OUTER HOUSE, COURT OF SESSION

[2018] CSOH 66

P1318/17

OPINION OF LORD PENTLAND

In the petition

INEOS UPSTREAM LIMITED and another

Petitioners

and

FRIENDS OF THE EARTH SCOTLAND

Interveners

against

THE LORD ADVOCATE

Respondent

Petitioners: Moynihan QC, McBrearty QC; Burnet; DLA Piper Scotland LLP
Interveners: Balfour + Manson LLP
Respondent: Mure QC, A Sutherland; Scottish Government Legal Directorate

19 June 2018

Introduction

[1] In this petition, which came before me for a substantive hearing, Ineos Upstream Limited and Reach Coal Seam Gas Limited seek judicial review of certain acts and decisions of the Scottish Government in relation to unconventional oil and gas ("UOG") in Scotland. The basis of the petitioners' case is that in 2017 the Scottish Government unlawfully imposed an indefinite ban on the method of oil and gas extraction known as hydraulic fracturing or

"fracking". The Lord Advocate maintains that, on a correct understanding of its acts and decisions, the Scottish Government did not impose any such ban. He contends that since there is no ban the petitioners have no case; the petition for judicial review is based on a series of fundamental misunderstandings of the Scottish Government's position and should accordingly be refused.

Fracking

[2] To set the scene I will briefly explain what is involved in the process known as hydraulic fracturing or fracking. Fracking is a drilling technique used to fracture rocks in order to release the oil and gas contained in those rocks. It is most frequently employed to extract oil and gas from shale. Shale deposits are mainly found at depths greater than 1 kilometre; in Scotland they are usually located at depths of between 1 and 3 kilometres. There are a number of shale deposits in Scotland, most notably across an area of the Central Belt known as the Midland Valley. In 2014 the British Geological Survey published an analysis of the potential shale resources in the United Kingdom. They estimated that the Midland Valley holds between 49.4 and 134.6 trillion cubic feet of shale gas. Only a relatively small proportion of these resources are likely to be commercially viable for development or production. Exploratory work would be required so as to understand more fully how much oil and gas could be economically and technically recovered.

[3] The oil and gas industry use a range of techniques to extract oil and gas from underground reserves. What are referred to as conventional oil and gas reserves can be exploited by drilling a well, allowing the oil or gas to flow out under its own pressure. Conventional deposits of oil and gas are contained in porous rocks with interconnected

spaces, such as limestone and sandstone. These interconnected spaces give rise to permeability which allows the oil or gas to flow effectively through the reservoir to the well.

[4] By contrast, unconventional oil and gas deposits are contained in impermeable rocks, such as shale or coal deposits. In these cases, the oil or gas cannot easily flow through the reservoir. In order to extract such oil and gases, techniques such as hydraulic fracturing are used. As I have explained, fracking is used to fracture rocks to release the oil and gas contained in them. The rock is fractured by injecting pressurised fluids into the rock to prise open small spaces in the rocks, which release the oil or gas.

[5] Water is injected into the shale at high pressure to create, or enlarge, existing tiny fractures in the rock; these may only be a few fractions of a millimetre in width. The injected water contains proportions of sand (around 5%) to help hold open the fractures. Chemicals are also used (less than 1%) to reduce friction and protect the drilling equipment from corrosion, and to remove accumulations of micro-organisms and mud from the drilling equipment.

[6] Coal bed methane is also considered to be an unconventional source of gas. This is because the gas is present in the coal rather than being held in pore spaces. To extract the gas, water is drained from the coal seam to release pressure; this is known as de-watering. Depending on local geological conditions, this may be carried out with or without hydraulic fracturing.

[7] The future of unconventional oil and gas in Scotland has proved to be a highly controversial subject. It has given rise to intense debate. Views for and against it are strongly held on all sides of the debate. In this case the court is not at all concerned with these questions; they raise sensitive issues of environmental, economic, and social policy. The court is concerned only with the legal question of whether, as the petitioners allege, the

Scottish Government has acted in excess of the powers conferred on it by imposing an outright ban on fracking. In a written intervention Friends of the Earth Scotland submitted that the Scottish Government had acted lawfully in imposing a ban on UOG development in Scotland. The intervention was prepared on the basis that an effective ban had been put in place. As I have explained, the position of the Scottish Government is that no effective ban has been imposed. The intervention did not seek to engage with that issue, which is the real issue in the present case. In the circumstances, I need say no more about the intervention.

Oil and gas licensing

[8] In the United Kingdom the right to search, bore for and extract petroleum, including oil and gas, is vested in the Crown. Petroleum exploration and development licences ("PEDLs") may be granted, at ministers' discretion, under the Petroleum Act 1998 ("the 1998 Act"). On 9 February 2018, pursuant to sections 47 and 48 of the Scotland Act 2016, responsibility for onshore petroleum licensing within the Scottish onshore area was devolved to the Scottish Ministers. A licence is granted to promote the exploitation of a national resource in the national interest. Consequently, it imposes positive obligations on the operator to progress work; operators are not entitled to 'bank' licenses as assets and to fail to make progress. On the other hand, in view of the scale of investment the government has only limited rights of revocation.

[9] It is important to appreciate that a PEDL does not give permission for operations; it merely grants exclusivity to licensees in relation to hydrocarbon exploration and extraction within a defined area. At each stage, the license holder will have to obtain not only a ministerial consent required under the terms and conditions of the PEDL, but also permissions and regulatory consents from land owners and a range of public authorities,

including the Scottish Environmental Protection Agency ("SEPA"), the Health and Safety Executive ("HSE"), the Coal Authority, Scottish Natural Heritage ("SNH"), and local planning authorities. None of these consents and permissions is provided for in, or guaranteed by, the grant of a PEDL. A PEDL grants exclusive rights in relation to the exploration and development of all types of conventional and unconventional oil and gas including tight gas, coalbed methane, mine vent gas, oil shale and shale gas. In order to carry out UOG extraction in Scotland, in addition to a PEDL, the petitioners would require to obtain *inter alia* planning permission under the regime in the Town and Country Planning (Scotland) Act 1997 as amended ("the 1997 Act") and related legislation, and authorisation by SEPA under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 ("the 2011 regulations").

[10] In the recent case of *R (Dean)* v *Secretary of State for Business, Energy and Industrial Strategy* [2017] 4 WLR 158 Holgate J discussed the nature of PEDLs and the applicable statutory and regulatory frameworks. He drew attention to a number of features of the licensing regime. For present purposes, it is of interest to note the following:

1. The activities licensed by a PEDL are intrinsically risky. The risks include completely unforeseen and sometimes unforeseeable changes in circumstances.

