FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 39
P833/23

Lord President
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition by

WILDCAT HAVEN COMMUNITY INTEREST COMPANY

Petitioners and Reclaimers

against

THE SCOTTISH MINISTERS

Respondents

and

VATTENFALL WIND POWER LTD

Interested Party

_____

Petitioners and Reclaimers: J d C Findlay KC; Colquhoun; Drummond Miller LLP
Respondents: Crawford KC; D Welsh; Scottish Government Legal Directorate
Interested Party: Mure KC; Eversheds Sutherland (International) LLP

15 November 2024

[1] Wildcat Haven Community Interest Company (the petitioners) seek judicial review of a decision of the Scottish Ministers to grant consent to Vattenfall Wind Power Ltd to construct a wind farm at Clashindarroch Forest, Aberdeenshire. They contend that the development will

disturb a population of wildcat in the forest. They argue that the decision failed to approach the question of mitigating these effects in the manner required by policy 3(b)(iii) of National Planning Framework 4 (NPF4). The decision was therefore unreasonable and based on an error of law. They ask the court to quash it. The Lord Ordinary dismissed the petition, see [2024] CSOH 10. That decision has been reclaimed (appealed) to this court.

Background

[2] Vattenfall applied to the Scottish Ministers for consent for the development under section 36 of the Electricity Act 1989. It would be the second of two wind farms at the site. The first was known as Clashindarroch I, and the new development would be Clashindarroch II. The Ministers appointed a reporter to consider the application. She held a public inquiry into the proposal.

[3] The forest forms part of the Strathbogie Wildcat Priority Area. The petitioners maintained that the development posed an unacceptably high risk to the wildcat population. In October 2022 the reporter recommended refusal of the application. This decision was not based on the impact on wildcat which would be negligible or minor in light of the mitigation measures set out by Vattenfall. However, the development would have significant and unacceptable adverse effects on the surrounding landscape, particularly in relation to the views from the prominent hill known as Tap o'Noth and the Correen Hills. As a result the proposal did not accord with national or local planning policy.

[4] In February 2023 a new series of planning policies encompassed in NPF4 was formally adopted by the Scottish Ministers. New energy policies were introduced. The Ministers asked the reporter to reopen the inquiry in order to hear submissions on the changes in energy and

planning policy. In a supplementary report it was recommended that the application be granted, subject to certain conditions. The Ministers granted the application on 26 June 2023.

[5] The petitioners contend that the reporter failed to apply the mitigation hierarchy within policy 3(b)(iii) of NPF4 in the correct manner. It introduced a significant innovation on the previous practice in that it requires decision makers to take a sequential approach and prefer mitigation measures which avoid or minimise an environmental impact over those which seek merely to offset the impact. Vattenfall had only proposed offsetting measures to mitigate the impact of the development on wildcat. Had the reporter applied the hierarchy properly she might have assessed these proposed measures as unsatisfactory and non-compliant with NPF4.

[6] The Lord Ordinary disagreed. He determined that policy 3(b) simply required a rational decision based on particular criteria. The weight to be attached to those criteria was a matter for the decision maker. Since neither the reporter nor the Ministers had made an error of law, there was no proper basis for the court to intervene.

Policy 3 and the mitigation hierarchy of National Planning Framework 4

Policy 3

[7] Policy 3 of NPF4 concerns biodiversity. It reads as follows:

> "**Policy Intent:**
> To protect biodiversity, reverse biodiversity loss, deliver positive effects from development and strengthen nature networks.
>
> **Policy Outcomes:**
> Biodiversity is enhanced and better connected including through strengthened nature networks and nature-based solutions.
>
> **Local Development Plans:**
> LDPs should protect, conserve, restore and enhance biodiversity in line with the mitigation hierarchy. They should also promote nature recovery and nature restoration across the development plan area, including by: facilitating the creation of nature networks and strengthening connections between them to support improved ecological

connectivity; restoring degraded habitats or creating new habitats; and incorporating measures to increase biodiversity, including populations of priority species.

