council*), *per* Lord Clyde, at pages 44I to 45F.

[142] National planning policy is a material consideration. (See *Edinburgh City Council*, *per* Lord Hope, at page 36; *R* v *Bolton Metropolitan Council, ex p Kirkham* [1998] Env LR 560, (*Bolton Metropolitan Council*), *per* Carnwath J, at pages 566 and 567) It is in the nature of high-level national policy that it is characterised by broad statements and avoids prescription wherever possible. It is necessary to retain flexibility to allow government policy to evolve and reflect the aspirations of the Scottish Government. (*North Lanarkshire Council* v *Scottish Ministers and Shore Energy* [2013] CSIH 58, *per* Lady Smith, at paragraph 15; *McGinty*, at paragraph 43)

[143] Although the interpretation of policy is a matter of law for the court, the application of policy to a particular set of facts will often require the exercise of planning judgment. That exercise of judgment falls within the jurisdiction of the decision-maker and can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Limited* v *Dundee City Council* 2012 SC (UKSC) 278, *per* Lord Reed, at paragraph 19)

[144] Where the Ministers are interpreting their own policy, short of perversity the court will respect their interpretation of their own words. *(R (on the application of Heath and Hampstead Society)* v *Camden LBC* [2008] EWCA Civ 193, [2008] 2 P&CR 13, *per* Carnwath LJ, at paragraph 16)

[145] A breach of an individual policy does not necessarily lead to the conclusion that a particular development proposal should not be granted consent. (*Rochdale*, *per* Sullivan J, at paragraph 49, cited with approval in *Tesco Stores Limited* v *Dundee City Council per* Lord Hope, at paragraph 34).

[146] In assessing compliance with policies, the relevance of the terms of the policy to a proposed development, the relative importance of the policy to the overall objectives of the policy-maker and the extent of breach, are all of relevance in the application of policy. These are primarily matters of planning judgment. (*Rochdale per* Sullivan J, at paragraph 51)

Factual background

[147] Miss Wilson submitted that, in order to address this ground of challenge, it is necessary to have regard to the factual background of relevance to both the location of the proposed development site in relation to wild land, and, the evolution of the Scottish Government's policy in relation to wild land.

The proposed development site

[148] The trust's argument proceeds upon an unsound factual basis, contended counsel, and depends upon the trust's erroneous belief that: the site is located in an area "having the highest qualities of wild land character" according to SNH mapping (statement of fact 6d of the petition); and, that nothing altered that position from 2002 until the grant of the section 36 consent for the proposed Stronelairg windfarm. In fact, in and around the proposed development site, prior to submission of the section 36 application, there had already been significant development as a result of the construction of the Glendoe hydro scheme. It is not pristine wild land. The trust has consistently refused to recognise the significance and

relevance of the development at Glendoe in its opposition to the proposed development of Stronelairg windfarm.

[149] Further, submitted counsel, the proposed development site is centred on the existing Glendoe development, as illustrated on the plan entitled "Plan showing relationship between Glendoe Hydro Scheme and Stronelairg Windfarm" produced by the developers. (Number 7/21 of process) Aerial photographs taken during the construction of the Glendoe development, depicting some of the access tracks and a cut-and-cover section of the aqueduct tunnel, as well as the hydro dam and reservoir, are included in the environmental statement. Counsel referred to the foot of page 2 of the Design Statement (technical appendix 4.1 in volume 4), and plate 5.1 on page 5-2 of volume 2. These photographs depict a small part of the development associated with Glendoe. Copies of these photographs are reproduced together by the developers at number 7/22 of process.

[150] Miss Wilson submitted that that consideration was properly taken into account by THC's planning officer in his report to SPAC, in the following passage: "recognition must also be had to the other man-made influences in the local area, most prominently the recent Glendoe hydro scheme, inundation area, maintenance tracks and intakes". (Paragraph 8.158 of number 6/7 of process).

[151] The Ministers were, therefore, fully entitled to take this existing development into account in their decision letter, when reaching their conclusion that the site was not an area having the highest qualities of wild land: "Ministers are of the view that the application site itself is not an area of pristine wild land where a strong sense of wildness can be experienced, given the hydro development in the area, including a substantial access road which is a dominant feature within the site. There are also numerous intakes, each with an access track, which are again strong features in views from within the site."

Accuracy and reliability of SNH's mapping

[152] Counsel argued that the datasets used by SNH for the purpose of its wild land mapping at the time of its objection to the proposed development did not take account of the Glendoe scheme. THC's planning officer noted this defect in paragraph 8.146 of his report to the committee, number 6/7 of process and concluded that, as a result, SNH's mapping was "therefore a useful reference point but [could] not be relied upon in its entirety".

[153] The court was advised that, to illustrate this defect, the developers had produced drawings of the proposed development site derived from the publicly available datasets used by SNH for its wild land mapping. The drawings are Geographic Information System software versions of pdf drawings downloaded from SNH's website shown at a more detailed resolution. In that connection, counsel referred to the affidavit of Jennifer Skrynka, number 7/27 of process. The datasets related to wild land mapping changed between 2012 and 2014. These drawings are described on the SNH website as "Absence of Modern Artefacts 2012", and are produced at number 7/23A of process, "Lack of Built Modern Artefacts 2014", number 7/23B of process, "Map of Relative Wildness 2012", number 7/24A of process, and "Map of Relative Wildness 2014" number 7/24B of process. Miss Wilson explained that they are produced together as pairs to facilitate a comparison that demonstrates the changes that required to be made by SNH to its wild land maps, in order to reflect accurately the development of at Glendoe.

[154] The Glendoe scheme was built between 2005 and 2009 and therefore, said Miss Wilson, it was in existence at the time of the earlier 2012 maps showing "Absence of Modern Artefacts" and "Map of Relative Wildness", respectively. It is evident, however, that the Glendoe scheme, in particular its network of access tracks, is a significant modern

artefact visible in the "Lack of Built Modern Artefacts 2014", which is (number 7/23B of process, downloaded from the SNH website in June 2014 but not in "Absence of Modern Artefacts 2012". (Number 7/23A of process, downloaded from the SNH website in November 2013) Counsel contended that the effect of that omission can be seen in comparing "Map of Relative Wildness 2012", number 7/24A of process, downloaded from the SNH website in August 2012 and "Map of Relative Wildness 2014", number 7/24B of process, downloaded from the SNH website in June 2014. In the later drawing, which correctly shows the Glendoe tracks, very little of the proposed development site is in an area of darkest green (the highest value wild land), whereas, in the earlier drawing, almost all of it is, incorrectly, in an area of darkest green. By contrast, in April 2014 the mapping shows areas within and around the proposed Stronelairg windfarm site as being of relatively low value.

[155] Counsel submitted that, in its advice to government, dated 16 June 2014, which is number 6/17 of process, SNH recognises what she described as this historic problem. Paragraph 4.1 explains that methodological and data improvements have increased the accuracy and consistency of the analysis in the 2014 maps. Paragraph 4.2 notes that the improvements include the fact that "the contribution of the remoteness layer to relative wildness has been reduced in areas where additional data identifies a more extensive network of tracks than previously" and the fact that "the contribution of the lack of built modern artefacts layer to relative wildness has been reduced where new development has been captured, such as windfarms, but in particular the more extensive track network". Paragraph A.9 in Annex A acknowledges that "significant structures, such as… hydro infrastructure" have now been included. Paragraph A.11 acknowledges that the analysis "can only ever be as good as the data input".

[156] Miss Wilson submitted that this defect in the datasets used led SNH to overstate the significance of wild land as a consideration in relation to the proposed development site and in making an "in principle" objection. The trust repeated that overstatement in its campaign of opposition to the proposed development prior to the Ministers' determination, and, in pursuing this ground of challenge. It is apparent, however, that both THC and the Ministers were aware of the misdescription as to the quality of the site area and location in terms of wild land characteristics.

[157] The failure of SNH to take account of the Glendoe scheme, and other built development in the vicinity of the site, argued counsel, has consistently been highlighted by the developers' landscape architects, ASH, in response to the SNH consultation responses. Miss Wilson referred to the letter from ASH to the ECDU, dated 9 November 2012, attached as Appendix 4 to THC's report to committee of 19 February 2013, number 6/7 of process. The inaccuracies that reduced the reliability of the SNH maps were identified by THC in its report to committee in which the planning officer said, at paragraph 8.146: "The mapping suggests that within the Monadhliath SAWL, some of the highest qualities of wild land are found within the application site, as well as to the east and north-east. However, it is understood that the recent Glendoe development may not have been accounted for in the datasets used to underpin this work. This mapping is therefore a useful reference point, but cannot be relied upon in its entirety."