2. Although they are "statutory licenses", PEDLs are contractual in nature, the obligations resting principally on the licensee.

3. Following the grant of a PEDL, the licensee is subject to a comprehensive system of regulation under other legislation to address potential environmental and safety issues. Obtaining consent under the license to proceed is subject to those regulatory approvals having been obtained.

4. PEDLs are highly prospective, with no guarantee of commercial viability.

5. License holders are required to pay an escalating annual rental to the government, designed to ensure that once a license is awarded, work proceeds in a manner most likely to establish whether a viable oil or gas field exists and can be developed.

6. Variations to the terms of PEDLs, including the extension of the terms, are considered by the licensing authority in the light of all relevant factors.

7. A PEDL is essential for a licensee not only to be able to search for and extract oil and gas, but also to obtain the right to own the product so as to be able to sell it to third parties. These are private law rights which are essential to an operator for the conduct of its business. The grant of a license is essentially a property transaction, akin to a mining licence or a mining lease.

The petitioners' interests

[11] The first petitioners hold interests in and are the operators of PEDLs 133 and 162, which cover defined onshore areas in Scotland. They hold 100% of the interest in PEDL 133, and 80% of the interest in PEDL 162. The second petitioners own the remaining 20% of PEDL 162. The petitioners aver that the second petitioners are a Scottish company which (either itself or through associated companies) has been involved in UOG development since about 2007; its term as licensee under PEDL 162 commenced on 1 July 2008. The first petitioners initially acquired interests in PEDLs 133 and 162 in 2014. They also acquired the interest in planning applications submitted for a site at Letham Moss, a small former mining village near Falkirk, and at Powdrake Road, near Airth, Plean, in respect of coal bed methane production; the relative sites are in the area covered by PEDL 133. The Scottish Ministers appointed reporters to determine these planning applications in June 2013; there was a three-week public inquiry in March and April 2014. No determination has yet been issued. The petitioners aver that they have both made multi-million-pound investments in Scotland in relation to UOG.

Planning law and policy

[12] It will now assist if I summarise the main features of the relevant planning framework, including consideration of (i) the applicable rules, policies, and practices of the Scottish planning system, and (ii) the policy framework in place in 2014.

[13] As is well-known, Scotland has a plan-led system for land use (*City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33 per Lord Hope of Craighead at 35G-36G; and Lord Clyde at 42G-45B). Section 37(2) of the 1997 Act provides *inter alia* that:

> "In dealing with … an application (sc. for planning permission) the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

[14] This applies equally where the determination is to be made by the Scottish Ministers on a called-in application under section 46 of the 1997 Act. The ministers' discretion in respect of planning applications is a broad one; the exercise of weighing up the material considerations and the development plan is a matter of planning judgment for the decision maker. The weight to be attached to a relevant consideration is also entirely for the decision maker, provided that he or she does not act unreasonably in a Wednesbury sense.

[15] In terms of section 25 of the 1997 Act, where in making any determination under the 1997 Act regard is to be had to the development plan, the determination is to be made in accordance with the development plan unless material considerations indicate otherwise. It may be said that in this sense a degree of priority is afforded to the development plan. It is not, however, the law that greater weight is to be attached to the policies of the development plan than to other considerations; other policy may overtake and supersede development plan policies (see *R (West Berkshire DC)* v *Secretary of State for Communities and Local Government* [2016] PTSR 982 per Laws and Treacy LJJ at paragraph 20).

[16] In terms of section 3A of the 1997 Act, Scottish Ministers are obliged to prepare, publish, and keep under review a spatial plan for Scotland known as the National Planning Framework ("NPF"). The current NPF ("NPF3") was published in June 2014. It represents the Scottish Government's spatial expression of its economic strategy and plans for development and investment in infrastructure. In particular, it sets out the Scottish Government's vision for achieving (i) a successful, sustainable place, (ii) a low carbon place, (iii) a natural, resilient place and (iv) a connected place (NPF3 paragraph 1.2).

[17] In terms of sections 8(1) and 16(2) of the 1997 Act, when preparing strategic development plans and local development plans, the relevant authorities are to "take into account the National Planning Framework", along with any information and considerations prescribed for that purpose, and such other information and considerations as appear to them to be relevant. NPF3 is not itself part of the development plan and applications do not have to be determined in accordance with its terms. It is, however, a material consideration in the determination of applications.

[18] In June 2014, the Scottish Government published Scottish Planning Policy 2014 ("SPP2014"). SPP2014 is part of the Scottish Government's national planning policy. It is a material consideration in the determination of applications for planning permission. It sits alongside NPF3 with other non-statutory planning policy documents including (i) Creating Places (2013), (ii) Designing Streets (2010) and (iii) various planning circulars. It sets out the Scottish Government's national planning policies for achieving its vision, which includes (i) supporting the aim of NPF3 to reduce greenhouse gas emissions and facilitate adaptation to climate change, and (ii) achieving the target set in the Climate Change (Scotland) Act 2009 of reducing greenhouse gas emissions by at least 80% by 2050, with an interim target of reducing emissions by at least 42% by 2020. It expressly states as a policy principle that the

planning system should support the transformational change to a low carbon economy (paragraph 154).

[19] Ministers' powers to formulate and adopt national planning policy (including SPP2014 and other non-statutory policies) derive, expressly or by implication, from the planning Acts; these give them overall responsibility for oversight of the planning system (*Hopkins Homes Limited* v *Secretary of State for Communities and Local Government and another* [2017] PTSR 623 per Lord Carnwath JSC at paragraphs 19-21). Planning policy is "not a rule but a guide" (*West Berkshire*, supra per Laws and Treacy LJJ at paragraph 19). Ministers are entitled to express their view as to the weight to be given to their policies but cannot "lay down the law" about them (*West Berkshire*, supra per Laws and Treacy LJJ at paragraph 23). As with SPP2014 and the equivalent NPPF in England and Wales, non-statutory policies such as the Scottish Energy Strategy are material considerations in the determination of applications for planning permission. Prospective changes to policy, such as the ministers' emerging policy position on UOG, can also be material considerations (*Cala Homes (South) Limited* v *Secretary of State for Communities and Local Government* [2011] 1 P & CR 22 451 per Lindblom J at paragraphs 49-52). Ministers' policy making powers are not therefore restricted to NPF and SPP.

