



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 86

P142/26

OPINION OF LORD HARROWER

In the cause

SCOTTISHPOWER RENEWABLES (UK) LIMITED

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: Mure, KC: Shepherd and Wedderburn LLP
Respondents: Sutherland; Scottish Government Legal Directorate

10 September 2026

Introduction

[1] The petitioner is ScottishPower Renewables (UK) Ltd. It is a developer of both onshore and offshore wind farms in the United Kingdom. The respondents are the Scottish Ministers. They have responsibility for determining applications for wind farm development under section 36 of the Electricity Act 1989 and deemed planning permission under section 57(2) of the Town and Country Planning (Scotland) Act 1997. On 23 December 2021, the petitioner applied to the respondents for consent for the construction and operation of a wind-powered electricity generating station with a grid connection date in 2029. Following amendment during the application process, the proposed development

included, together with associated infrastructure, 12 wind turbines, each with a ground to blade-tip height of up to 200m. The turbines were to be located within Carrick Forest near the Galloway Dark Sky Park.

[2] Article 222 of the Air Navigation Order 2016 requires structures more than 150m above ground level to be fitted with night-time aviation warning lights, unless the requirement to do so has been disapplied by the Civil Aviation Authority (“CAA”). In order to mitigate the visual impact of such lighting, the petitioner proposed to reduce the intensity and direction of the lighting, and to deploy what is referred to in the industry as an Aircraft Detection and Obstacle Lighting System (“ADLS”). Such a system would involve the installation of sensors on the wind farm to detect signals being transmitted from an aircraft’s transponder or other, so-called, “electronic conspicuity” (“EC”) device. Since there is no general requirement for aircraft, flying in uncontrolled airspace, to be equipped with a transponder or EC device, the petitioner would be required to submit an airspace change proposal to the CAA, requesting the establishment of a transponder mandatory zone (“TMZ”) around the wind farm. In that event, the aviation lighting, instead of being on constantly throughout the night, would only illuminate for a short period while aircraft were passing through the demarcated zone. In terms of a suspensive condition proposed by the petitioner, no development would commence until all its proposed measures to mitigate aviation lighting, including the ADLS, had been approved by the respondents, after consultation with the CAA and the Ministry of Defence.

[3] A public inquiry was held before three reporters, conjoined with inquiries into two neighbouring wind farm proposals (at Craiginmoddie and Knockcronal). On 29 July 2024, the reporters issued separate reports on each proposal, recommending that the respondents grant consent to Craiginmoddie and Knockcronal, but that they should refuse consent in

relation to the petitioner's application at Carrick Forest. Critical to the reporters' reasons for recommending refusal was the perceived uncertainty regarding whether ADLS would be approved, or what the timescale for that approval might be.

[4] More than 15 months later, on 5 November 2025, the respondents accepted the reporters' recommendations, and refused to grant consent for the Carrick wind farm proposal, while approving the neighbouring projects. The petitioner sought judicial review of the respondents' decision on four grounds. Firstly, the petitioner argued that the respondents failed adequately to inform themselves, at the time they made their decision, of the up-to-date position regarding ADLS. Secondly, the petitioner expressed what was substantially the same criticism as a failure to take account of relevant considerations. Thirdly, the petitioner argued that the decision was irrational, the respondents having misdirected themselves regarding what would be required to implement the proposed suspensive condition within the usual five-year period. Finally, the petitioner argued that the respondents failed to give adequate reasons for their decision. In the event that any of the first three grounds of review were to find favour with the court, the petitioner sought declarator and reduction of the respondents' decision. Declarator of unlawfulness of the decision was the sole remedy sought in respect of the final ground relating to allegedly inadequate reasons.