Policy in relation to "wild land"

[158] Counsel next responded to the trust's contentions that the Ministers wrongly interpreted their policy "because the areas of wild land have been settled by SNH in conjunction with the Scottish Government as a matter of fact", and that: "The assessment

and mapping of SAWL and CAWL was undertaken by SNH using a strict, consistent and defined methodology approved by the Scottish Ministers". (Petition, statement 8 at page 14) These contentions, submitted Miss Wilson, mischaracterise the nature of SNH's developing approach to wild land and ignore the defects in, and evolution of, the mapping processes referred to above.

[159] In its advice to government of 16 June 2014, number 6/17 of process, SNH recognises the changes in the evolution of the wild land mapping exercise over the period from 2002 to 2014. It states that:

> "Use of the search areas map has grown considerably since its preparation 12 years ago, and has evolved from providing the starting point for review of where the main resource is likely to be found, to informing decisions on individual proposals. This has highlighted its known limitations, in particular that it is a preliminary and incomplete search map and does not identify smaller areas and uninhabited islands. Neither was the scale of the map originally intended to identify the extent of areas with precision."

[160] Miss Wilson referred to the trust's contention that the proposed development site has been identified as wild land since 2002. Until 2013, however, she said, SNH identified only "Search Areas for Wild Land". In SNH's first policy statement on "Wildness in Scotland's Countryside" issued in 2002, number 7/4 of process, SNH explained the significance of the map of SAWLs at paragraph 13 of Annex:

> "Its purpose is not to delimit wild land, but to act as a starting point for review of where the main resource of wild land is most likely to be found… It includes land which is known to have detracting features, say roads or forestry plantations, and it also includes some land formerly of evident wild land quality, but now of less significance on account of major impairment – say, in the glens affected by major hydro-power reservoirs. At this stage, then, it is no more than a search area map, prepared for debate with other parties, but it is thought to include most of the significant and valued areas of wild land."

Counsel said that it was understood that this remains SNH's position as to the significance of the SAWLs.

[161] In 2013, SNH consulted on proposed Core Areas of Wild Land ("CAWLs") and, as a result of that consultation, published a revised map of renamed "Wild Land Areas", as opposed to search areas, in June 2014, superseding the earlier maps. The proposed development site is not in a wild land area.

[162] Counsel noted that the trust cites SNH's comment in its advice to government of 16 June 2014, at page 32 of number 6/17 of process, that the central part of what was the Monadhliath CAWL has been excluded from the wild land area in the 2014 maps "as a consequence of the consenting of Stronelairg windfarm". She submitted that, given the dataset problems acknowledged by SNH, that inference cannot be accepted as reliable because the existence of the Glendoe scheme was not properly reflected in the datasets used for the 2013 CAWL, despite having been present for several years. In Table 3 of the June 2014 advice to government, at page 12, it is recognised that corrections to CAWL area 17 (the Monadhliath CAWL) were necessary, and in the same table it is noted that there was an issue with the tracks dataset that was used when assessing lack of built modern artefacts.

[163] Miss Wilson contended that the trust separately overstates the significance of the identification of wild land in policy protection terms. The inclusion of land within a SAWL did not entail any policy protection. She submitted that the trust exaggerates the nature of the policy protection which was subsequently given to wild land under NPF2, in 2009, and the SPP, in 2010. She argued that the trust appears to suggest that both these policy documents create an absolute obligation to "safeguard" wild land. That is incorrect: (i) paragraph 99 of NPF2, number 11/19 of process, merely identifies wild land as one

consideration to be taken into account in assessing proposed development;

(ii) paragraph 128 of the SPP, number 11/18 of process, only requires planning authorities to "safeguard" the character of wild land areas in the development plan, it does not suggest that no development is permitted; and paragraph 131 makes clear that "while the protection of the landscape and natural heritage may sometimes impose constraints on development, with careful planning and design the potential for conflict can be minimised and the potential for enhancement maximised.

[164] Even following the publication of SNH's wild land area maps in June 2014, submitted counsel, there is no absolute policy protection for wild land. The revised SPP, number 6/30 of process, recognises that "windfarms may be appropriate in some circumstances" in wild land and notes that "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". In its FAQs in relation to onshore wind published on 5 December 2014, number 7/25 of process, the Scottish Government explains that such mitigation could include reducing the number of turbines, careful siting and design of the proposal. The publication also suggests limiting the visibility of the proposal through understanding of the geographical features of the area. Comments received during the design, scoping and engagement stages of windfarm development could also help to identify the scope for development. Counsel contended that such a process of mitigation is exactly what the revisions to the layout of the proposed development at Stronelairg achieved. That was recognised by the Ministers and taken into account when reaching their decision to grant section 36 consent for the development of the proposed Stronelairg windfarm. In that connection, counsel referred to the advice given at pages 13 to 15 of

ECDU's request for determination of the developers' application, number 6/2 of process, which advice, she said, was accepted by the Ministers.

Ground of challenge b(i)

The Ministers misunderstood and misapplied their policy, and so failed to have regard to a material consideration

[165] In reply to the trust's argument that the Ministers wrongly interpreted their policy in relation to wild land, Miss Wilson submitted that the trust's contentions involve issues of weight and are not properly questions of interpretation. The Ministers' conclusions on the weight to be given to the policy were entirely a matter for them. Further, the trust's position is based on its overstatement, and own misunderstanding, of the policy importance of wild land.

[166] In advancing this ground of challenge, said counsel, the trust relies on the wild land maps created and published by SNH. The alleged unreasonableness is based on a claim of irrationality, having regard to the various conclusions that the trust draws from the wild land mapping exercise that SNH had been concurrently, though entirely separately, progressing before and at the time of the decision on the proposed Stronelairg windfarm.

[167] The impact on wild land was simply one material consideration to which the Ministers were required to have regard. In that context, it is clear from their decision letter that the impact on wild land was an important consideration to which they gave considerable weight: "Ministers recognise that the impact of development on wild land was a major cause of concern during the consultation and accept that there will be some impact on wild land surrounding the site"; "Scottish Ministers consider that the landscape and visual impact on the SAWL is a primary determining issue and a matter of concern".

[168] In considering this issue, it was for the Ministers to determine what weight to attach to the advice from SNH, having regard to the representations from THC as contained in the report to committee that supported the recommendation of no objection subject to the agreed revisions to the layout of the proposed windfarm and reduction in height of specified turbines. The Ministers were entitled to take account of THC's analysis of the wild land issues, the lack of reliability of the SNH maps, and the conclusion by THC that the impacts on the SAWL were unlikely to be as severe as advocated by SNH and the Cairngorms National Park Authority. Similarly, the Ministers were entitled to take into account further representations from the developer's landscape architect in response to SNH's consultation response that contradicted the conclusions relied upon by the trust in this challenge. The Ministers were not obliged to accept the advice from SNH or SNH's description of the wild land characteristics of the application site for the purposes of interpreting and applying their own policy on wild land.

[169] The decisions taken by the Ministers in relation to the section 36 applications for the proposed Glenmorie windfarm and Dunbeath windfarm were not inconsistent with the approach taken to the interpretation and application of policy in relation to the proposed Stronelairg windfarm.

Ground of challenge b(ii)

The Ministers acted unreasonably having regard to the approach they took to wild land issues in the Dunbeath decision and the Glenmorie decision.

[170] Counsel for the developers observed that, in this ground of challenge, the trust argues that the Ministers acted unreasonably, having regard to the approach they took to wild land issues in the Dunbeath decision and the Glenmorie decision. She submitted that

the argument is misconceived. The decisions in relation to the Dunbeath and Glenmorie applications illustrate no more than the proposition that the decision-maker will reach a view, in each individual case, based on the particular facts and circumstances of the development under consideration.

[171] The Ministers were under no duty to reach the same result in this application as in either the Dunbeath or the Glenmorie application. Citing the judgment of Mann LJ, at pages 145 to 146 in *North Wiltshire District Council* v *Secretary of* 29 *State for the Environment and Clover* [1993] 65 P&CR 137 (*Clover*), counsel argued that, although an earlier decision is capable of being a material consideration, it is not a material consideration if it is "distinguishable in some relevant respect". A decision-maker is "under no obligation to manifest his disagreement with other decisions which are distinguishable" – that would be "a gratuitous and pointless exercise".