[20] NPF3 and SPP2014 include specific policies on mineral extraction and UOG. NPF3 states at paragraph 4.26:

> "Reserves of coal bed methane in the Scottish midland valley (Central Belt) could contribute to secure energy supplies in the medium term but will require careful planning to avoid negative environmental and community impacts from extraction activities. A framework for this is set out in the Scottish Planning Policy."

[21] The policies contained in SPP2014 for promoting the responsible extraction of indigenous coal, oil and gas aimed to minimise impacts on the environment, local

communities, and the built and natural heritage. Paragraphs 245 and 246 set out specific matters which should be taken into account in relation to proposals for shale gas and coal bed methane extraction and hydraulic fracturing. This approach represented a significant tightening of policy when compared to SPP2010. In an affidavit lodged in the present proceedings, Mr John McNairney, chief planner in the Scottish Government, explained that by 2016 planning policy applied a risk assessment approach towards UOG with the intention of establishing buffer zones to protect sensitive receptors from unacceptable risks. If there was an inadequate buffer, permission was to be refused. Paragraph 245 of SPP2014 provided that when considering applications planning authorities and statutory consultees must assess the buffer zone distances proposed; where these were considered to be inadequate the policy stated that the Scottish Government expected planning permission to be refused. Mr McNairney referred to a statement made by the then planning minister, Mr Derek Mackay MSP, to the Scottish Parliament on 19 February 2014, in which he stated that the Government had made clear its direction of travel on UOG; it expected robust understanding of impacts on the environment before consent could be given.

[22] The Scottish Government's policy position on UOG at the time NPF3 and SPP2014 were adopted in June 2014 requires to be understood in light of the fact that in September 2013 it had convened an independent expert scientific panel to report on the scientific evidence relating to UOG. The remit of the independent panel was *inter alia* to deliver a "robust, well-researched evidence base relating to unconventional oil and gas upon which the Scottish Government can reliably base future policy in this area". The panel published its report in July 2014 after the adoption of NPF3 and SPP2014.

The 2015 Directions

[23] On 28 January 2015 the Scottish energy minister, Mr Fergus Ewing MSP, made a statement to the Scottish Parliament on UOG to the effect that there was to be work on planning and environmental regulation, a health impact assessment, and a consultation process on UOG. He stated that given the importance of this work it would be inappropriate to allow any planning consents in the meantime. He therefore announced what he described as a moratorium on the granting of planning consents for all UOG developments, including fracking. The moratorium was to continue until such time as the work referred to had been completed. The minister stated that a direction would be sent to all Scottish planning authorities to give immediate effect to that policy. A similar direction would be issued to SEPA.

[24] Following this announcement, the Scottish Ministers issued, under powers vested in them by regulations 31 and 32 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, planning directions requiring local planning authorities to intimate the receipt of planning applications for any UOG developments to them; the directions were originally issued in January 2015 and revised in October of that year. The direction issued on 8 October 2015 was the Town and Country Planning (Notification of Applications) (Unconventional Oil and Gas) (Scotland) (Number 2) Direction 2015 ("the 2015 Planning Direction"). The definition of "unconventional oil or gas development" for the purposes of the 2015 Planning Direction excludes the drilling of boreholes solely for the purpose of core sampling. Subject to that exclusion, planning authorities must notify the Scottish Ministers of applications for UOG development; and they are prohibited from granting planning permission within 28 days of notification to Ministers. The purpose of the direction is to allow ministers to consider whether to exercise

their power to call in the application for determination by them. The ministers also made directions in January and October 2015 under the Water Environment (Controlled Activities) (Scotland) Regulations 2011. The 2011 regulations apply to any "controlled activity" as defined in regulation 3(1); this extends to activities liable to cause pollution of the water environment. The Water Environment (Controlled Activities) (Unconventional Oil and Gas Development) (Scotland) (No. 2) Direction 2015 ("the 2015 SEPA Direction") requires SEPA to refer for ministerial determination any application for authorisation to carry on any controlled activity in connection with UOG development, subject to the same exclusion as in the case of the 2015 Planning Direction. The 2015 Planning Direction and the 2015 SEPA Direction gave legal effect to the moratorium. The power of the Scottish Government to call in planning applications for determination by them, coupled with the 2015 Planning Direction and the 2015 SEPA Direction gives Scottish Ministers the means to control two of the essential legal requirements for onshore extraction of UOG. By refusing planning permission or authorisation of controlled activities under the 2011 regulations, the Scottish Government could prevent onshore UOG development extending beyond drilling of core samples. To date, the notification requirements under the 2015 Planning Direction have not been triggered. No application has been remitted to ministers by SEPA under the 2015 SEPA Direction.

[25] On 6 February 2015 the Directorate for Planning and Environmental Appeals ("DPEA") advised parties to the Letham Moss planning appeals that in view of the ministerial statement made on 28 January 2015 the reporters proposed to suspend work on their report to ministers and that the appeals would be sisted to await the outcome of the research and consultation announced by the Scottish Government. On 12 October 2015 the

reporters published a notice on the DPEA website intimating that their work on the appeals had been suspended and that the appeals had been sisted.

Further research and public consultation

[26] In late 2015 and 2016 the Scottish Government commissioned a series of reports and research projects from a range of experts. The purpose of these strands of work was to address a number of gaps in the evidence identified by the independent expert scientific panel which had reported in July 2014. Reports were obtained on economic impacts and scenario development (from KPMG), on climate change impacts (from the committee on climate change), on understanding and monitoring induced seismic activity (from the British Geological Survey), on transport issues (from Ricardo), on decommissioning, site restoration and aftercare (from AECOM), and on the health impact of UOG (from Health Protection Scotland). The research reports were published in full on 8 November 2016.

[27] In January 2017 the Scottish Government launched a public consultation exercise by publishing a consultation document entitled: "Talking Fracking - a consultation on unconventional oil and gas". In the foreword the minister for business, innovation and energy, Mr Paul Wheelhouse MSP, explained that once the consultation had closed and the responses had been independently analysed, the Government would consider the full range of evidence, and make its recommendation. He said that the Government would then ask the Scottish Parliament to vote on the recommendation, and the Government would come to what he described as a final decision by the end of 2017 on whether or not UOG has a role in Scotland's energy mix. The consultation period lasted 4 months. There were 60,535 valid responses to the consultation. About 99% of the responses were opposed to fracking.