Policy 3
a) Development proposals will contribute to the enhancement of biodiversity, including where relevant, restoring degraded habitats and building and strengthening nature networks and the connections between them. Proposals should also integrate nature-based solutions, where possible.

b) Development proposals for national or major development, or for development that requires an Environmental Impact Assessment will only be supported where it can be demonstrated that the proposal will conserve, restore and enhance biodiversity, including nature networks so they are in a demonstrably better state than without intervention. This will include future management. To inform this, best practice assessment methods should be used. Proposals within these categories will demonstrate how they have met all of the following criteria:

i. the proposal is based on an understanding of the existing characteristics of the site and its local, regional and national ecological context prior to development, including the presence of any irreplaceable habitats;
ii. wherever feasible, nature-based solutions have been integrated and made best use of;
iii. an assessment of potential negative effects which should be fully mitigated in line with the mitigation hierarchy prior to identifying enhancements;
iv. significant biodiversity enhancements are provided, in addition to any proposed mitigation. This should include nature networks, linking to and strengthening habitat connectivity within and beyond the development, secured within a reasonable timescale and with reasonable certainty. Management arrangements for their long-term retention and monitoring should be included, wherever appropriate; and
v. local community benefits of the biodiversity and/or nature networks have been considered.

c) Proposals for local development will include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. Applications for individual householder development, or which fall within scope of (b) above, are excluded from this requirement.

d) Any potential adverse impacts, including cumulative impacts, of development proposals on biodiversity, nature networks and the natural environment will be minimised through careful planning and design. This will take into account the need to reverse biodiversity loss, safeguard the ecosystem services that the natural environment provides, and build resilience by enhancing nature networks and maximising the potential for restoration."

The mitigation hierarchy

[8] In Annex F of NPF4 the mitigation hierarchy is defined as follows:

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

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The reporter's first report

[9] The proposal would have significant effects on the surrounding landscape. There would be adverse visual effects from the north east, south east and south, including on the views from the rural communities at Tillathrowie and south of Rhynie. There would be adverse visual effects on the views from the summit of Tap o' Noth hill and from the Correen Hills. The views from the path towards the Tap o'Noth summit, and of the hill's silhouette from the south, would be impacted. Tap o' Noth was distinctive. A previous proposal to develop a wind farm in the area had been amended in response to the sensitivity of this location. Another had been refused partly on that basis.

[10] It was possible that the population of wildcat in the area amounted to just five. A population of that size would be a vital part of any remaining Scottish population. Vattenfall

had correctly treated it as a population of national importance when predicting adverse effects and designing mitigation measures. Significant adverse effects on the wildcat population were predicted, but, with some adjustments, the proposed mitigation measures would render the effects negligible to minor. These included species protection and on-site and off-site habitat improvements. The environmental impact assessment (EIA) had not been flawed. It had presented reasoned conclusions regarding the presence of, and the effects of the development on, wildcat in the area. It was accepted that the development would not avoid an area where they were present. However, as required by the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, the proposals described the "measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment." The wind farm had been designed to avoid potential resting sites and valuable foraging habitat. A management plan aimed to strengthen the existing habitats, such as the riparian corridors, and introduce wider benefits in habitat connectivity across the Strathbogie WPA. When identifying detrimental effects of the development, Vattenfall had taken a precautionary approach. Where there was any doubt about whether a detriment would occur, they had assumed that it would. That approach accorded with the broad expectations of the EIA. Avoiding all significant effects was desirable but was not the intention of the 2017 Regulations. With certain adjustments to the conditions regarding mitigation measures the proposed development would have no significant adverse effect on any protected species, including wildcat. The residual impact on them would be negligible.

[11] The development would have no significant effects in relation to noise, ornithology, aviation, transport and access, associated infrastructure or any other matters. The proposal would make a meaningful contribution towards increasing renewable energy generating capacity, meeting climate change objectives and emission reduction targets. The development

would produce national and local economic benefits arising during the construction and operational phases, and a net benefit in terms of carbon emissions. Those benefits would not outweigh the significant adverse effects on the landscape. Although the considerations set out in schedule 9, paragraph 3 of the Electricity Act 1989 had been taken into account, overall the development was not compliant with national and local planning policy. While tackling climate change was a heightened priority in national and UK energy policy, it had not been elevated to the level of an overriding consideration. Environmental considerations, including Scotland's landscapes and important habitats and species, remained an integral part of National Planning Framework 3 (the predecessor to NPF4). There was still a need to find the right place for development, and the development did not meet this requirement. Section 36 consent and deemed planning permission under section 57 of the Town and Country Planning (Scotland) Act 1997 ought to be refused.