[172] Miss Wilson contended that the trust does not suggest that the facts and circumstances of either the Dunbeath or the Glenmorie application are identical to those in this case. The trust's argument effectively elevates impacts on wild land to be the only relevant consideration. In the case of both of these other decisions, however, the Ministers' determination was based on an overall assessment of all relevant considerations, and there were several reasons for refusal, other than impacts on wild land.

[173] In its note of argument, said Miss Wilson, the trust observes that the Ministers' decision under challenge in this petition is "sandwiched between the Dunbeath decision and the Glenmorie decision". Counsel said that she did not take issue with that observation, as a matter of fact but, she submitted, it is irrelevant.

[174] Counsel contended that the "short passages" from the decision letters in these two cases which are quoted by the trust are taken out of context and cannot simply be contrasted

with the approach taken by the Ministers in relation to the proposed Stronelairg windfarm, because of the differences in the facts and circumstances. To do so is misleading, and provides an unsound and inadequate basis for the argument that the Ministers have taken a contradictory approach.

Ground of challenge b(iii)

Ministers misunderstood SNH's advice and so failed to have regard to a material factor

[175] Miss Wilson observed that this argument appears to be based on the Ministers' summary of SNH's objection in their decision letter: "SNH maintained an objection due to the impacts the development would have on wild land". The trust argues that the Ministers' summary fails to note that the objection was one of principle, that natural heritage issues of national importance were involved, and that, if consent were given, the Monadhliath SAWL would no longer be considered wild land. The trust's argument, contended counsel, is misconceived. It is clear that the Ministers were fully aware of the precise nature of SNH's objection. The decision letter records: "SNH are of the opinion that there would be significant adverse effects on the Monadhliath Search Area for Wild Land (SAWL), to the extent that the SAWL would no longer be considered wild land". Further, Annex 3 to the decision letter, which summarises the response of statutory and non-statutory consultees, records SNH's objection as being "primarily on the issue of significant landscape and visual impacts on the Search Area for Wild Land (SAWL) of the Monadhliath". The advice to Ministers of 16 May 2014, which led to the Ministers' decision, in addition records:
"Officials recognise that the impact of the development on wild land was a major cause of concern during the consultation and accept that there will be some impact on wild land

surrounding the site. This issue was the main factor in SNH and CNPA raising an objection, and was the main subject of consultation from the John Muir Trust."

[176] The objection of SNH was a material consideration for the Ministers to take into account, along with all the other environmental information that was before them. Miss Wilson submitted that it is clear that they properly did so. It was nevertheless open to them to grant consent despite that objection.

Ground of challenge b(iv)

Ministers failed to have regard to the fact that EU law does not establish any priority between the EU's environmental policy and its energy policy

[177] Counsel contended that this argument is not supported by either the terms of the decision of the European Court of Justice in *Azienda Agro-Zootecnica Franchini Sarl* v *Regione Puglia (C-2/10)* [2011] ECR I-06561, [2012] Env LR (*Azienda*), or the approach taken by the Ministers in determining the section 36 application. The passage in *Azienda* that the trust relies on is no more than the following observation by the CJEU: "Suffice it to observe in that connection that Article 194(1) TFEU states that European Union policy on energy must have regard for the need to preserve and improve the environment". (Paragraph 56) Miss Wilson argued that the Ministers are not prevented from carrying out the balancing exercise that was part of their decision-making process, by virtue of the *Azienda* decision.

[178] In their decision letter, argued Miss Wilson, the Ministers make clear that they had regard to the need to preserve and improve the environment. They took full account of the landscape impacts and weighed them appropriately against the renewable energy policy benefits:

> "Ministers have taken into account the fact that there are impacts from this development on some sensitive and remote areas, but consider that the location of the turbines has been considered carefully and that the landscape and visual impacts of the reduced development are minimised in line with SPP. The design of the windfarm has gone to considerable lengths to safeguard the area's wild land character insofar as possible, and the impacts that remain have been weighed against the benefits of the development. Fundamentally, Ministers are of the view that on balance the very significant renewable energy benefits of this development and their contribution to sustainable economic growth mean that the development is broadly supported by policy."

[179] Counsel submitted that the suggestion that, in coming to that view, the Ministers accorded an automatic priority to their energy policy over the need to preserve and improve the environment, or that they failed to have regard to that need, is untenable.

Ground of challenge b: decision and reasons

Ground of challenge b(i)

The Ministers misunderstood and misapplied their policy and so failed to have regard to a material consideration

(i) The proper approach to the consideration of the decision letter

[180] As I have noted, Sir Crispin submitted that, because the terms of the EIA directive applied to the decision-making process in this case, the court has to look behind the decision to the facts, in order to be satisfied that the competent authorities made a correct assessment of the issues, and complied with EU law. In support of that proposition, counsel relied on the cases of *Sweetman* and *Abraham.* In a slightly different context, Mr Mure argued that counsel for the trust's reliance on these cases was misconceived. I agree.

[181] In *Sweetman*, the Irish Planning Board had granted planning permission to construct a road across an area which had been placed on a list of potential SCIs (Sites of Community

Importance). The location affected was a priority habitat type as referred to in Annex I to the Habitats Directive. The High Court rejected an application for leave to issue judicial review proceedings. On appeal, the Supreme Court sought a preliminary ruling from the European Court of Justice. The legislative provision under consideration was article 6(3) of the Habitats Directive which established an assessment procedure which was intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned, but likely to have a significant effect on it, was authorised only to the extent that it would not adversely affect the integrity of that site. Articles 6(2) to (4) "impose upon the Member States a series of specific obligations and procedures designed… to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation." (Judgment, paragraph 36)

[182] Articles 6(2) to (4) are in the following terms:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or

> economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

[183] Following upon its reference to the imposition on member states of a series of specific obligations and procedures, the court observed that, in terms of article 1(e) of the directive, the conservation status of a natural habitat is taken as "favourable" when the natural range and areas which it covers are stable or increasing and that the specific structure and functions which are necessary for the habitat's long-term maintenance exist and are likely to continue for the foreseeable future. The court noted that, in that context, it had already held that the Habitats Directive had the aim that member states take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types.

[184] Consequently, said the court, in order that the integrity of the site as a natural habitat is not to be adversely affected, the site needs to be preserved at a favourable conservation status. Authorisation for a plan or project, as referred to in article 6(3):

> "may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects…" (Judgment, paragraph 40)

[185] In that context, the court said this:

> "So far as concerns the assessment carried out under art.6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned… It is for the national court to establish whether the assessment of the implications for the site meets these requirements." (Judgment, paragraph 44)

The assessment referred to in article 6(3) is an assessment to be carried out by the competent authority. (Judgment paragraph 46) It is the competent authority that is charged with the responsibility of meeting the "requirements" referred to in paragraph 44 of the judgment. Whether or not the competent authority has done so is for the national court to determine.

[186] By contrast, the EIA directive does not "impose upon the Member States a series of specific obligations and procedures to maintain" the environment. Article 5 requires member states to adopt measures to ensure that the developer supplies, in an appropriate form, certain specified information. Article 6 provides that member states shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. It also provides that the public shall be given certain specified information. Article 7 acknowledges that a project may be likely to have significant effects on the environment in another member state and requires the first member state if aware of that likelihood to do certain things. As pointed out by Miss Wilson, article 8 provides that the results of consultations and the information gathered pursuant to articles 5, 6 and 7 "shall be taken into consideration in the development consent procedure". Where the decision of the competent authority is challenged, therefore, the task of the court is to review

the decision-making process and determine whether such matters have been taken into consideration.

[187] *Abraham* was concerned with issues different from those under consideration in *Sweetman.* Reference had been made for a preliminary ruling in respect of certain provisions of Council Directive 85/337/EEC of 27 June 1985, the predecessor to the EIA directive ("the 1985 directive"). The reference related to works at Liège-Bierset Airport which were alleged to have promoted its use for air freight services and to have caused an increase in night flights. The issue before the court was essentially under what conditions modifications to the infrastructure of an airport require an environmental impact assessment, and whether an intended increase in air traffic is to be taken into consideration.