[5] The petition came before me at a substantive hearing. In addition to their written pleadings and oral submissions, I received notes of argument from both parties, helpfully cross-referenced to both a joint bundle of documents comprising more than a thousand pages and to a joint bundle of authorities. In addition, the petitioner lodged affidavits, and in some cases supplementary and further supplementary affidavits, from John van Hoogstraten, an aviation expert, and Mary Fisher, an expert in planning and visual impact

assessment, both of whom had given evidence to the public inquiry, and from Grant Paul Douglas, the petitioner's head of planning and environmental policy. The respondents lodged affidavits from Catherine Cacace and Alan Duncan Brogan, both from the Energy Consents Unit ("ECU"), which administers wind farm development proposals on behalf of the respondents. I took that information into account in the preparation of this opinion.

The reporters' recommendations

[6] The reporters identified the landscape and visual effects of the proposed wind farm, including the effects from aviation lighting, as a main consideration for the respondents when determining whether to give their consent to the proposed development. The reporters considered that the visual day-time effects, taken on their own, were not inconsistent with the development plan, having regard to the contribution the development would make to the generation of renewable energy. So far as the night-time effects of aviation lighting were concerned, the local planning authority, South Ayrshire Council, had objected to the application on the basis that lights would be introduced in an area important for dark skies, concerns that had also been expressed in a number of other representations. However, the council had conceded that, with ADLS in place, the adverse effects on the Dark Sky Park and wild land area would not be significant. Noting that the southern boundary of the proposed development site was close to the northern boundary of the Dark Sky Park, the reporters considered that, without ADLS, the number of aviation lights and their spread across a wide view would be very likely to have a significant adverse effect on the experience of darkness from the northern part of the Dark Sky Park and the wild land area. As a result, they concluded that, without ADLS, the night-time and day-time effects, overall, were inconsistent with the development plan.

[7] The reporters noted the council's concerns that ADLS could not be implemented at that time, given its reliance on "other external factors including regulatory approval". From both a commercial and a regulatory perspective, no development could take place until the petitioner's application to the CAA for an airspace change proposal establishing a TMZ around the proposed wind farm had been approved. I have already referred to the petitioner's proposed suspensive condition, which was in the following terms:

"No development shall commence unless and until an Aviation Lighting Landscape and Visual Impact Mitigation Plan (ALLVIMP) for:

- a. the use of an aircraft detection lighting system (ADLS);
- b. the reduction of lighting intensity during good meteorological visibility; and
- c. the specification of lighting;

has been submitted to and approved in writing by the Scottish Ministers following consultation with the Civil Aviation Authority and Ministry of Defence.

The approved ALLVIMP shall be fully implemented throughout the lifetime of the Development unless any change to the ALLVIMP is otherwise approved in writing by the Scottish Ministers.

Reason: In the interests of aviation safety."

This in turn raised concerns about whether any development could take place within a reasonable time. In terms of the reporters' recommended conditions, annexed to their report, they proposed both a section 36 condition (condition 2) and a condition attached to any deemed planning permission the respondents might grant (condition 7), in the following terms:

"Commencement of Development

- (1) Commencement of Development shall not be permitted after the expiry of the period of five years from the date of this consent, or in substitution such longer period as the Scottish Ministers may hereafter direct in writing.
- (2) Written confirmation of the intended date of Commencement of Development shall be provided to the Planning Authority and Scottish Ministers no later than one calendar month before that date."

The reason for the section 36 condition was said to be, “[t]o ensure the consent is implemented within a reasonable period” and, for the deemed planning permission condition, “[t]o comply with section 58 of the Town & Country Planning (Scotland) Act 1997”, which provides for three years or such other period as the planning authority may specify as the period after the expiry of which development may not begin. In terms of the reporters’ recommended conditions, “Commencement of Development” meant:

“the implementation of the consent and deemed planning permission by the carrying out of a material operation within the meaning of section 27 of the Town and Country Planning (Scotland) Act 1997 but excluding Enabling Works”.

And “Enabling Works” were defined as meaning:

“(i) any site investigation or other preparatory works or surveys necessary for the purpose of satisfying or discharging any conditions which must be satisfied or discharged (in whole or in part) prior to the Commencement of Development and (ii) the provision of any temporary fencing and/or contractors’ facilities within the Site necessary for (i) above.”