The supplementary report

[12] Key changes in energy and planning policy had taken place since the original report. These included the replacement of the Onshore Wind Policy Statement 2017 and the Onshore Wind Policy Statement Refresh Consultative Draft 2021 with the Onshore Wind Policy Statement 2022 (OWPS 2022). It recognised that delivering Scotland's onshore wind target would necessitate taller and more efficient turbines. This would inevitably change the landscape. If Scotland was to meet its 2030 or 2032 renewable energy targets, it needed to increase its renewable energy capacity, particularly onshore wind capacity. Clashindarroch II would make a meaningful contribution to these targets within the timescales. It would reduce carbon dioxide emissions and help to tackle climate change. OWPS 2022 guided decision makers towards approving wind farm proposals that would make a meaningful contribution to

the onshore wind target, unless they would have adverse visual or landscape effects which were so significant that they overrode the imperative to increase wind capacity. A balancing exercise was expected. The OWPS 2022 changes the scale or extent of adverse effects that may now be deemed acceptable. It was inevitable that the point at which effects were considered to be acceptable would move in response to the increased importance given to meeting energy targets.

[13] NPF3, the Scottish Planning Policy 2014, and the draft of NPF4 had been replaced by NPF4. It did not retain the SPP 2014 requirement for local development plans to set out a spatial framework for onshore wind developments. Instead, broad principles were set out in NPF4 policies 4, *Natural Places*, and 11, *Energy*. The acceptability of landscape and visual impacts under policy 4 had to be considered alongside policy 11, which now provided some direction on when significant landscape and visual impacts ought to be considered acceptable. Policy 11 supported wind farm development in principle, albeit not in a National Park or a National Scenic Area. Consideration of natural heritage was replaced with consideration of the impact on biodiversity. Net economic impact, including local socio-economic benefits such as employment, associated business and supply opportunities, should be maximised. When considering the acceptability of impacts overall, policy 11 required greater and significant weight to be placed on the proposal's contribution to energy targets and greenhouse gas emission reduction targets. This necessitated a change to the reporter's previous assessment of the landscape and visual effects of the proposal. These effects were still significant and adverse, but they were no longer unacceptable. Visual effects in unprotected areas such as the Tap o'Noth should be given less importance. A trend towards taller turbines was anticipated in the OWPS 2022, thereby rendering the design differences between Clashindarroch I and II acceptable. The proposal's contribution to targets was important enough to offset its impact on

biodiversity and the Tap o'Noth hillfort. There would be no significant adverse effect on wildcats or other protected species. There was no conflict with policies 4 or 11.

[14] NPF4 policy 1, *Tackling the climate and nature crises*, directed that the global climate and nature crises ought to be given significant weight. There was no doubt that Clashindarroch II was a positive response to the climate crisis. It offered a timeous contribution to meeting targets which had to be given significant weight. It did not conflict with the intent of policy 1 regarding the nature crisis.

[15] Part (b) of policy 3, "Biodiversity", required developers to demonstrate that a proposal would conserve, restore and enhance biodiversity. Five criteria related to this aim had to be addressed. As per the findings in the first report, four of them had been met: the understanding of the ecological context; the use of nature-based solutions where feasible; the mitigation of negative effects; and consideration of the local community benefits arising from biodiversity enhancement. What remained was whether part (b)(iv) could be satisfied, i.e. the provision of significant biodiversity enhancements in addition to proposed mitigation. Recognising that this was a transition project, and to make the development compliant with that part of policy 3, a revised planning condition should be attached to make it clear that approval of additional biodiversity enhancements beyond the mitigation measures proposed would be required as part of the final version of the habitat management plan.

[16] The energy and planning policy updates urged decision makers to place greater importance on the delivery of renewable energy and emission targets. The adverse effects on the landscape were still present, but as they did not impact upon protected landscape and were localised, they were now to be given less weight than before. The renewable energy, economic and environmental benefits of the proposal outweighed the negative landscape and visual effects. The proposal complied with NPF4 and was acceptable overall. Subject to conditions,

section 36 consent should be granted and planning permission should be deemed to have been granted under the Town and Country Planning (Scotland) Act 1997.