[188] In terms of the 1985 directive, certain specified projects "shall be made subject to an assessment". One such project was the construction of airports with a basic runway length of 2100 metres or more. "Airport" is defined to mean "airports which comply with the definition of the 1944 Chicago Convention setting up the International Civil Aviation Organisation." The directive provided that modifications to these specified projects were not made subject to an assessment on the mandatory basis, but only where member states consider that their characteristics so require.

[189] Member states were, therefore, given a measure of discretion to specify those types of project which would be subject to an assessment, but that discretion was limited by an obligation, which was set out in article 2(1) of the 1985 directive, requiring that projects likely, by virtue of their nature, size or location, among other things, to have significant effects on the environment were to be subject to an impact assessment.

[190] Thus, said the court, a member state which establishes criteria and/or thresholds, taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion.

[191] In that context, the court held that it was "for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment". In other words, that issue was to be determined as a matter of law. The ruling takes Sir Crispin nowhere towards his contention that, when considering the decision letter, the court should not defer to "planning judgment" and should look behind the decision at the factual context, in order to be satisfied that the competent authorities "made a correct assessment of the issues".

Error in interpreting the policies

[192] I am not persuaded that the Ministers fell into error in interpreting the various policies. Sir Crispin submitted that a number of policy statements are not fully quoted in the decision letter. In the "Wild Land" paragraph, for example, the Ministers quote from paragraph 128 of the SPP: "areas of wild land character in some of Scotland's remoter upland, mountain and coastal areas are very sensitive to any form of development or intrusive human activity." But, said counsel, they left out the words "planning authorities should safeguard the character of these areas in the development plan." Whilst that assertion is correct, as a matter of fact, Sir Crispin fails to acknowledge that, in an earlier passage in the decision letter, the Ministers record the policy in full, including the need to safeguard the character of these areas in the development plan. (Number 11/18 of process, page 5) On the same page, the Ministers quote the following passage from NPF2: "Such

areas are very sensitive to any form of development or intrusive human activity and great care should be taken to safeguard their wild land character."

[193] I reject the trust's contention that it was not open to the Ministers to express the view "that the application site itself is not an area of pristine wild land". According to the Shorter Oxford English Dictionary, "pristine" means "of a thing, having its original condition, unmarred, uncorrupted, unspoilt." As the Ministers record in the same passage, the site had lost that character, "given the Hydro development in the area, including a substantial access road which is a dominant feature within the site [as well as] numerous intakes, each with an access track, which are again strong features in views from within the site." These are mixed matters of fact and planning judgment which the Ministers were entitled to record in the decision letter. The Ministers were not, therefore, "irrational" in expressing those views.

[194] In advancing the foregoing contentions, counsel maintains that SNH has included the area of the proposed development in the SAWL and later CAWL over a number of years, and observes that the Ministers knew that the area was to be in the 2014 wild land map. As counsel for the developers points out, however, in its first policy statement issued in 2002, which is number 7/4 of process, SNH pointed out that the purpose of the preliminary search map for areas of wild land was not to delimit it, but to act as a starting point for review of where the main resource of wild land is most likely to be found. SNH acknowledges that it includes land which is known to have detracting features, such as roads or forestry plantations, and refers to land, formerly of evident wild land quality, but now of less significance on account of "major impairment" including glens affected by major hydro-power reservoirs. SNH points out that "this is no more than a search area map, prepared for debate with other parties, but it is thought to include most of the significant and valued areas of wild land." (See paragraphs [158] and [159] of this opinion)

[195] In any event, it is important to understand the purpose of a policy. It is not to shackle decision-makers, but to inform them. As the Cabinet Secretary observes in the foreword to NPF2, the strategy it sets out "will inform decisions". (Number 11/19 of process) In the introduction, the framework is described as "setting out strategic development priorities", and, in the section of the framework entitled "Landscape and Cultural Heritage", at paragraph 99, landscape and visual impacts are described as "important considerations in decision-making on developments." Similarly, at paragraph 131 of the SPP, it is acknowledged that landscapes and the natural heritage are sensitive to inappropriate development. (Number 11/18 of process) Policies may conflict, and it will be for the decision-maker to attempt to strike an appropriate balance. What planning authorities should do, therefore, is ensure that potential effects "are considered when preparing development plans and deciding planning applications." One purpose of such consideration is to minimise the potential for conflict "with careful planning and design". It is noted that "there will be occasions where the sensitivity of the site or the nature or scale of the proposed development is such that the development should not be permitted". It is clear that the policy recognises that developments may cause adverse impacts on landscapes and the natural heritage and it advises careful planning and design to minimise them. Whether or not sensitivity of the site or scale of the proposed development are such that development should not be permitted is, clearly, a matter of planning judgment, to be exercised by the decision-maker. Finally, in the main issues report, noting that SNH has been updating its wild land mapping and has published a map of the core areas of wild land in Scotland, the Ministers declare that they do not intend to designate core areas of wild land under statute. (Paragraph 2.21) "However", they say, "we think the SNH mapping can inform future planning for windfarm development." In my view, there is a

clear recognition in all of these passages that, ultimately, such decisions will be a matter of planning judgment. As Lord Hope of Craighead said of development plans, in *Edinburgh City Council*, at page 36:

> "The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged… 'slavishly to adhere to' it. It is at liberty to depart from the development plan if material considerations indicate otherwise."

[196] Moreover, as Mr Mure points out, SNH does not regard wild land as immune from development, or immune from the balancing exercise inherent in planning decisions, or claim that its own judgments on wild land areas are determinative of planning decisions. I adopt the reasons for these propositions which are set out at paragraph [131] of this opinion, noting, in particular, SNH's view that "wild land does not denote 'no human management or development'".

[197] Having regard to all of the foregoing considerations, I reject the trust's assertion that the various statements which employ the word "safeguard" operate to prohibit all development which will have an adverse impact, to any extent, on wild land.

[198] On the question whether the Ministers were bound to follow the advice given by SNH, I agree with Mr Mure that the correct analysis of the representations made by SNH is that they represented relevant and material considerations for the decision-maker to take into account. Regulation 4(2)(b) of the EIA regulations makes that clear. The reasons given by the Ministers for coming to the view that the impact on wild land of the proposed development "does not on this occasion warrant refusal of consent", which are set out on page 10 of the decision letter are, in my opinion, good and sufficient.

Ground of challenge b(ii)

The Ministers acted unreasonably having regard to the approach they took to wild land issues in the Dunbeath decision and the Glenmorie decision.

[199] I reject this ground of challenge, also. The material considerations relevant to the Stronelairg application were different from those relevant to each of the other applications. It was incumbent on the Ministers to determine each of the three on a case by case basis. In the exercise of their planning judgment, the Ministers were entitled to refuse the Dunbeath and Glenmorie applications and to grant the Stronelairg application.

[200] In the Dunbeath decision letter, which is number 6/32 of process, the Ministers note that there were a number of landscape and visual impacts which were additional to those on wild land and say this:

> "The view given by SNH outlines that there would be significant impacts on key landscape characteristics and that the proposed removal of 5 turbines from the original application proposal to satisfy the planning authority would in fact reduce the windfarm's overall cohesion as a single development. The Reporter's assessment considered the effects on Sweeping Moorland Landscape Character Type (LCT), Berriedale Coast and Flow Country Special Landscape Area (SLA), the impact on nearby Wild Land and the visual impacts on a residential and recreational basis. The overall conclusions confirm that there would be significant adverse impacts to the key landscape characteristics, there would be no safeguarding of the nearby Wild Land resource in the area if this development was approved, cumulative impacts from other nearby windfarms would be significant and there would be significant adverse visual impacts on recreational receptors and on road users. The Reporter also concludes that there would be adverse impacts on nearby residential receptors however these would not on the whole be overbearing. The Scottish Ministers accept and agree with the Reporter's detailed conclusions in this regard." (Page 4)

[201] The Glenmorie decision letter is number 6/34 of process. At paragraph 7.128, the author records the reporter's view that the individual and cumulative impact of the

proposed development on the character of the surrounding remote, upland landscape would be significant and adverse. The reporter continues:

> "The impact on part of the Fannichs, Beinn Dearg and Glencalvie Special Landscape Area would be significantly detrimental and there would be an adverse impact on the integrity of the Ben Wyvis Special Landscape Area designation as a whole. The proposed development would have a significantly detrimental impact on the wildness qualities of a significant proportion of the adjacent Search Area for Wild Land and its approval would not safeguard the wild land resource of the area."