[8] The reporters noted two recent decisions in which the respondents had refused consent for wind farm developments at Clauchrie (August 2023) and Narachan (March 2024) on the basis of concerns over whether ADLS would be capable of being implemented within a five-year period. In light of these decisions, the reporters took written evidence on the practicalities of implementing ADLS and the likely timescales involved.

[9] The reporters noted that the petitioner had been engaging with the CAA in order to obtain a temporary TMZ around the Mark Hill wind farm in order that ADLS trials could be carried out there. The reporters acknowledged that the petitioner was in a good place to comment on progress with regard to the practicalities of implementing ADLS. They

acknowledged further that there was “a regulatory system in place to provide for ADLS and [EC] and that offshore [TMZs had] previously been agreed in the UK”.

[10] However, the reporters noted that the Mark Hill trials had been proposed to last for six months and had yet to begin. Although the ADLS equipment had been installed at Mark Hill, as at the date of the inquiry the petitioner was still awaiting flight data from National Air Traffic Services which would be required before the trial plan could be finalised with the CAA. Although the petitioner had been confident that the trials could start by the summer of 2024, the reporters noted that ADLS at the proposed development could not begin until the trials had been completed and the results analysed.

[11] The reporters referred to the Civil Aviation Publication (“CAP”) 764, being the CAA’s policy and guidelines on wind turbines, a draft of the 7th edition of which had only just been published and put out for consultation. This new edition had proposed for the first time a set of minimum requirements for the operation of ADLS. The draft guidance made it clear that the CAA itself would not approve the installation or operation of ADLS. It would, however, grant a permission to operate ADLS in terms of its powers under Article 222(6) of the Air Navigation Order. Before doing so, it would require the developer to submit a declaration of compliance with the minimum requirements. The reporters observed that it was unclear to them, at that stage, whether the petitioner’s proposed ADLS would meet these minimum requirements or whether permission for its operation would be granted.

[12] Regarding the process for establishing a TMZ, the reporters noted that the CAA had recently published its 5th edition of CAP 1616, “Airspace Change Process”. This edition had been published in response to directions issued by the UK Government, requiring the CAA to develop procedures and guidance relating to airspace change proposals, and further that

all procedures would have to reflect Government policy, be proportionate, and be aimed to expedite proposals. Accordingly, the purpose of this new edition had been to establish a “more proportionate” regulatory process, focussing on “simplification, clarification and proportionality”. As the reporters noted, the changes appeared to be designed to speed up the process, rather than to implement a more favourable policy towards the establishing of a TMZ. While the petitioner had been confident that the approval process would be complete in 2027, the reporters noted concerns that had been raised over the introduction of a TMZ, in particular, from the general aviation industry, including light aircraft, which would require to bear the costs of installing the EC technology. Swift approval, they noted, would not be guaranteed.

[13] The reporters concluded that without the results of the Mark Hill wind farm trial, there had been no significant change to the concerns that had been expressed by the respondents in the context of the other wind farm proposals at Clauchrie and Narachan regarding the implementation of ADLS. The reporters took account of all the evidence they received, including evidence that ADLS had been deployed in the United States, Canada, Germany, Denmark, Norway and Sweden. They took the view that there was no guarantee of ADLS approval in the UK or what the timescale for approval might be “given the steps in signing off the ADLS approach and the related TMZ”. On that basis, they refused to recommend the inclusion of the proposed suspensive condition. Without an ADLS in place, the reporters considered that the petitioner’s proposal would have an unquantified and unmitigated night-time effect that was likely to be significantly adverse. Although the proposal was in line with the national need for renewable energy, without an ADLS in place, it had significant individual and cumulative landscape and visual impacts on the Dark Sky Park and to some extent the biosphere. Taken together with the adverse day-time effects,

therefore, the application fell to be refused. The reporters concluded by advising the respondents that, should they disagree with the reporters' conclusions and agree with the petitioner that an ADLS was deliverable within a reasonable timescale, then the proposed development could be approved.