The Scottish Ministers' decision

[17] The Scottish Ministers accepted and adopted the reporter's conclusions on the proposal's: (i) effect on the landscape; (ii) effect on wildcat and other protected species and habitats; (iii) noise impact; (iv) generation of energy and production of carbon savings; (v) contribution towards renewable energy targets; and (vi) consistency with national and local planning policy. The reporter's conclusion that there was increased importance on renewable energy projects in the new policy material was accepted and adopted. The seriousness of climate change, its potential effects, and the need to cut carbon dioxide emissions remained matters of significant priority. The adverse landscape and visual effects were acceptable when balanced against the contributions to onshore wind and emissions targets offered by this proposal.

[18] The proposed mitigation measures, which included species protection and habitat improvements, would render the residual effects on the wildcat population negligible to minor. The effects on other protected species and habitats would not be significant. A planning condition will require biodiversity enhancement beyond the measures aimed at mitigation of adverse effects. The proposal would make a meaningful contribution to renewable energy targets. This, and its contribution to carbon savings, were factors which weighed in its favour. Section 36 consent was therefore granted, and planning permission was deemed to have been granted.

The Lord Ordinary's decision

[19] If the reporter and in turn the Ministers had failed to understand the import of NPF4 and policy 3(b)(iii), the decision would be susceptible to reduction. If the policy had been properly understood, it could be challenged only on the bases that: (i) it was not a reasonable decision based on relevant grounds; or (ii) the reasons for the decision failed to meet the requisite standard. The petitioners did not advance such criticisms.

[20] It was for the court to interpret planning policy. That task was not to be conducted in a legalistic manner. Bearing in mind the broad nature and purpose of policy documents of the type in question, it should be carried out objectively in accordance with the language used viewed in its proper context. Approaching matters in that light, the Ministers' and Vattenfall's interpretation of the policy was correct for three reasons. First, the language of the policy indicated that certain development proposals, including Clashindarroch II, would be supported only if they demonstrated their positive effects upon biodiversity. One of the criteria upon which the sufficiency of that demonstration would turn was an assessment of potential negative effects which should be fully mitigated in line with the mitigation hierarchy. Policy required a developer to provide such an assessment. As part of the assessment of compliance with policy 3, the decision maker would then form a view as to whether the effects would be mitigated in line with the hierarchy. There was nothing in the language of the policy which suggested that when doing so, the decision maker was constrained by anything other than the implicit requirement to make a rational decision based on relevant criteria.

[21] Secondly, there was nothing in the context of NPF4 which suggested that an alternative interpretation of policy 3(b)(iii) applied. The petitioners' interpretation would effect considerable change in the significance of the mitigation hierarchy for national and major developments, and for those requiring an EIA. There was nothing in any *travaux préparatoires*,

policy discussion papers, or consultation exercises concerning NPF4 which suggested an intention to bring about such a change. If the petitioners' interpretation were correct, there would be a conflict between the hierarchy and the minimum legal requirements for the provision of information in the 2017 Regulations, which still applied to the proposal.

[22] Thirdly, NPF4 was a material consideration to be taken into account. The weight to be attached to material considerations was a matter for the decision maker. A policy document must be properly understood by a decision-maker, but NPF4's nature rendered it an unlikely repository for a stringent requirement such as that contended for by the petitioners.

[23] If the court had found that the reporter and the Ministers had proceeded upon a material misunderstanding of policy 3(b)(iii), it would not have been possible to conclude that if the misunderstanding had not occurred there would have been no real possibility of the ultimate decision being different. Predicting what the outcome of the application would have been had certain considerations been given greater significance would have required the deployment of knowledge and skills which the court does not possess.

[24] Many interested individuals entertained serious and reasonable concerns about the effects of the proposal on the wildcat population at Clashindarroch. However, it had not been established that the reporter or the Ministers had made an error of law. In those circumstances, there was no room for intervention by the court.

The parties' submissions

Petitioners

[25] The Lord Ordinary erred in determining that policy 3(b)(iii) of NPF4 did not require a sequential approach to the assessment of the mitigation of adverse environmental effects. Negative effects had to be mitigated in line with the hierarchy which required decision makers

to take a sequential approach to the consideration of mitigation measures. They had to prefer measures which avoided or minimised environmental impacts over those which merely sought to offset them. The use of the word "hierarchy", and the illustration appended to the definition of the hierarchy, indicated that a sequential approach was expected. An approach which entirely discounted or ignored the avoidance or minimisation, and focused only on offset, was not in line with the sequential approach. The Lord Ordinary erred in holding that the policy did not imply that the mitigation hierarchy was intended to be binding. An applicant required to demonstrate compliance with the policy's criteria, including the mitigation hierarchy. The decision maker had to address whether they were met.