At paragraphs 7.129 and 7.130 the reporter says this:

> "7.129 In addition, the proposed development would have significant adverse visual impacts, both individually and cumulatively, on upland locations and on Strath Rusdale and its residents. The impacts would affect both landscapes and visual receptors (residents and others engaged in outdoor recreation) which are particularly susceptible to change. The avoidance of adverse impacts on the more heavily populated lowlands would not justify an upland location where the level of impact on these highly sensitive landscapes and receptors would be so detrimental.
>
> 7.130 The applicant removed 9 turbines from the original wind farm proposal in an attempt to mitigate the landscape and visual impacts on the natural beauty of the area. However, the overall scale of the amended design (34 wind turbines of 125 metres in height to blade tip, 31.9 kilometres of new access tracks either 5 metres or 8 metres in width, 34 crane hardstandings, 5 borrow pits and other associated infrastructure) would, as described above, still have significant adverse environmental impacts both alone and cumulatively."

[202] In addition to these findings, the Ministers also considered the reporter's conclusions in respect of wild land as follows:

> "The area of this Development now sits largely on Wild Land Areas as shown on the 2014 SNH map of these areas, where previously it was adjacent to the Search Areas for Wild Land (SAWL). The Reporter highlighted the significant detrimental impact the proposed development would have on the wilderness qualities of wild land in the area around the development. Ministers have considered the Reporter's conclusions regarding the impact on the wilderness qualities of the area, which remain relevant, in the context of the new SPP and the fact that the prospective site now sits largely in a Wild Land Area in SNH's 2014 map. Ministers have concluded

> that, if anything, the wild land impacts are of greater concern in the context of the new map and SPP than they were in the context of the previous SPP and map of SAWLs, and therefore that these considerations only lend weight to a decision to refuse the Development."

[203] Further, as Mr Mure points out, the proposed developments at Dunbeath and Glenmorie were contrary to the development plan. In the present case, the Ministers note in the decision letter that:

> "*The Highland Wide Local Development Plan 2012…* recognises the potential for renewable energy development in Highland. Policy 67 (Renewable Energy Developments) gives general support to this type of renewable energy development and is the key policy consideration in assessing this application among the several relevant policies."

[204] As Miss Wilson submitted, the argument advanced on behalf of the trust appears to elevate impacts on wild land to be the only relevant consideration in each of these three applications. In both the Dunbeath and Glenmorie decisions, however, the Ministers' determination was based on an overall assessment of all relevant considerations, and the reasons for refusal in each case extended to other than wild land considerations.

[205] Having in mind the view of Mann LJ in *Clover,* that a decision-maker is under no obligation to manifest his disagreement with other decisions which are distinguishable, in my judgment there are such significant differences between the proposed Dunbeath and Glenmorie developments, on the one hand, and the proposed Stronelairg development, on the other, that, in the exercise of their planning judgment, the Ministers were entitled to reach a decision on the Stronelairg application different from that in respect of each of the other two.

Ground of challenge b(iii)

Ministers misunderstood SNH's advice and so failed to have regard to a material factor

[206] In advancing this ground of challenge, counsel for the trust contends that the summary of SNH's advice which is to be found at page 2 of the decision letter is not an accurate reflection of SNH's objection and fails to note certain particular grounds for that objection, the first of which is that the objection was one of principle to a windfarm in that location.

[207] In response, Mr Mure and Miss Wilson contend that it is clear that the Ministers were fully aware of the nature of SNH's objection. The particular features are set out in paragraph [175] of this opinion. On the information that has been put before me, however, the Ministers do not appear to have been aware of the extent of that objection.

[208] In the second paragraph of its letter to the Energy Division of the Scottish Government's Energy and Climate Change Directorate, dated 18 September 2012, which is number 6/5 of process, SNH notes that, in the scoping advice which it had previously provided, it had indicated "that we may object to the principle of windfarm development here." SNH goes on to say that it "objects to the principle of the windfarm in this location", which may be taken to mean that the objection was to the principle of the proposed windfarm in that location. In its conclusion, however, SNH says this:

> "A wind farm such as Stronelairg, in the central area of the Monadhliath and that does not follow the existing pattern or design of development will have significant adverse impacts, resulting in a loss of wild land that will fundamentally change the individuality and character of the SAWL and wider Monadhliath area. **It will not be possible to mitigate these impacts**. **We therefore object to the principle of a wind farm in this location**." (My emphasis)

[209] By communication, dated 16 May 2014 and addressed to the Minister for Enterprise, Energy and Tourism, the ECDU sought the determination of Ministers of the Stronelairg application. Under reference to that application, the author notes:

> "(SNH) objected on the grounds of significant adverse effects on the Monadhliath Search Area for Wild Land (SAWL), such that the SAWL would no longer be considered wild land. They also raised an objection based on the likelihood of impacts on the Monadhliath Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI), but would remove this part of the objection, subject to conditions." (Number 6/2 of process)

[210] In their decision letter, the Ministers set out the information on which their decision was based. At Annex 3, they list SNH as one of the statutory consultees, and they paraphrase its objection in the following terms:

> "SNH objects to **the proposal**, primarily on the issue of significant landscape and visual impacts on the Search Area for Wild Land (SAWL) of the Monadhliath. They also raised concerns over potential adverse impacts on the Monadhliath Special Area of Conservation (SAC). However, SNH considered that these latter impacts could be sufficiently mitigated by condition." (My emphasis)

In the same Annex, they list THC as another statutory consultee and record that it made no objection, "subject to" various mitigation measures that had been agreed with the developers.

[211] It can be seen that, in the decision letter, SNH's objection is paraphrased in terms very similar to those in the request for determination of the application. It is also clear that, in these passages, there is no reference to SNH's advice that it would not be possible to mitigate the environmental impacts of the proposed development and that, for that reason, SNH's objection was one, in principle, to any windfarm development at that location.

[212] On my reading of the decision letter, counsel for the trust is well-founded in saying that the Ministers did not take into account SNH's objection in principle to any windfarm development at Stronelairg. Neither Mr Mure nor Miss Wilson pointed to any indication that the Ministers did so.

[213] Mr Mure submitted that it is for the decision-maker to determine what is a material factor relevant to his decision, and to decide upon the manner and intensity of enquiry into any relevant factor, subject to *Wednesbury* review. The passage in *Khatun* cited by Mr Mure in support of that proposition follows on the quotation of a passage from the speech of Lord Scarman in *In re Findlay* [1985] AC 318, at pages 333 to 334, in which Lord Scarman described the following words of Cooke J in a New Zealand decision as being "a correct statement of principle":

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, or even that it is one which many people, including the court itself would have taken into account if they had to make the decision… there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers… would not be in accordance with the intention of the Act."

[214] As Sir Crispin argues, regulation 4(2)(b) provides that the Ministers "shall not grant the required consent" unless, among other things, "they have taken into consideration the environmental information" which, in this case, includes SNH's representations dated 18 September 2012. These representations were, therefore, "considerations required to be taken into account by the authority as a matter of legal obligation". SNH's belief that it would not be possible to mitigate the environmental impacts of any windfarm development

at Stronelairg was at the forefront of its representations. In any event, SNH's view was so obviously material to the Ministers' decision, particularly when THC was expressing what was, in effect, the opposite view, not to give direct consideration to it would not be in accordance with the intention of the EIA regulations. If the Ministers did take into consideration SNH's objection in principle to any windfarm development at Stronelairg, they have given no reason for having rejected it, and the decision is defective on that account. I say more about that later in this opinion. For the foregoing reasons, the Ministers' decision falls to be reduced.

[215] This ground of challenge is closely bound up with the Ministers' failure to comply with the terms of regulation 14A. Had the THC report been dealt with as additional information, as I have held that it should have been, its existence would have been advertised before the decision was taken, and the public, including SNH, would have been entitled to have commented on it, and to challenge THC's assertion that the mitigation measures that had been agreed with the developers were such that, in the balancing of benefits against adverse landscape impacts, it would be appropriate to grant consent. In terms of regulation 4(2)(e), the Ministers would have taken into account the terms of any such challenge, before determining the application.