The ministerial statement of 3 October 2017

[28] On 3 October 2017 Mr Wheelhouse made a statement on UOG to the Scottish Parliament. The minister opened by stating that the Scottish Government had consistently taken a cautious, evidence-led approach to considering the potential exploration of UOG in Scotland. He said that he wished to set out the Government's "preferred position on the future of unconventional oil and gas in Scotland which is based on the findings of our consultation and the extensive evidence we have collated." The minister went on to explain that the preferred position would be the subject of a full parliamentary debate and vote after the recess. He then said that, in line with the Government's statutory responsibilities, a strategic environmental assessment would be commissioned following the parliamentary vote to assess the impact of the Scottish Government's position "prior to its finalisation."

[29] Mr Wheelhouse continued by setting out the findings of the public consultation. He stated that reaching a "decision" on UOG had been the culmination of a period of careful and comprehensive evidence gathering. He said that the Government had not taken the process or the decision lightly. He then proceeded to review the research findings. Having dealt with the findings of the research and with the outcome of the process of public engagement, the minister said this:

> "Taking all that into account, and balancing the interests of the environment, our economy, public health and public opinion, I can confirm that the conclusion of the Scottish Government is that we will not support the development of unconventional oil and gas in Scotland.
>
> To put that position into immediate effect, we have today written to local authorities across Scotland to make it clear that the directions that give effect to the moratorium will remain in place indefinitely. That action means that we will use planning powers to ensure that any unconventional oil and gas applications are considered in line with our position of not supporting unconventional oil and gas.

> Let me be clear: that action is sufficient to effectively ban the development of unconventional oil and gas extraction in Scotland. The decision that I am announcing means that fracking cannot and will not take place in Scotland.
>
> My comments relate to the use of planning powers. …"

[30] The minister referred to the fact that the transfer of licensing powers from Westminster to Holyrood had been expected to occur in February 2017 but had yet to be progressed by the UK Government. He explained that he had written to the Secretary of State for Business, Energy and Industrial Strategy in the UK Government to set out the Scottish Government's position on the future of UOG in Scotland and to seek assurances that the proposed devolution of licensing powers would not be affected by Brexit. Mr Wheelhouse continued as follows:

> "Although that is important, I want to make it crystal clear that using our planning powers in the way that I have set out allows us to deliver our position, no matter what Westminster decides. I am aware that there is a proposal for a Member's Bill on this issue from Claudia Beamish. However, the use of planning powers is an effective and much quicker way to deliver our policy objective, as with our actions on nuclear power stations. Legislation is therefore not necessary."

[31] It is convenient to explain at this point that on 1 June 2016 there had been a vote in the Scottish Parliament on an amendment to the Environment, Climate Change and Land Reform Bill moved by Claudia Beamish MSP. The amendment sought an outright ban on fracking. It was passed, in a non-binding vote, by 32 votes to 29 with the Scottish National Party having abstained.

[32] Towards the end of his statement on 3 October 2017 the minister said the following:

> "Taking full account of both the available evidence and the strength of public opinion, my judgment is that Scotland should say 'no' to fracking. That position will be reflected in our finalised energy strategy, which we will publish in December.
>
> The next step in this process will be for the Scottish Government to lodge a motion for debate, to allow the Parliament to vote on whether to support our carefully considered and robust position on unconventional oil and gas."

[33] In the debate following the minister's statement Claudia Beamish welcomed the indefinite extension of the moratorium, but she observed that this was not "as strong as a full legal ban" and could be overturned at any point "on the whim of a future minister". In response, Mr Wheelhouse stated that the Government had put in place through the measures he had outlined "an effective immediate ban on unconventional oil and gas extraction activities in Scotland".

[34] At a later stage in the parliamentary debate, Mark Ruskell MSP said that "we do not have a ban in front of us". He asked the minister when the Government would introduce a permanent ban by using Scottish planning policy, environmental regulations, and licensing powers. In reply, the minister said that he was taken aback because he did not think that Mr Ruskell had listened to what he had said in his statement. The minister added this:

> "Using planning policy, we have put in place an immediate ban on unconventional oil and gas extraction activities in Scotland… We believe that the position is robust… I give reassurance – I tried to make it crystal clear in my statement – that there is, in effect, a ban on unconventional oil and gas activities in Scotland."

Events after the ministerial statement

[35] On 3 October 2017 Mr McNairney wrote to the heads of planning at all Scottish local authorities ("the 2017 letter"). He drew their attention to the announcement that, on the basis of the available evidence, the Scottish Government did not support the development of UOG in Scotland. The letter advised that the Government would continue to use planning powers to give effect to this policy. The 2015 Planning Direction which gave effect to the moratorium on UOG would continue to remain in force. The notification arrangements would be on the same basis as set out in the original planning direction issued on 28 January 2015. Mr McNairney's letter also stated that as required under the Environmental

Assessment (Scotland) Act 2005 ("the 2005 Act"), the Scottish Government would shortly commission a strategic environmental assessment of its preferred position on UOG.

[36] On 5 October 2017, at First Minister's question time, Mr Ruskell observed that there was concern that the ban was not yet legally watertight "as it merely extended a temporary brake on planning decisions". He asked the First Minister if she would "get the ban properly over the line by putting it on the same footing as the ban on new nuclear power stations, and whether she would commit to using the licensing powers when they arrived". In reply to Mr Ruskell's question, the First Minister said this:

> "The ban on new nuclear energy in Scotland is done through planning powers and that is exactly what we are proposing for the ban on fracking. Let me be clear, because to some ears, it will sound as if some members are dancing on the head of a pin: fracking is being banned in Scotland – end of story. There will be no fracking in Scotland, and that position could not be clearer.
>
> … What Paul Wheelhouse outlined to the chamber earlier this week is an effective way of banning fracking and … is the quickest way of banning fracking. Instead of continuing to have this abstract argument, those who, like me, do not believe that fracking should go ahead in Scotland should welcome the fact that fracking in Scotland is banned."