Further information available to the respondents prior to making their decision

[14] In November 2024, NatureScot published their "Guidance on Aviation Lighting Impact Assessment", a document developed by a working group called the Aviation Lighting Working Group that had been established by the respondents. It referred to ADLS as an "emerging" or an "evolving" mitigation measure. It referred to the Mark Hill trial having been undertaken in June 2024, and expressed the hope that it would help to inform the implementation of an effective TMZ strategy in the UK. It referred to the established use of ADLS elsewhere in Europe, particularly in Germany and Austria, and stated that it would be for developers and consultees to review its deployment "when it [became] a viable option in the UK".

[15] On 14 February 2025, following the reporters' decision, the respondents refused consent for the Earraghail wind farm. While the respondents, in that case, acknowledged that ADLS would be feasible in principle, it added that, "no timeline [had] been provided to confirm that the necessary mitigation measures could be implemented within 5 years of [that] application's determination".

[16] On 21 February 2025, and in light of the respondents' decision regarding the Earraghail wind farm application, the petitioner wrote to the ECU regarding a number of matters. The petitioner explained that the petitioner's application for a TMZ for the purpose of the Mark Hill trial had been withdrawn because it had become unnecessary. In their

view, this followed from the publication of the draft guidance in CAP 764, and in particular, the minimum requirements which the CAA had proposed that any ADLS would require to meet. The petitioner explained that the equipment remained in place and would continue to operate for the purpose of gathering data from aircraft already equipped with a transponder or EC device. These further trials would begin in the second quarter of 2025 with a view to assessing the capabilities of its ADLS system against the new minimum requirements, demonstrating the “safety case and the concept of operations”, and building “further confidence in the system”. In particular, the petitioner informed the respondents that the trials required the installation of a “further independent system” in order “to further test” the system’s performance. The petitioner had anticipated that a detailed report would be available by the end of 2025.

[17] In the same letter, the petitioner advised the respondents on the status of the petitioner’s proposal submitted to the CAA for an airspace change for a full night-time TMZ covering south-west Scotland, including the area of and around the proposed Carrick wind farm. The petitioner made it clear that this application had been temporarily “paused”, and that it maintained its commitment to a larger TMZ that would avoid the “inherent danger that there would be a proliferation of [airspace change applications]”. Regarding the status of the CAP 764 guideline, the petitioner advised that the CAA had been unable to provide any definitive timescale, but that it understood that its finalisation would be “imminent”. The petitioner reminded the respondents that the new edition of CAP 1616 had established a more “streamlined” process for applying for changes to airspace design, and that there were “numerous examples of offshore windfarms in Scotland delivering a TMZ involving airspace change to discharge suspensive aviation safety conditions”.

[18] On 27 March 2025, representatives of the petitioner met with representatives of the ECU in order to discuss recent decisions by the respondents regarding ADLS, including the Earraghail decision. The petitioner's representatives underlined the need properly to understand the significance of the Mark Hill trials, and that, based on their experience, the process for requesting a TMZ would take a maximum of 2 years. The representatives of the ECU observed that there was no "certainty" that ADLS would be available within 5 years, and that the CAP 764 was still only in draft form.

[19] On 25 April 2025, the petitioner sent the ECU a presentation on ADLS, outlining its view that ADLS could be deployed within 2 years. The covering email, headed "ADLS in Scottish Windfarms", reminded the ECU that the petitioner had been working with the CAA, other "stakeholders" and technology suppliers to trial various pieces of equipment. It commented that the results had been positive, that the petitioner had invested significant sums in demonstrating equipment and that it hoped to complete that investment "and therefore facilitate a much wider use of ADLS particularly in SW Scotland aligned to the Dark Sky Park at an appropriate time".

[20] On 22 May 2025, representatives of the petitioner provided the ECU, in particular new members of staff, with what the petitioner referred to as a "training session" regarding the process the petitioner would typically follow for developing a site, highlighting the factors shaping policy in the renewables sector.

[21] On 4 July 2025, the UK Government's Department for Energy Security and Net Zero published its Onshore Wind Taskforce Strategy, which included a commitment to review and publish the revised CAP 764 guideline during the summer of 2025.