Ground of challenge b(iv)

Ministers failed to have regard to the fact that EU law does not establish any priority between the EU's environmental policy and its energy policy

[216] The basis of this ground of challenge is unclear. On page 5 of the decision letter, the Ministers record that they took into account the environmental impacts from the proposed development, noticed the effect of the reduced development and then carried out a

balancing exercise between what they described as "the very significant renewable energy benefits of this development and their contribution to sustainable economic growth" and the impacts that remain. Neither in that passage, nor in any other cited by the trust, do the Ministers assert that energy policy has priority over environmental policy. What they said was that, having regard to the facts and circumstances of the case which they had to decide, the balancing exercise came out in favour of granting consent. As said by Lord Hoffmann in *Tesco*: "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".

[217] This ground of challenge is, therefore, without foundation.

Submissions for the trust: ground of challenge c

Inadequate reasons for the decision

[218] Sir Crispin submitted that the decision should, in any event, be reduced, because the Ministers have failed to give adequate reasons for it in the decision letter.

[219] The trust accepts the approach to reasons set out in: *South Bucks* and *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, subject to the caveat that, as this is an EU case, the court may have to look behind the reasons, to make sure that the Ministers have carried out a proper assessment of the environmental issues including landscape. Counsel, once again, relied on the decision in *Sweetman* as authority for that proposition.

[220] Sir Crispin observed that, in his affidavit, Mr Coote of ECDU accepts that: "Some of these sections of text [in the decision letter] are standard template sections" and refers to a "typo" to contradict the statement that "Supplementary Environmental Information" had

been considered. Counsel submitted that the trust, the court, and the public cannot rely on the decision letter as indicating that the Ministers applied their minds properly to the issues before them, or what other "typos" there might be in the decision letter arising from "standard template sections".

[221] In these circumstances, in so far as not already dealt with in his earlier submissions, Sir Crispin submitted that the reasons given in the decision letter are inadequate to explain the impact on its decision of the following considerations: (a) economic benefits; (b) tourism; and (c) non—material considerations.

(a) Economic benefits

[222] Counsel submitted that, in the context of purporting to balance energy and economic benefits against the loss of wild land, the Ministers do not adequately explain on what basis they considered that there were very considerable renewable energy and economic benefits, which are described in the decision letter as two of the main determining issues. If those are main determining issues, argued Sir Crispin, one would expect the Ministers to have dealt with them in detail.

[223] Under the heading "Renewable Energy Benefits", the Ministers merely assert that there will be "a significant reduction in CO2 emissions" without any quantification or consideration of the CO2 releases arising from such a development in the manufacture, construction and operation of the project.

[224] Under the heading "Economic benefits" the Ministers rely on the developer's estimates for the original project, but there was no assessment of the renewable energy output or benefit, or of the economic benefits, of the reduced project. The Ministers have not explained why economic benefits will "outweigh any negative economic impacts", when

they have not set out what might be the negative impacts, or quantified what the energy or economic benefits of the reduced proposal might be. In the absence of conditions or a section 75 agreement, the Ministers have not explained on what basis they are satisfied that such benefits will be delivered. In these circumstances, contended counsel, the decision letter is inadequate on this issue.

(b) Tourism

[225] Sir Crispin notes that, at page 13 of the decision letter, the Ministers say:

> "Some representations have highlighted the potential for the site to have a negative impact on tourism and therefore an associated negative economic impact. Whilst Ministers accept that the visual and landscape impacts set out above will be experienced by some visitors to the area, Ministers do not consider that the presence of these impacts is likely to have a significant effect on tourism."

Counsel contended that the applicable policies contradict that assertion. At paragraph 97 of NPF2, number 6/14 of process, landscapes are described as "a national asset of the highest value" and "a major attraction for our tourist visitors".

[226] At paragraph 125 of the SPP, number 6/29 of process, the following appears: "Scotland's landscape and natural heritage are internationally renowned and important, underpinning significant industries such as the food, drink and tourism industries." One of the trust's objections to the Stronelairg proposed development was on tourism grounds, including reference to research by Visit Scotland the results of which, contended counsel, demonstrated that interviewees were "against wind farms".

[227] Counsel noted the following statement in the decision letter: "Ministers do not consider that the presence of these impacts is likely to have a significant effect on tourism",

and said that no reasons are given. The trust does not know why its objection was not accepted.

[228] While there must be a ground for every decision, argued Sir Crispin, there must be reasons for each ground. The Ministers have given their ground for rejecting the tourism objection, but they have given no reasons. Counsel cited *Leisure Inns Ltd* v *Perth & Kinross Licensing Board* 1991 SC 224 (*Leisure Inns*), *per* the Lord Justice-Clerk at page 233: "I agree with him that behind every ground for refusal there must be adequate reasons, and that for these reasons there must be a proper basis in fact." Sir Crispin submitted that the same principles apply in this case. Further, he contended, *Leisure Inns* accords with *Wordie Property* at page 348 where it is said that the decision-maker's duty is:

> "to give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader 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".

[229] Counsel submitted that tourism is an important issue in the policy context, but the informed reader does not know on what basis the Ministers concluded that they did not consider that the proposed development would "have a significant effect on tourism".

(c) Non –material considerations

[230] Counsel drew the court's attention to page 14 of the decision letter, under the heading "Non-material considerations", where the Ministers refer to various community benefits which would accrue as result of the development. The Ministers state that they have not taken them into account when considering their decision on the application. Sir Crispin questions why the Ministers make reference to these considerations in such

detail. The only reasonable conclusion, he suggests, is that the Ministers have taken these considerations into account and, accordingly, have had regard to an irrelevant consideration.

Submissions for the Ministers: ground of challenge c

[231] Mr Mure submitted that, when issuing a decision letter, the Ministers' duty is prescribed by the terms of regulation 10(3A) of the EIA regulations. Any analysis of the decision letter in this case must take into account that statutory background, in addition to judicial warnings not to give elaborate and lengthy accounts of reasons. In that connection, counsel cited *Asif v Secretary of State for the Home Department* 1999 SLT 890 (*Asif*), at 894 per Lord Penrose; *Eagil Trust Co Ltd* v *Pigott-Brown* [1985] 3 All ER 119 (*Eagil*), at 122 *per* Griffiths LJ; and *Moray Council* v *Scottish Ministers* 2006 SC 691 (*Moray Council*).

[232] The trust's contention that, because the decision letter included an erroneous reference to "Supplementary Environmental Information", the public cannot rely on the decision letter as indicating that the Ministers applied their minds properly to the issues rather than merely following a template, is wrong in principle, submitted Mr Mure. It remains for the trust to demonstrate that the decision fails to meet the duty which was imposed on the Ministers by the terms of regulation 10. The presence of a non-material typographical error does not reverse the onus. It remains for the trust to establish its ground of review. Counsel referred to *R* v *Governors of Bishop of Challoner Roman Catholic School ex. Parte Choudhury* [1992] 2 AC 182 (*Choudhury*), at page 197.

[233] In his affidavit, Mr Coote explains that similar structures are used for decision letters, a process which could prompt officials not to omit particular issues. Mr Coote has explained how the mistake arose, and does not suggest that any other errors occurred. For the reasons

already discussed, said Mr Mure, this court is not obliged to enter upon a factual investigation of the environmental assessment conducted by local and national authorities.

[234] Mr Mure noted that, at statement 9 of the petition, the trust contends that the reasons given in the decision letter are inadequate to explain seven features of the decision. They are the following:

1. Why the Ministers have not followed the advice given by SNH that the environmental impacts could not be mitigated and that, if the development went ahead, the area would no longer be considered wild land;

2. Why the Ministers have not followed the wild land policies in NPF2 and SPP;

3. Why the impact on wild land did not warrant refusal, despite the Ministers' concluding that the impact was "significant";

4. Why the Ministers, having stated that, notwithstanding the revised design of the proposed development, there remained a significant impact on wild land, cited the revision as a factor which justified their conclusion that the impact on wild land did not warrant refusal;

5. Why the Ministers determined that the area of land on which the windfarm would be sited was "not an area of pristine wild land", and yet determined that the proposed development would still have a significant impact on the wildness qualities of the Monadhliath SAWL;

6. On what basis the Ministers consider that there were considerable renewable energy and economic benefits; and

7. Why the Ministers refer to "non-material considerations" in such detail as they do when they claim not to have taken such considerations into account.

[235] Counsel responded to each of those criticisms on the ground of inadequate reasons, in turn.