[37] On 24 October 2017 the promised debate on UOG took place in the Scottish Parliament. In opening the debate Mr Wheelhouse said that the Scottish Government was honouring the commitment it had previously given to allow the Parliament an opportunity to "endorse our carefully considered and robust position on unconventional oil and gas." Mr Wheelhouse went on to explain that in coming to their position he had sought legal advice and considered precedents, including the Government's position on not supporting new nuclear power stations or underground coal gasification. The minister then said this:

> "The approach that we have adopted, using our fully developed planning powers, is to set out a robust and effective ban, using planning policy. Our approach ensures that decisions on onshore unconventional oil and gas developments will be made in line with planning policy and procedure, and within the framework of Scottish

> Government policy – policy that does not support unconventional oil and gas extraction in Scotland.
>
> …
>
> After this debate, we will issue a written policy statement on our position on unconventional oil and gas. That will support the preparation of a strategic environmental assessment, which I propose will commence shortly and conclude in summer 2018. We will then set out our finalised position, which will be reflected in future iterations of Scotland's energy strategy."

Mr Wheelhouse moved a motion in the following terms:

> "That the Parliament agrees with the Scottish Government's position of not supporting the development of unconventional oil and gas in Scotland; endorses the government's decision to introduce an immediate and effective ban on onshore unconventional oil and gas developments using its devolved powers, in line with the Scottish Ministers' statutory responsibilities, and notes that this position will be subject to a strategic environmental assessment before being finalised."

An amended motion was passed endorsing the Government's decision to introduce an immediate and effective ban on UOG and noting that this position would be subject to a strategic environmental assessment before being finalised.

[38] On 8 November 2017 DPEA sought parties' views on further procedure in the Letham Moss planning appeals in light of the ministerial announcement made on 3 October and the motion passed in Parliament. By email sent on 29 November 2017 DLA Piper, the petitioners' solicitors, advised DPEA that the petitioners were still considering the implications of the Scottish Government's revised policy announcement on their clients' position. The email stated that if the appellants decided to insist on the reporters' recommendations being submitted to Scottish Ministers (as to which no decision had yet been made), it would be expected that the ministers would attach overriding weight to their new "no support" planning policy and refuse the appeals, regardless of the reporters' recommendation. The issue for the reporters, according to DLA Piper, would be whether as a matter of law, the Scottish Ministers' new policy was a relevant material consideration

which the reporters would be required to take into account and, if it was such a consideration, what weight (if any) should be attached to that policy "in circumstances where it has still to be taken through a strategic environmental appraisal and adopted into the next iteration of SPP."

[39] On 7 December 2017 the Scottish Government published a position statement on UOG. It summarised the investigations and research that had been carried out and referred to the ministerial statement made on 3 October 2017. The position statement explained that any policy decision that had potential for significant environmental effects had to be subject to a strategic environmental assessment prior to its finalisation; this was required under the 2005 Act. The position statement said that it was anticipated that this assessment work would commence in the summer of 2018, after which the policy on UOG would be finalised. The statement explained that on the basis of the research it had commissioned the Scottish Government did not support the development of UOG in Scotland. The Government would embed its position on UOG in the next iteration of the National Planning Framework which was expected in 2020 "thereby giving an assurance (that) the policy would carry significant weight in development planning …".

[40] On 13 December 2017 DLA Piper wrote again to DPEA by email. They explained that they were seeking the opinion of senior counsel on the legal implications of the ministerial announcement of 3 October 2017. Without prejudice to their clients' final position, they expressed the view that ministers would presumably attach significant weight to their new policy of no support and refuse the appeals.

[41] On 20 December 2017 the Government published the Scottish Energy Strategy. This stated that the Government's preferred policy position would be subject to a strategic

environmental assessment. It explained also that, once finalised, the policy on UOG in Scotland would be reflected in the next iteration of the National Planning Framework.

[42] On 28 December 2017 the petitioners raised the present proceedings.

[43] The UK Government has waived the PEDL annual rental fees for PEDLs 133 and 162 payable in June 2016 and July 2017.

Is there a legal ban on fracking?

[44] It is true, as Mr Moynihan QC highlighted on behalf of the petitioners, that ministers in the Scottish Government repeatedly stated to the Scottish Parliament that they had introduced an effective and robust ban on fracking in Scotland and that they had done so by means of the powers given to them (expressly or by implication) under planning legislation; what they referred to as their "planning powers". These statements (whilst they are admissible in the context of judicial review of executive action: see for example, *Toussaint* v *A.G. of St Vincent & the Grenadines* [2007] 1 WLR 2825) are not, however, determinative of the legal issue that the court must address in the present petition. The legal question is not whether ministers have accurately described or commented on their understanding of the legal effect of the various steps they have taken or authorised to be taken under the planning system, but the fundamentally different question of what the legal effect of those steps really is. The latter question is one of law for the court to decide, on the basis of an objective and independent legal analysis of the nature and effect of the Scottish Government's acts and decisions.

[45] In carrying out this legal analysis it is important to identify what the relevant acts and decisions of the Scottish Government actually are in the present context. In my view they are: (a) the decision to announce a "preferred policy position" to the effect that the

Scottish Government will not support the development of UOG in Scotland; and (b) the decision that the 2015 Directions should continue in force indefinitely. These are the two decisions that are at the heart of the Scottish Government's stance on fracking as matters currently stand.

[46] What then is the legal effect of these two decisions?

The preferred policy position

[47] As far as the preferred policy position is concerned, a number of points seem to me to be important. First, the evidence shows that the policy position announced so far has never been intended to be a final policy; that was made clear by the minister in the statement he made to the Scottish Parliament on 3 October 2017 - he explained that statute (the 2005 Act) required that a strategic environmental assessment had to be carried out before the policy could be finalised. The fact that the policy position was expressed as being a "preferred" one shows that the Scottish Government understood, in my view correctly, that unless and until the strategic environmental assessment was completed, a policy on UOG could not lawfully be finalised and adopted. I shall come back to consider the 2005 Act in more detail later. I note that the position statement in turn made clear that there required to be a strategic environmental assessment before the policy could be finalised.

[48] Second, I reject Mr Moynihan's submission that in understanding the intended effect of the policy no account should be taken of the position statement published by the Scottish Government on 7 December 2017. That seems to me to be an artificial and unrealistic approach, particularly in view of the fact that the minister explained to the Parliament during the debate on 24 October 2017 that the Scottish Government would issue a written policy statement setting out its position. In the circumstances, I consider that regard must be

had to the position statement when it comes to considering the true meaning and effect of the Scottish Government's stance. It is notable that the petitioners do not attack the position statement in the present proceedings.