[22] On 15 October 2025, the petitioner provided an update on the Mark Hill trials which was shared with members of the Aviation Lighting Working Group, in which it stated that

the trials had only a few weeks to run, that an interim report was expected shortly, and that following completion, a final report was expected at the end of 2025.

[23] On 31 October 2025, staff from the petitioner hosted reporters from the respondents' Planning and Environmental Appeals Division, giving them a presentation on the use of ADLS in the UK, including a further update on the Mark Hill trial. The petitioner mentioned that the final version of the new edition of CAP 764 was due for publication in November, but that even without it, the CAA had power under Article 222 to grant permission allowing an applicant to implement an ADLS on a wind farm development.

Respondents' decision

[24] On 8 October 2025, officials within the ECU issued to the Cabinet Secretary for Climate Action and Energy a submission to assist in the respondents' determination of the application. The report was attached to the submission, together with two annexes, one containing a note of regulatory requirements and advice, and the other containing a draft decision letter. None of these documents mentioned the information detailed in the preceding section.

[25] In their decision letter dated 5 December 2025, the respondents adopted the draft decision letter, and concluded that,

“although many of the environmental impacts could be overcome by way of mitigation or would be overall acceptable when balanced against the net economic benefits and the renewable energy benefits that would be delivered if the proposed Development were to be deployed, the likely significant individual and cumulative landscape and visual impacts, impacting on the Dark Sky Park (and to some extent the Biosphere) would not” (paragraph 145).

The respondents noted that they had,

“considered the option of imposing a suspensive condition, to secure the installation of an ADLS prior to construction of the proposed Development, but [did] not find

that the evidence available to date on the matter afford[ed] [them] sufficient assurance that the proposed ADLS mitigation method would be capable of being installed on the proposed Development within the next 5 years. As such, taking account of the resulting uncertainty on timescales for the deployment of the proposed Development if it were to be consented, the [respondents] concluded that it would not be appropriate to impose a suspensive condition” (paragraph 146).

Ultimately, therefore, while acknowledging the many factors in favour of the proposed development, the respondents concluded that it was not “the right [d]evelopment in the right place”. In agreement with the reporters, it was not acceptable overall.

[26] The respondents pronounced themselves satisfied that their reasoned conclusion was up-to-date.

Submissions for the petitioner

[27] Senior counsel for the petitioner submitted that the respondents had failed to carry out sufficient inquiry before making their decision. The scope of the so-called *Tameside* duty of inquiry (from the case of *Secretary of State for Education and Science v Tameside Metropolitan BC* [1977] AC 1014), had now been authoritatively set out by the Court of Appeal in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, at paragraphs 99-100. The obligation was to take such steps to inform oneself as were reasonable, subject to review on public law grounds. The task for the court was to establish what material was before the decision-maker and it should only strike down a decision not to make further inquiries if no reasonable decision-maker possessed of that material could suppose that the inquiries they had made were sufficient.

[28] The respondents had been aware that ADLS was an established and fast-evolving mitigation solution for aviation lighting. After the report had been issued, the respondents’ ECU had received considerable additional information from the petitioner. Policy and

guidance had also changed during that period. Despite the passage of time, none of this new information and guidance had been referred to in the decision. The respondents had a particular obligation to take that additional information and guidance into account when reaching their decision having regard to (i) the importance and urgency of applying available solutions to mitigate the visual impact of aviation lighting in south west Scotland given the Dark Sky Park there; (ii) the need to ensure best use of onshore wind farm capacity (as promoted by the respondents' policy); (iii) the fact that objections to aviation lighting were the most commonly reported objections to onshore wind farms in relation to aviation; (iv) the respondents' knowledge that the petitioner had been holding trials at Mark Hill wind farm, which were yielding positive results; (v) the respondents' knowledge that the CAA was about to publish the 7th edition of CAP 764; and (vi) the policy import of the UK government's 2023 Directions and the revised CAP 1616.