1. *For not following SNH advice on mitigation*

[236] Mr Mure contended that this criticism is misconceived, because there is no requirement for the Ministers "to follow the advice given by SNH". SNH does not have a decisive or determining role in the decision-making process. The correct analysis of the representations made by SNH is that they were relevant and material considerations for the decision-maker to take into account. Counsel referred, again, to section 4(2)(b) of the EIA regulations . As a statement made under the provisions of regulation 10(3A), the decision letter addresses the position advanced by SNH under the headings "Wild land" and "Landscape and Visual Impacts". Counsel pointed out that the Ministers agreed with SNH's proposal that the implementation of a deer management plan should be made a condition of the development, and imposed such a condition. (See page 11, under "Blanket Bog and Deer Management in relation to Protected Sites") It can be seen, therefore, contended Mr Mure, that the decision-maker took into account the views of SNH. Mitigation was dealt with in detail within the environmental statement and was supported by the amendment to a reduced project, which was itself supported by the Development Plan and the Interim Supplementary Guidance on On-shore Wind Energy.

2. *For not following wild land policies in NPF2 and SPP*

[237] Wild land is one of many competing considerations for the decision-maker, and the policy within NPF2 and SPP does not require the protection of wild land to preclude

development, but does require the decision-maker to weigh the competing economic, environmental and energy considerations associated with the development.

3. *For not refusing consent, despite concluding that the environmental impact was "significant"*

[238] The decision letter gives clear reasons why the development attracted consent and deemed planning permission, notwithstanding the impact on wild land, which was just one issue among many. Under the heading "Wild land" the decision letter states:-

> "… Ministers have taken into account the fact that the development will be significantly shielded from surrounding land by topography, sitting as it does in a natural hollow surrounded by high ground. Ministers therefore consider that the development is well designed to minimize the impact on the surrounding areas of wild land, and the changes requested by The Highland Council are designed to further ensure that the wind farm is well contained within the bowl shaped landform surrounding the site and will therefore result in a reduction in the overall prominence and visibility of the turbines".

4. *For concluding that the impact on wild land did not warrant refusal notwithstanding their accepting that the revised design had a significant impact on wild land*

[239] The Ministers were entitled to draw that conclusion from all of the material before it, including the material in the environmental statement and the representations received from THC.

5. *For determining the proposed development area not to be an area of pristine wild land, yet concluding that the proposed development would have a significant impact on the wildness qualities of the SAWL*

[240] The efforts of the developer to minimise the impact on the surrounding areas of wild land is a relevant factor for the decision-maker to have regard to. While the application site

itself was not considered "pristine", it was recognised that visual impacts would be felt beyond that site, and would affect the Monadhliath SAWL. The Ministers were entitled to have regard to the individual circumstances surrounding the site and the surrounding area of wild land, and take into account the effect of the existing surrounding development including roads. They were equally entitled to take into account that the area was not pristine and to take an individualised approach to the site under consideration.

6. *For concluding that there were very considerable renewable energy and economic benefits*

[241] The Ministers had regard to the Scottish Government's policies promoting renewable energy: e.g. SPP, at paragraph 182:

> "The commitment to increase the amount of electricity generated from renewable sources is a vital part of the response to climate change. Renewable energy generation will contribute to more secure and diverse energy supplies and support sustainable growth."

[242] In any event, the decision letter refers to the clear policy support for renewable energy, the details of the benefits of this particular project were contained within the environmental statement, detailed reference to which was not required within the decision letter. The environmental benefits described within the decision letter reflect the material before the decision-maker contained within, amongst other things, the carbon savings calculation at technical appendix 17.2 in volume 4 of the environmental statement.

[243] With respect to tourism, counsel refers to (i) Chapter 16 of the environmental statement, under the heading "Land Use, Socio-Economics and Tourism" and (ii) the decision letter's discussion of the very limited visibility of the proposed development from the Cairngorms National Park and the Cairngorms Mountain NSA. A section 75 agreement

would have been inappropriate for the purpose proposed by the trust, given the location and nature of the land.

7. *For setting out non-material considerations in such detail if these considerations were not taken into account*

[244] Mr Mure submitted that the trust's complaint is misconceived. For the sake of transparency and comparison, the letter clearly explains that the payments mentioned have not been taken into account and thus played no part in the decision-making process.

Submissions for the developers: ground of challenge c

Summary

[245] Counsel for the developers submitted that the Ministers' reasons for their decision are, on a fair reading of the decision letter as a whole, "perfectly clear". The reasons refer to the main issues in dispute and are proper and adequate to explain the Ministers' conclusions on the principal important controversial issues that were before them.

The law in relation to adequacy of reasons

[246] Miss Wilson contended that the law in relation to adequacy of reasons in a planning decision is well established, principally as summarised in *South Bucks*, *per* Lord Brown at paragraph 36 and followed in *Moray Council*, *per* the Lord Justice-Clerk, at paragraph 31. The reasons given for a decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". They need refer only to the main issues in dispute, not to every material consideration. (*South Bucks*, *per* Lord Brown, at paragraph 36) The provision of

adequate reasons does not require an elaborate philosophical exercise, and the decision-maker is not required to provide reasons for every issue raised by the parties. (*Moray Council*, at paragraph 30)

[247] Counsel argued that it is important to maintain a "sense of proportion" when considering the duty to give reasons, and not to impose on the decision-maker a burden that is unreasonable having regard to the purpose intended to be served. (*Uprichard* v *Scottish Ministers* [2013] UKSC 21, 2013 SC (UKSC) 219, *per* Lord Reed, at paragraph 48)

[248] Miss Wilson submitted that, most importantly, a reasons challenge will only succeed if the party aggrieved can satisfy the court that he or she has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision (*South Bucks*, at paragraph 36)

[249] Counsel concluded her analysis of the relevant law by submitting that the reasons given by the Ministers for their various conclusions "easily meet" the legal tests.

Renewable energy and economic benefits

[250] Turning to what the trust argues are particular defects in the decision letter, Miss Wilson contended that the Ministers' reasons for their conclusion that the proposed development would have significant renewable energy benefits are clear. They begin by setting out in detail the policy support for renewable energy in general. They go on to describe the benefits of the proposed development in particular:

> "This development makes a significant contribution towards meeting greenhouse emission and renewable energy targets. Ministers note that the development does not currently support the target of 500 MW of renewable in community or local ownership by 2020, but the fact remains that the reduced Development of around 242MW at Stronelairg would provide power equivalent to the needs of approximately 114,000 homes. This substantial increase in the amount of renewable

> energy produced in Scotland is entirely consistent with the Scottish Government's policy on the promotion of renewable energy and its target for the equivalent of 100% of Scotland's electricity demand to be met from renewable sources by 2020."

Counsel submitted that, in the context of the "strong policy support for renewable energy", that passage provides adequate reasons for the Ministers' conclusion on the issue under discussion. Separately, SEPA had confirmed that there was sufficient confidence in the carbon payback figure for the revised development provided to it for the Ministers to use it as a material consideration in their decision-making. Miss Wilson invited attention to the terms of number 7/10 of process.

[251] Similarly, she submitted, the decision letter contains a "clear and succinct description" of the likely economic benefits. The Ministers state:

> "Significant economic benefits to Scotland will arise through investment in construction and employment, and there will also be clear economic benefits to the country arising from the production of electricity – through its export, which is an important aspiration for Scotland, and through the fact that it will support security of supply which is essential to the country's economic wellbeing".

[252] The letter goes on to set out a detailed description of the likely economic benefits through investment in construction and employment. It notes the developers' estimates that during construction the proposed development would create contracts during construction of £466.1 million (including £81.3 million in the Highland area and £48.4 million in the local area) and potentially create the equivalent of 611 job years (including 379 in the local area), and that, during operation, it would create an estimated 117 jobs (including 92 in the local area). The letter also notes that, although those figures will clearly be reduced as a result of the reduction to the proposed development, they serve to demonstrate its significant economic benefits.

[253] Miss Wilson submitted that these were conclusions which the Ministers were fully entitled to reach and their reasons for doing so are clear and adequate. Given the large scale nature of the consented wind farm, comprising 67 turbines, it was within the knowledge of the Ministers and their officials from their consideration of other large scale wind farm proposals of national importance that such a scale of development would deliver significant energy and economic benefits.