[49] Third, when one looks at the various ways in which the policy (or more accurately the emerging policy) has been expressed, it seems to me that what it amounts to is a statement by the Scottish Government that it does not support the development or extraction of UOG in Scotland. Nothing else that ministers have said about the effect of the policy amounts to a formulation or articulation of the policy, but rather to commentary on it. Such commentary does not, in my opinion, affect the meaning of the emerging policy. The meaning of the emerging policy is a question of construction for the court; the opinions of ministers or MSPs on that issue or on the import or merits of the policy are irrelevant to that question (see *R (Public Law Project)* v *Lord Chancellor* [2016] AC 1531 per Laws LJ in the Court of Appeal at paragraph 20). So, for example, when Mr Wheelhouse said on 3 October 2017 that the Government's actions were sufficient to effectively ban the development of UOG in Scotland he was referring back to the two decisions I have identified: (a) the announcement of the preferred position and (b) the decision to maintain the 2015 Directions in place indefinitely. He was expressing his and the Government's then view as to the effect of those steps. The First Minister was engaged in essentially the same exercise when she answered Mr Ruskell's question on 5 October 2017.

[50] So, the ministerial comments reflecting the opinion that there was an effective ban on fracking are (a) irrelevant to the legal question before the court; (b) not binding on the court; (c) in any event, not determinative of the question of construction that the court has to address; and (d) to the extent that they did not accurately express the legal effect of the decisions taken must be left out of account when it comes to answering the legal question.

[51] The other point to notice in this connection is that the emerging policy does not in fact provide that the development or extraction of UOG in Scotland is to be prohibited. It says something different, namely that the Scottish Government does not support such activities. The petitioners contend that a policy of no support equates to an outright ban or that, in any event, the policy of no support was ambiguous and should therefore be construed compatibly with the ministerial commentary on it. In my opinion, the emerging policy is not ambiguous. It means what it says: the Scottish Government does not support fracking. It does not mean that any planning or other application for consent to carry on such activity must be refused as a matter of law. It conspicuously does not stipulate that the Scottish Government has banned fracking. This is not a technical or legalistic distinction. The policy reflects the Scottish Government's provisional evaluation of the position as at October 2017 based on the outcome of their public consultation and the other evidence available to them at that time. In light of those sources of information, they stated that their preferred position was not to support fracking; it seems to me that this provisional view does not amount to an attempt to lay down a legally enforceable rule, applicable to all decision makers, that fracking is henceforth prohibited.

[52] Fourth, the petitioners' approach reflects a misconception as to what a planning policy truly is. A policy is not a rule; it is merely a guide (see *West Berkshire* supra per Laws and Treacy LJJ at paragraph 19). It is axiomatic that a decision maker (including the Scottish ministers in the context of a called-in application) is not bound by any rule of law to follow policy, however strongly expressed that policy may be; he or she is entitled to depart from it in the event that the particular facts and circumstances of the application under consideration, when they are evaluated in the light of all relevant evidence (including the policy), justify such a course being followed. It is accordingly open to a decision maker, as

matters currently stand, to grant planning permission and other consents needed to allow UOG developments in Scotland to proceed, notwithstanding the government's emerging policy of no support for such developments.

[53] To the extent that some sections of the ministerial statements made to the Scottish Parliament were capable of being read as suggesting that the policy would amount to a ban on fracking, Mr Mure QC accepted on behalf of the Lord Advocate that such statements did not accurately reflect the legal position; they were to that extent mistaken. The way Mr Mure put it was to say that the concept of an effective ban was a gloss; it was, he said, the language of a press statement. Mr Moynihan, for his part, urged the court to take the view that no meant no and that ministers should be taken at their word. In my opinion the petitioners' argument is unsound; when the government's policy position is properly understood as a matter of law, ministers have not laid down an absolute and unbending ban on fracking. The position statement correctly sets out the legal effect of the emerging policy as follows:

> "The outcome of our public consultation shows that in those communities which would be affected, there are considerable concerns about the potential impacts and disruption that could be caused.
>
> It is the Scottish Government's position that the research we have commissioned and considered does not provide a strong enough basis from which to address those communities' concerns.
>
> On this basis the Scottish Government does not support the development of unconventional oil and gas in Scotland.
>
> This position is implemented using the fully devolved planning powers to establish robust and effective controls. On 03 October the Chief Planner wrote to local authorities across Scotland to make clear that the Planning Direction of 2015 will continue to remain in force.
>
> This approach ensures decisions on onshore unconventional oil and gas will be made in line with planning policy and procedure, and within the framework of Scottish

> Government policy – a policy that does not support unconventional oil and gas extraction in Scotland."

The final paragraph of this extract rightly explains that decisions are expected to be made "in line with" planning policy and procedure; this is different from stipulating that the policy must be followed in every case. The same point is made by the reference to decisions having to be taken "within the framework" of the Scottish Government's policy. The position statement makes clear that the Government's intention was for its policy to carry significant weight in development planning and decision making; in other words, the policy would not be determinative of planning applications. I note that this was the view put forward by DLA Piper, on behalf of the petitioners, in their correspondence with DPEA in the aftermath of the October 2017 ministerial statement. A policy that it does not support a particular type of development is, I consider, a policy that central government is entitled to adopt. It should also be recalled that the Scottish Government is entitled to articulate a planning policy in broad, unqualified, and indeed robust terms; it need not expressly state in the formulation of the policy that it may be subject to exceptions - after all the objective of the policy maker is that his or her policy should be followed. When a minister articulates a planning policy there is no legal requirement incumbent on him or her to spell out that in its application the policy is constrained by considerations of fairness, good faith or the obligation to take account of the facts and circumstances of the individual case (see *West Berkshire supra* per Laws and Treacy LJJ at paragraphs 21, 25 and 28).

The 2015 Directions

[54] As far as the 2015 Directions are concerned, these are essentially procedural in character. The 2015 Planning Direction requires planning authorities to notify Scottish

Ministers of applications for UOG development; this allows central government to consider whether to call in the applications for determination. The 2015 SEPA Direction requires SEPA to refer for ministerial determination any application for authorisation to carry on any controlled activity in connection with UOG development. It is clear that neither of these directions makes provision as to the content, meaning or effect of any planning policy. They do not create a ban on fracking. The directions were lawfully made under statutory powers. They require to be given effect by the authorities to whom they are addressed.

[55] I conclude that neither the preferred policy position nor the 2015 Directions introduced a prohibition against fracking in Scotland. No decision has been made on what the final policy position of the Scottish Government will be in relation to fracking.