[26] The Lord Ordinary erred in determining that the policy was only binding on an applicant. Even if that was correct, the decision maker still required to consider whether the applicant had complied with the policy. If they had not, the policy would not support the proposed development. The Lord Ordinary had conflated the requirements of the policy with the 2017 Regulations, which applied only to the party preparing an EIA report.

[27] The Lord Ordinary erred when he concluded that it was unlikely that NPF4 effected such a considerable change. NPF4 heralded a new approach in terms of planning policy. It gave primacy jointly to the global climate emergency and the growing nature crisis. It deemed these crises to be of the same magnitude. Policy 1 was a general policy which required significant weight to be given to the nature crisis. It formed part of the context in which policy 3 ought to be considered. Its role was to rebalance the planning system in favour of conservation, restoration and enhancement of biodiversity. One element of that was the mitigation hierarchy. Policy 3(b)(iii) reflected a new, more stringent approach. The Lord Ordinary had erred in concluding that it should be interpreted as imposing a burden on an applicant to provide information to a decision maker. The purpose of an EIA was to provide information about the

likely environmental effects of a development, and to allow third parties and members of the public to comment intelligently on the proposal. Planning policy was concerned with the broader question of whether a development should be permitted, and if so, on what conditions. Applications for planning consent were decided in accordance with planning policy, informed, where appropriate, by an EIA. There was no reason why planning policy concerning the acceptability of a development from an environmental perspective must mirror the technical rules regarding the preparation of an EIA. The Lord Ordinary had concluded that, because the application was made under section 36 of the 1989 Act, NPF4 was only a material consideration, and did not set out binding requirements. That fact was irrelevant to the correct construction of policy 3.

[28] The Lord Ordinary's reasons for rejecting the petitioners' submissions were flawed. The reporter had failed to have proper regard to the mitigation hierarchy. Had she done so, she may have found that the proposed mitigation measures, and therefore the development as a whole, did not comply with NPF4. In her initial report, the reporter had dismissed the petitioners' complaint that avoidance had been leap-frogged by Vattenfall on the basis that there was no weighting in favour of avoidance, as opposed to offsetting measures. NPF4 now required decision makers to apply such a weighting, yet in her supplementary report when considering policy 3 the reporter had explicitly adopted her earlier reasoning. She continued to take the pre-NPF4 approach. The case brought into sharp focus the extent to which NPF4 had added anything new in terms of species protection. On the reporter's approach, as endorsed by the Lord Ordinary, it had made no difference. Such a conclusion was contrary to the thrust of NPF4 as a whole. The reporter had removed much of the protection which the policy intended to provide.

The Scottish Ministers

[29] The Lord Ordinary's decision displayed no error of law. Policy 3(b)(iii) requires developers to identify, for the decision maker, any potential negative effects on biodiversity and to demonstrate how those have been mitigated. It was for the decision maker to decide whether the proposed mitigation was acceptable or not. The petitioners' challenge amounted to no more than a disagreement with the Ministers' assessment of the proposal's compliance with the policy. That was not a relevant ground of review.

[30] The Lord Ordinary's interpretation of policy 3(b)(iii) was premised on the plain meaning of the words. He correctly recognised that the interpretation of the policy was a matter for the court. Having considered the policy's language, he determined that there was nothing in the context or status of NPF4 which indicated that any other interpretation was required. That was correct. The petitioners had accepted that the EIA had been carried out properly. It provided a proper basis to inform the Scottish Ministers as to the extent to which Vattenfall had complied with their duty to mitigate any effect on, and the desirability of preserving, amenity (Electricity Act 1989, schedule 9, paras 3(1)(a) and (b)). It was for the decision maker, informed by the EIA, to determine whether a developer had demonstrated compliance with policy 3(b). NPF4 was part of the local development plan and was therefore a material consideration (section 24(1) of the 1997 Act). The weight accorded to a material consideration was a matter of planning judgement challengeable only on public law grounds, and none were advanced by the petitioners.

[31] The petitioners correctly acknowledged that a developer did not require to avoid all negative effects. If it were otherwise, there would be no need for a mitigation hierarchy. The hierarchy is intended to be flexible, albeit with the goal of full mitigation in mind. Consideration of the hierarchy was a matter of planning judgement and no set approach was

required. Inevitably, there are effects which cannot be avoided. The petitioners' interpretation of policy 3(b) ignores that fundamental matter. The Lord Ordinary had expressly noted that mitigation was one of the criteria against which a development proposal would be assessed. As with all matters related to EIAs, it was designed to ensure that decisions were made on an informed basis.