Tourism

[254] Counsel contended that, on a fair reading of the letter as a whole, it is clear why the Ministers did not consider that the visual and landscape impacts were likely to have a significant effect on tourism. The Ministers say:

> "Some representations have highlighted the potential for the site to have a negative impact on tourism and therefore and associated negative economic impact. Whilst Ministers accept that the visual and landscape impacts set out above will be experienced by some visitors to the area, Ministers do not consider that the presence of these impacts is likely to have a significant effect on tourism."

[255] Miss Wilson submitted that, in that passage, the Ministers cross-refer to the visual and landscape impacts "set out above". In the discussion of those visual and landscape impacts, the Ministers make clear their view that those impacts will be limited, by specific reference to the Cairngorms National Park and the Cairngorms Mountains NSA, which have obvious relevance to impacts on tourism. In particular, they say: "Ministers consider that the ZTV produced in the Environmental Statement demonstrates that the extent of visibility of the Development will be remarkably small within the CNP." Later, they express the following view:

> "Ministers consider it to be an important consideration that visibility from within the Cairngorms Mountains NSA, a key designated area within the park which is fundamental to its character and integrity, and from Cairngorms Central Massif, one of Scotland's iconic mountain landscapes, is very limited in extent, and that where there is visibility this is at distances of around 30km or more and therefore not significant."

When the letter is read as a whole, argued Miss Wilson, it is clear why the Ministers do not consider that the visual and landscape impacts are likely to have a significant effect on tourism.

[256] Moreover, in the paragraph which follows, the Ministers go on to explain that, even if they had considered that the visual and landscape impacts were likely to have a significant effect on tourism, that would have made no difference to their decision, because the effect on tourism would have been outweighed by the other economic benefits of the proposed development, saying:

> "<u>Regardless</u>, whilst accepting the figures provided by the Company are estimates, Ministers are content that they serve to demonstrate that the economic benefits of the proposal far outweigh any negative economic impacts, and have concluded that the development will therefore have significant positive economic impact locally and nationally". (Counsel's emphasis)

[257] Counsel submitted that the Ministers' explanation follows their detailed discussion of the likely economic benefits of the proposed development. That discussion is such that, read in proper context, it is clear why the Ministers were content that the benefits would outweigh any negative economic impacts, even if their belief that the visual and landscape impacts were unlikely to have a significant effect on tourism was wrong. This was a conclusion which they were fully entitled to reach and their reasons for doing so are clear and adequate.

Community benefit

[258] Contrary to the trust's assertion, contended Miss Wilson, the terms of the decision letter make it clear that the Ministers did not take into account the developers' policy of committing to community benefit. They say: "The Ministers, while supportive of community benefit, have not taken these payments or the community benefit arising into account when reaching their decision on the application". The trust's assertion that, nevertheless, the Ministers did take those considerations into account is, argued counsel, untenable.

Ground of challenge c: decision and reasons

The relevant law

[259] In the *South Bucks* case, Lord Brown of Eaton-under-Heywood, with whose opinion Lords Steyn, Scott of Foscote, Rodger of Earlsferry and Carswell agreed, conducted a review of the leading cases on reasons challenges to decisions made in the context of planning legislation. At paragraphs 35 and 36 of his speech, Lord Brown set out what his Lordship described as a "broad summary" of the authorities governing the proper approach to a reasons challenge in that context. Paragraph 36 is in the following terms:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn.

> The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[260] I am unable to find within the petition, the trust's written submissions, or Sir Crispin's oral submissions any express claim by the trust that it has been substantially prejudiced by any failure by the Ministers to provide adequate reasons. It may be, however, that, if the Ministers' reasons were inadequate in any respect, such prejudice may emerge from an understanding of what effect such inadequacy has had. It appears to me, therefore, to be helpful to understand what Lord Brown had in mind when referring to the need for a challenger to satisfy the court that there has been substantial prejudice. As his Lordship said, at paragraph 35, the summary of the law which was offered was not expected to "avoid all need for future citation of authority".

[261] As noted by Lord Brown, the issue of prejudice was fully dealt with by Lord Bridge of Harwich in *Save Britain's Heritage* v *Number 1 Poultry Ltd* [1991] 1 WLR 153. At page 168B of the report, his Lordship expressed the following opinion:

> "The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given."

The burden of proof, said Lord Bridge, lies on the applicant "to satisfy the court that he has been substantially prejudiced by the failure to give reasons". (Lord Brown, paragraph 29)

[262] A deficiency of reasons would cause substantial prejudice, said Lord Bridge, in the following circumstances:

> "... I should expect that normally such prejudice will arise from one of three causes. First, there will be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications." (Lord Brown, paragraph 30)

[263] In addressing the seven individual elements of this ground of challenge which were advanced by the trust in its petition and in counsel's submissions, it is convenient to follow the order adopted by Mr Mure in his response to each of the trust's criticisms of the decision letter.

1. *For not following SNH advice on mitigation*

[264] Mr Mure is correct, in my opinion, in saying that the representations made by SNH were relevant and material considerations for the Ministers to take into account in considering their decision, but that there was no requirement for them to follow the advice given by SNH. Earlier in this opinion, however, when considering ground of challenge

b(iii), I have held that the Ministers did not take into account SNH's objection in principle to any windfarm development at Stronelairg, because mitigation was not possible, and that, if they did take into account that objection in principle, they have given no reason for having rejected it.

[265] As I have noted in paragraph [19], in determining an application to which the EIA regulations apply, the Ministers are prohibited from granting a section 36 consent "unless… they have taken into consideration the environmental information… and state in their decision in relation to that consent that they have done so." (Regulation 4(2)(b)) SNH's objection in principle formed part of the environmental information. If, contrary to what I have held, the Ministers did take it into account, they have not stated in their decision that they did so.

[266] In my view, the trust has suffered prejudice as a result of the Ministers' failure to give reasons. That prejudice falls within the first of Lord Bridge's three categories. Having regard to the complete absence of any reference to SNH's objection in principle in the decision letter, there is a "substantial doubt whether the decision was taken" in accordance with the terms of regulation 4(2)(b). The reasoning, therefore, gives rise to a substantial doubt as to whether the Ministers erred in law by misunderstanding the extent of SNH's opposition. That was clearly an important matter, because SNH's objection in principle to any windfarm development at Stronelairg was in direct conflict with THC's advice. It follows that the trust succeeds on this aspect of ground of challenge c.

2. *For not following wild land policies in NPF2 and SPP*

[267] For the reasons given by counsel for the Ministers, I agree that they were not required to follow these wild land policies. Their task was to weigh the competing considerations. In the "Wild Land" section of the decision letter, the Ministers set out what the competing considerations were and why, in balancing these considerations, they determined that the environmental impacts of the proposed development are outweighed by the "very considerable benefits" that it would bring.

3. *For not refusing consent, despite concluding that the environmental impact was "significant"*

[268] This aspect of the reason challenge also fails. The Ministers adequately set out the competing considerations and explain why the environmental impact was outweighed.

4. *For concluding that the impact on wild land did not warrant refusal notwithstanding their accepting that the revised design had a significant impact on wild land*

[269] As Mr Mure submits, the Ministers were entitled to reach that conclusion, and they adequately explained why they did so.

5. *For determining the proposed development area not to be an area of pristine wild land, yet concluding that the proposed development would have a significant impact on the wildness qualities of the SAWL*

[270] Here, too, the Ministers had to balance competing considerations. They adequately explained what these considerations were and why their assessment of them brought them to the conclusion that they should grant consent.

6. *For concluding that there were very considerable renewable energy and economic benefits*

[271] The relevant passages in the decision letter were identified in her submissions by Miss Wilson, and they are set out at paragraphs [250] to [253] this opinion. In my view, the Ministers' reasons met the relevant legal tests.

7. *For setting out non-material considerations in such detail if these considerations were not taken into account*

[272] For the reasons advanced by both Mr Mure and Miss Wilson, I reject the trust's argument in support of this aspect of ground of challenge c.

Disposal

[273] For the foregoing reasons, I hold that the trust's challenge to the Ministers' decision of 6 June 2014, in respect of grounds of challenge a(ii), b(iii) and the first aspect of ground of challenge c, succeeds. The challenge otherwise fails. I shall sustain the trust's pleas-in-law 2, 3 and 6, repel the Ministers' second and third pleas in law, and the developers' second, third, fifth, sixth and seventh pleas-in-law. The Ministers' decision of 6 June 2014 will, accordingly, be reduced. I shall reserve all questions of expenses.