The 2005 Act

[56] Strategic environmental assessment ("SEA") is regulated by the 2005 Act. The purpose of SEA is to ensure that the competent authorities take significant environmental effects into account when *inter alia* preparing and adopting plans or programmes (*Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 per Lord Reed at paragraph 11). Section 1(1) of the 2005 Act provides as follows:

> "The responsible authority shall -
>
> (a) during the preparation of a qualifying plan or programme, secure the carrying out of an environmental assessment in relation to the plan or programme; and
>
> (b) do so –
>
> (i) where the plan or programme is to be submitted to a legislative procedure for the purposes of its adoption, before its submission; or
>
> (ii) in any other case, before its adoption."

[57] As I have explained, the current position is that the Scottish Government's preferred policy of no support for fracking has not been finalised; it remains under preparation and subject to further consultation and evaluation. There was no dispute between the parties that a new planning policy on UOG development would be a "qualifying plan or programme" for the purposes of the 2005 Act. Mr Moynihan submitted that "adoption" in section 1(1)(b)(ii) meant "brought into effect". Since a new planning policy banning fracking had, he said, been brought into effect without a SEA having been carried out, there had been a breach of section 1(1) and the policy was accordingly unlawful. As I have explained, I consider that a new planning policy banning fracking has not been made; accordingly, no such policy has been brought into effect. The current position is that there is an emerging planning policy, which has not been finalised; the emerging policy does not ban fracking.

[58] In addressing the petitioners' submission, it is important also to note that the 2005 Act provides for a process to be followed through in the course of preparation of a qualifying plan or programme. The cornerstone of the process for carrying out a SEA is the preparation and publication of an environmental report. Section 14(2) of the 2005 Act provides:

> "The report shall identify, describe and evaluate the likely significant effects on the environment of implementing-
>
> (a) the plan or programme; and
>
> (b) reasonable alternatives to the plan or programme,
>
> taking into account the objectives and the geographical scope of the plan or programme."

Thus, in order to prepare an environmental report, it is necessary first to have a proposed plan or programme. In the present case, I consider that the only sensible approach which is consistent with the scheme and purposes of the 2005 Act is to hold that the Ministers'

preferred policy position as outlined in late 2017 constitutes the proposed plan or programme. I note also that in terms of section 15(1) of the 2005 Act, before deciding on the scope and detail of the information to be included in the environmental report, and the consultation period, the responsible authority must send to consultation authorities, such as SEPA and SNH, such sufficient details of the qualifying plan or programme as will enable the consultation authority to form a view on those matters. Again, this shows that it is necessary to have a clear plan or programme in mind in order to submit it to the SEA process. Finally, under section 16 the responsible authority must: (a) provide consultation authorities with a copy of the environmental report and the qualifying plan or programme to which it relates; (b) publicise those documents; and (c) thereafter consult for a period "of such length as will ensure that those to whom the invitation is extended are given an early and effective opportunity to express their opinion on the relevant documents". Again, it would seem that the consultation process can only work if there is a proposed plan or programme on which meaningful consultation can take place.

[59] It follows from this analysis that, as matters presently stand, there is a preferred policy position which is to be regarded as a proposed plan or programme; that is what will now go forward to the stage of a SEA. This will allow for a fully informed consultation process based on the information assembled in the course of the expert investigations in 2015-16; the responses to the public consultation exercise in 2017; and the direction of travel of planning policy currently favoured by the Scottish Government. Mr Mure submitted that all this would be consistent with the objective of the 2005 Act and the EU Directive which it implements. It seems to me that this analysis is correct. It is worth noting that Article 1 of Directive 2001/42/EC provides that its objective is to provide for a high level of protection of the environment and to contribute to the integration of environmental

considerations into the preparation and adoption of plans and programmes by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment. In my opinion, the process now underway will achieve this objective. I note that the consultation on the environmental report is expected to begin in July 2018 and to last for 8 weeks; it will consider reasonable alternatives. In accordance with the Scottish Government's standard practice, a Business and Regulatory Impact Assessment ("BRIA") will be conducted at the same time. Thereafter, when considering their final policy position, Scottish Ministers are obliged to take account of the environmental report and every opinion expressed by the consultation authorities and the public (section 17 of the 2005 Act). Mr Moynihan submitted that the procedure which the Ministers proposed to follow was inconsistent with their own guidance which states on page 11 that:

> "the SEA should begin at an early stage in a plan's preparation, as it is important that the future consultation on the plan and the environmental report takes place when ideas are forming and policy options are still being actively considered".

He submitted that the policy had not only been formed, it had been applied and had had an impact. In my view, this submission is unsound. Policy has not been formed; it is still evolving and remains to be finalised under the SEA process.

[60] It follows that the petitioners' challenge insofar as based on failure to comply with the 2005 Act fails.

Other grounds of challenge

[61] Since I have held that, as a matter of law, there is no prohibition against fracking in Scotland, the petitioners' other grounds of challenge may be dealt with briefly; essentially, they were all predicated on the proposition that the Scottish Government had imposed an

effective prohibition against fracking. First, the challenge based on alleged unlawful fettering of discretion must fail. The time for evaluating whether discretion has been fettered is at the stage when the final policy comes to be applied in the context of determination of an application for consent to proceed with a UOG development (*West Berkshire* supra per Laws and Treacy LJJ at paragraphs 17 and 21). That point has not been reached. I can see no basis for holding that the preferred (emerging) policy operates so as to fetter the fair and proper determination of planning applications in accordance with the applicable statutory framework.

[62] Second, the petitioners complain that ministers have used their statutory powers for an improper purpose. This ground of challenge, which substantially overlaps with the first, again depends on a ban having been put in place. Since I have concluded that there is no ban, this line of attack cannot succeed. Moreover, I can see no merit in the contention that the Scottish Government has misused its statutory powers. The Scottish Government's power to formulate and adopt national planning policy is derived, expressly and by implication, from the 1997 Act. The emerging policy will take its place among other local and national policies, and along with those policies will carry weight at the point when a planning application (or application under the 2011 regulations) falls to be determined. The position is quite different from the one that arose in *Laker Airways* v *Department of Trade* [1977] QB 643 where guidance issued by the Secretary of State had the purported effect of undermining the policy reflected in primary legislation.