[32] The Lord Ordinary decided that, having regard to the context within which NPF4 was located, there was nothing to suggest that the policy should be interpreted other than by giving the words their plain meaning. The Lord Ordinary appreciated that the interpretation suggested by the petitioners would effect a considerable change in the significance of the mitigation hierarchy. The petitioners had been unable to point to any support for such an intention in any contemporary documentation. The Lord Ordinary had also been correct to note that the 2017 Regulations continued to govern the legal requirements of an EIA for a development of this nature. They said nothing about an absolutist hierarchical approach to mitigation.

[33] The Lord Ordinary had not failed to recognise that NPF4 formed part of the development plan. He had determined, correctly, that the policy was a material consideration. Though a decision maker required to consider the policy, he or she was not bound by it. To suggest otherwise was to elevate the status of the policy to something beyond even the statutory requirements of the EIA process.

[34] If there had been a public law failure to consider and apply policy 3(b)(iii), the evidence had demonstrated that nonetheless the wildcat population would be adequately protected. Any breach of legal rights was one of form and not of substance. Even if the reporter had framed her report in the manner for which the petitioners contended, there was no realistic

possibility that she would have reached a different decision or issued a different recommendation. It would have made no conceivable difference to the outcome.

Vattenfall

[35] The Lord Ordinary did not hold that the language of policy 3 implied that it was not mandatory or that it did not connote a preference for avoidance or minimisation. The Lord Ordinary correctly identified the distinction which the policy drew between the role of the developer and that of the decision maker. It was for a developer to demonstrate how the proposal met the criteria in policy 3(b), including the mitigation hierarchy. The key to policy 3(b) was in its first sentence, which contained the words "will only be supported where". The decision maker had to have regard to all of the criteria and to the information provided by the developer under each criterion. What was possible or advisable as a means of mitigation would depend on the environmental interests impacted and the whole circumstances of the development.

[36] A mitigation hierarchy had been a central part of EIAs for years. By way of examples, reference was made to the 2017 Regulations at 5(2)(c) and schedule 4, paragraph 7, and to Planning Advice Note 1/2013 at paragraph 4.30 and Figure 2. Decision makers were used to considering mitigation proposals according to this hierarchy, and to balancing that with other aspects of the environmental information provided. The same approach was required by policy 3(b) and by NPF4 as a whole. The Lord Ordinary had been correct to note that the legal framework for EIAs remained unchanged, and that NPF4 did not express an intention to make the significant change for which the petitioners contended.

[37] The Lord Ordinary had been entitled to say that the policy required to be considered with the rest of NPF4. It was not an error of law for the Lord Ordinary to observe that the

wording of policy 3(b)(iii) was an unlikely repository for a shift as significant as that submitted by the petitioners. The reporter had carefully considered the proposed mitigation measures in their context. She and the Ministers had been entitled, in the exercise of their planning judgement, to find that the proposed mitigation measures would render the effects on the wildcat population negligible to minor.

[38] If that is wrong, in any event the court should exercise its discretion not to grant a remedy. On the basis of the EIA and the evidence before the reporter, neither the petitioners nor the public interest in the protection of wildcat would suffer substantial prejudice from the grant of a section 36 consent. If there was a re-determination, there was no realistic prospect of the Ministers reaching a different decision.

Discussion and decision

[39] As elaborated upon in oral submissions, the central proposition for the petitioners was that, in addition to requiring major development proposals to demonstrate enhancement of biodiversity, policy 3(b) of NPF4, when allied to the definition of the mitigation hierarchy in Annex F, also changed how a decision maker should go about assessing potential negative effects. The alleged mistake of the reporter was to fail to recognise this in her second report, thus she did not give avoidance the necessary greater preference or weighting over other mitigation measures. It was contended that in line with the increased importance attached to biodiversity, and in light of the significance of the wildcat population, a view on avoidance of the potential adverse effects at the outset ought to have been taken first. Instead the reporter relied on the assessment carried out in her first report which was prepared under the previous regime. Her conclusion on this matter proceeded on the basis that avoidance has no greater

value than the other factors in the mitigation hierarchy, namely minimisation, restoration and offsetting. But for this, the outcome might have been different.