[29] The officials within the ECU had failed to consider the further information that was available to them, failed to seek further information from the petitioner and failed to advise the Cabinet Secretary of events that had taken place since the date of the report. There was no such thing as collective knowledge within a government department (*HMRC v Tooth* [2021] 1 WLR 2811 at paragraph 70 per Lord Briggs and Lord Sales JJSC). Whatever knowledge ECU officials might have had could not be attributed to the respondents in their decision-making capacity. The Cabinet Secretary lacked full, accurate and up-to date information relevant to the key determining issue.

[30] The respondents having failed to have regard to the matters listed above, and to the fact that the practical, policy and regulatory framework had moved on since the report was prepared and issued in 2024, had thereby failed to have regard to material, relevant considerations. As a result, the respondents could not rationally conclude that an ADLS

could not realistically be installed in compliance with the suspensive condition proposed by the petitioner.

[31] The respondents declined to attach the suspensive condition because, in their judgment, the evidence available did not provide them with “sufficient assurance that the proposed ADLS mitigation method would be capable of being installed on the proposed Development within the next five years”. The respondents’ concern was that “it would not be appropriate to go beyond the usual 5-year period in this case and apply a longer period for implementation” of the consent. The petitioner, however, had not sought a longer period for implementation, nor had it advised either the reporters or the respondents that a longer period would be necessary. The suspensive condition proposed by the petitioner, and agreed by the council, would not have involved, or required, the postponement of implementation of the consent beyond the normal five-year period. Under the terms of the suspensive condition, the consent would be capable of implementation by commencement of development once the ALLVIMP had been approved in writing by the respondents, following consultation with the CAA and the Ministry of Defence. The terms of condition 2 and condition 7 within the recommended conditions appended to the report would have simply required that development be commenced within the period of five years from the date of the consent (or such longer period as the respondents might direct in writing). Plainly an ADLS could not be installed until the turbines had first been constructed. The respondents’ approach to this issue had therefore unreasonably restricted the time for commencement of development to a far shorter period than five years.

[32] The respondents’ conclusions regarding the uncertainties over whether EC ADLS would be capable of being deployed within a five-year period demonstrated a failure to provide proper, adequate and intelligible reasons (*South Bucks DC v Porter (No. 2)* [2004]

1 WLR 1953). In particular, the respondents failed to provide any explanation why either the deployment of ADLS or the purification of the suspensive condition would not be capable of being achieved within five years of the grant of consent. The decision referred to “inherent regulatory and technical uncertainties”, but on the evidence available to the respondents, they would have been aware that the technology had been widely used in other countries, that TMZs were already in place within the UK, and that the CAA’s approach to airspace change proposals had been liberalised and accelerated.

Submissions for the respondents

[33] Counsel for the respondents began his submissions by underlining the legal and administrative context in which the respondents made their decision (*Taylor v Scottish Ministers (No 2)* 2019 SLT 681, paragraphs 31, 34). A public inquiry had taken place, in which evidence was led and submissions made. The respondents were presented with detailed recommendations by three reporters. While making no challenge of any kind to the report itself, the petitioner now sought to challenge the respondents’ decision on the basis of *ex parte* submissions that had not been considered by the reporters and on which participating parties had not been afforded the opportunity to comment. If participating parties were permitted to make submissions after the public inquiry had concluded it would be likely only to distort the system set up under the Electricity Act 1989. While counsel conceded that the passage of time between the report and the respondents’ decision was less than ideal, Mr Brogan in his affidavit had put the delay down to a lack of resources, the complex, overlapping nature of the issues in the conjoined inquiries, and the need to review and consider all the additional submissions made by the petitioner. But it would be wrong to suggest that the respondents, as a result of the passage of time, were required to review

everything *de novo*. If new information were to have become available, or if there had been a material change of circumstances, after the inquiry had been concluded, then the respondents would have needed to consider whether the inquiry should be reopened. But that was not the situation in this case.