[63] Third, there is no substance in the petitioners' case insofar as based on breach of legitimate expectation. It is clear that the Scottish Government's position on UOG extraction has been developing for a period of some years. There can be no legitimate expectation as to the way in which broad and discretionary ministerial powers, including the power to

formulate policy, will be exercised. The petitioners have failed to identify any statement or assurance given by ministers that their policy on UOG would remain unaltered in the future. On the contrary, it must have been clear to the petitioners that ministers were reviewing their policy; indeed, all planning policies are inherently transient and liable to be reviewed and developed. As commercial investors, the petitioners would be well aware of this. It seems to me that the only expectation that the petitioners could legitimately claim to have was that when planning (and other) applications came to be decided, they would be lawfully determined in accordance with the law and policy then applicable. For these reasons the petitioners' complaint of breach of legitimate expectation must, I consider, be rejected.

[64] Turning next to the petitioners' case based on infringement of their rights under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"), this too can be briefly dealt with. Mr Moynihan argued that the petitioners' interests in the PEDLs, including legitimate expectations of the term extensions for which they provide, and the petitioners' financial resources amounted to possessions for the purposes of A1P1. He maintained that the PEDLs had been frustrated, without consideration having been given by the Scottish Government to the financial consequences, for example in relation to decommissioning costs; no attempt had been made to strike a fair balance he said. Mr Mure submitted in response that in the circumstances of the present case the petitioners had no substantive interest protected by A1P1.

[65] This aspect of the dispute again requires to be assessed on the basis that at present there is only an emerging and unfinalized planning policy of no support for UOG extraction; as I have explained, this does not amount to an outright ban. The petitioners' arguments on this branch of their case were predicated on the basis that their interests in the PEDLs would

be of no commercial value in the event that the alleged ban on fracking remained in place. In my opinion, it is not possible at the present time to assess what the effect of any eventual policy on fracking may be on the petitioners' interests in the PEDLs. The SEA and BRIA processes are still to be followed through; clearly it would be inappropriate for the court to attempt to prejudge what the outcome of those processes may be or to try to predict what the terms of any final planning policy may ultimately transpire to be. The eventual terms of the policy, its justification and aims, the impact which it will have on the holders of PEDLs such as the petitioners, and its proportionality are all matters that are highly germane to any argument based on A1P1. The court cannot come to any view on such issues until a final policy has been adopted. The petitioners' complaint of a breach of their rights under A1P1 is premature.

[66] The emerging policy is merely one consideration to which regard will be paid in the determination of any application by the petitioners for planning (or other) consent. Since the emerging policy does not amount to a ban, I cannot see how it interferes with any possessory interest that the petitioners may have in their PEDLs. I did not understand Mr Moynihan to submit that if there was no ban there was still nonetheless an interference with the petitioners' A1P1 rights. It should also be borne in mind that the petitioners have never had any legitimate expectation that they would obtain all (or indeed any of) the necessary permissions for the purposes of UOG extraction. They have not been deprived of their interests in the PEDLs; these have not been withdrawn or revoked. There has been no legislative change affecting the viability of the PEDLs. Such possessory interests as the petitioners might have in the PEDLs are, in any event, highly vulnerable to the inherent commercial risks of an industry that is constantly affected by fluctuations in market prices. Having regard to these factors and to the substantial uncertainty that exists about the extent

of the recoverable amount of UOG in Scotland, I am doubtful whether the petitioners' interests in the PEDLs would qualify as possessions for the purposes of A1P1. It seems to me that there is considerable force in the views on similar issues expressed by Sir Christopher Bellamy QC in *R (Royden)* v *Wirral MBC* 2003 BLGR 290 at paragraph 143:

> "Even assuming that a hackney carriage vehicle licence, or its value, constitutes 'property', that 'property' arises solely because of the legal regime in force in the Wirral which restricted the number of licences in issue. It has been the case, at least since 1985, that the restriction on the number of licences in issue in the Wirral could, in law, be removed. It follows that anyone acquiring a licence after 1985 did so on the implied understanding that that might occur. The 'property' in the licence was, therefore, inherently subject to the possibility of such a change occurring. On this view, there is no 'interference' with the property, since the possibility of 'de-restriction' occurring was always intrinsic to the 'property' itself. This approach may also be expressed in wider terms, with which I myself would respectfully agree, namely that changes in the law which may affect property values, or the value of a business, cannot normally be impugned under art 1 of the First Protocol solely on the grounds that a change in the law has caused a diminution in value."

[67] It is not, however, necessary for me to come to any concluded view on these and other questions raised in the context of this branch of the case since I consider the claim under A1P1 to be premature.

[68] Finally, the petitioners argued that the alleged ban on fracking was outside the devolved competence of the Scottish Ministers since it related to a reserved matter, namely "oil and gas, including - (a) the ownership of, exploration for and exploitation of deposits of oil and natural gas" (Scotland Act 1998 Schedule 5, Part 2, Head D2(a)). This too must fail on the ground that there is no ban. In any event, the argument seems to me to be misconceived: town and country planning is not a reserved matter; nor is protection of the environment. The powers exercised by ministers in relation to the emerging policy of no support for fracking and the 2015 Directions come under these heads and are only loosely or consequentially connected with the oil and gas reservation in the Scotland Act (see *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29 at paragraphs 28-33). Scottish Ministers are not

precluded from making policy in respect of planning and environmental issues raised by, or affecting, reserved matters in Scotland. The 2015 Directions were lawfully made under powers given to the Scottish Ministers.

Conclusion

[69] The petition is predicated on the proposition that the Scottish Government has introduced an unlawful prohibition against fracking in Scotland. Whilst acknowledging that there have been a number of ministerial statements to the effect that there is an effective ban, the Lord Advocate, on behalf of the Scottish Ministers, made it clear to the court that such statements were mistaken and did not accurately reflect the legal position. The stance of the Scottish Government before the court is that there is no legally enforceable prohibition. For the reasons set out in this judgment, I consider that the Government's legal position is soundly based and that there is indeed no prohibition against fracking in force at the present time. What exists at present is an emerging and unfinalized planning policy expressing no support on the part of the Scottish Government for the development or extraction of UOG in Scotland. The process of policy development is not yet complete; the important stages of a strategic environmental assessment and a business and regulatory impact assessment have still to be carried out. There is no basis on which the court should interfere with those procedures; the petitioners will have a full opportunity to contribute to and participate in them. I conclude that since there is no prohibition against fracking, the petitioners' case is unfounded; their application for judicial review of the alleged ban must accordingly fail.

[70] I shall sustain the respondents' first and second pleas-in-law, repel the petitioners' pleas and refuse the petition. I shall reserve all questions as to expenses.