[40] The change in approach was described in various ways by counsel for the petitioners. Rather than recognise that avoidance of potential negative effects should come first in the assessment and afford it the requisite importance, the reporter adopted a "straight line", "flat" or "non-hierarchical" approach. Full mitigation in line with the mitigation hierarchy had been made a policy imperative. A sequential weighted approach is now demanded. The appropriate weight to be given to avoidance is driven by the importance of what is at stake. There is now a "very clear" preference for avoidance over the other elements in the mitigation strategy. It was accepted that no new approach to the mitigation hierarchy was heralded during the preparation of NPF4, but it was said to be inherent in its terms. The recognition of a nature crisis prompts a greater need to protect the environment. It mattered not that the policy was stricter than the EIA requirements laid down in the 2017 Regulations.

[41] In the court's view the submissions for the petitioners have no merit. It is clear that policy 3(b) of NPF4 introduced an important new requirement for major developments, including this one, namely to demonstrate a contribution to the enhancement of biodiversity. However, and contrary to the submission on which the petitioners' challenge depends, there is nothing in the wording of policy 3(b) and Annex F, nor in anything else, which signals the suggested material change in the mitigation strategy nor in how potentially significant adverse environmental effects are to be assessed and dealt with by decision makers.

[42] The use of a mitigation hierarchy similar to that defined in NPF4, including a preference for avoiding significant adverse environmental impacts, is well established in pre-NPF4 regulations and guidance. For example PAN 1/2013 para 4.30 states that the most effective mitigation measures are those which avoid or prevent the creation of adverse effects. "The aim

should be to prevent or avoid the effects if possible, and only then consider other measures." Apart from it not mentioning restoration, there is no material difference between the diagrammatic representation of the mitigation strategy in Figure 2 of the advice note and that in Annex F of NPF4. Figure 2 states that avoidance is "most preferred" and offset "least preferred".

[43] While it is no doubt common sense to prefer avoidance where feasible, the hierarchy itself recognises that there may be adverse impacts which cannot be removed at the outset of a development's design. All of this can be seen in the context of the aim and purpose of an environmental impact assessment and the application of a mitigation hierarchy, namely to identify likely significant adverse effects and introduce measures which will prevent or reduce them to an acceptable level. If, as was decided here, through a combination of measures there will be no significant adverse effect on wildcat or other protected species, the exercise has served its purpose. Once reduced to insignificant levels the impacts have been "fully mitigated in line with the mitigation hierarchy" and the proposal is compliant with policy 3(b)(iii).

[44] Standing the finding that the windfarm development as approved will have negligible adverse effects on the wildcat population, it would be remarkable if nonetheless it was open to challenge because of wildcat issues. The decision was that there will be no significant impacts, so the discussion as to the weight to be given to avoidance as opposed to other measures is of little practical relevance.

[45] In any event, matters of weight and planning judgement are well understood to be for the decision maker, not the court. The significant new issue for the reporter arising from NPF4 policy 3(b) was whether the proposals went beyond mitigation and offered biodiversity enhancement consistent with policy 3. The answer was that, with appropriate revisions to the conditions attached to the consent, this could be achieved. There was no reason for the reporter

to revisit her conclusions on the mitigation of potential adverse impacts set out in her first report.

[46] There is no challenge to the developer's EIA. It was acceptable to NatureScot. The petitioners acknowledge that it is consistent with the still applicable 2017 Regulations on the identification and mitigation of potentially significant adverse effects arising from this development. It would be odd if nonetheless the reporter required to adopt a wholly different approach when assessing the environmental impact of the proposal. Though not expressed in such blunt terms, the petitioners' argument amounts to a plea that the potential for disturbance of wildcat should in itself have been considered as a possible reason for refusal without consideration of how this might be addressed by mitigation measures. There is no warrant for this in the terms of NPF4 which, in accordance with well-established practice, requires a careful identification of a development's potential negative impacts on biodiversity and an assessment of whether mitigation measures will reduce them to acceptable levels.

[47] This was the approach adopted by the authors of the EIA, the reporter in both reports, and by the Scottish Ministers. It involves classic issues of planning judgement with which the court will not interfere. In common with the Lord Ordinary, we have identified no misinterpretation of planning policy nor any error of law in the decision making process. It follows that the reclaiming motion is refused.