[34] Addressing, firstly, the duty of inquiry, the respondents emphasised that the duty was a specific application of the public law duty to act reasonably. The court should only intervene if no reasonable decision-maker could have been satisfied, on the basis of the inquiries made, that it possessed the information necessary for its decision (*Ibrahimi v Glasgow City Council* 2026 CSIH 4, paragraph 41). Put differently, the question was whether the respondents failed in their duty to take such steps as were reasonable in all the circumstances to acquaint themselves with material sufficient to permit them to reach the decision that they did (*Scottish Ministers Petitioners (Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023*) 2024 SC 173, paragraphs 74-75).

[35] Against that background, the respondents submitted that there had been no significant change in the practicalities of implementing ADLS at Carrick wind farm between the report and the decision. None of the information had been of such centrality or importance as to render the decision irrational. An assessment had rightly been made to that effect by officials in the ECU prior to making their submission to the Cabinet Secretary.

[36] The implementation of ADLS faced inherent regulatory and technical uncertainties at the date of the report, and they continued to do so at the date of the decision. Further, CAP 764 had been in draft form at the date of the report, and remained in draft at the date of the decision. Regarding specifically the petitioner's letter dated 21 February 2025, it had been in general terms and contained no new information that would have been of relevance to the determination of the petitioner's application. It had remained the case that an

airspace change would be required to implement a TMZ. It had remained the case that this would be decided by the CAA in accordance with CAP 1616. It remained the case that swift approval could not be guaranteed. The meeting on 10 March 2025 had been a general meeting to discuss all the then current applications made by the petitioner for consent. There had been discussion of the draft CAP 764 at the meeting that took place on 27 March 2025, but not specifically in relation to the Carrick wind farm proposal. Following the meeting, Mr Brogan had contacted Andy Wells of the CAA, on an informal basis, to clarify matters relating to the status of CAP 764. Mr Wells had advised that, while he considered it unlikely that there would be any changes to the draft, he could not be certain of that. He could not be certain of when the draft would be formally adopted. He advised that there could be no certainty from the outset as to whether an application for an airspace change would be granted or not.

[37] For essentially the same reasons, there had been no failure on the part of the respondents to have regard to any relevant consideration. In effect, the petitioner was seeking to review the merits of the respondents' decision. Regarding the respondents' assessment that there had been insufficient assurance that EC ADLS would be capable of being implemented on the proposed development within five years, this has been a reasonable conclusion on the evidence with which this court should not interfere. Finally, the informed reader had not been left in any real or substantial doubt as to what the reasons were for the decision. The reasoning was both intelligible and adequate.

Decision

[38] Although the petitioner had accepted that its reduced lighting, without ADLS, might well have significant effects due to its location within or near the Dark Sky Park, it had not

carried out any assessment of what these effects might be. As a result, the reporters had concluded that the night-time visual effects were “unquantified and unmitigated”.

However, the reporters had also accepted that, with ADLS in place, there would be no significant effects on the wild land area or the Dark Sky Park. As a result, the key issue became one of whether ADLS could be delivered within a reasonable timescale. If the respondents disagreed with the reporters’ conclusion on that issue, the reporters recommended that the application could be granted subject to the suspensive condition.

The duty to make inquiries

[39] I consider firstly the respondents’ objection based on the need to consider the legal and administrative context in which the respondents made their decision (*Taylor v Scottish Ministers (No 2)* 2019 SLT 681, paragraphs 31, 34). I do not agree with the respondents that granting participating parties the opportunity to make further submissions after the close of the inquiry would be likely to “distort” the system set up under the Electricity Act 1989. The situation must frequently occur, particularly where such a long time has elapsed since the reporters issued their recommendations, in which the respondents are required to consider whether new information has come to light or whether there has been a change in circumstances, and if so whether either of these eventualities is liable to have a material impact on the decision they propose to make. I understand, for example, in the case of Earraghail, that the respondents themselves chose to have regard to information relating to the withdrawal of the TMZ for the Mark Hill wind farm, information which would not have been available to the reporters appointed to the inquiry in relation to that application. As it happens, the new information did not cause the respondents to depart from the reporters’ recommendations, and so there would have been no question of any unfairness to the other

participants. Where, by contrast, new evidence or a new issue of fact comes to light after the close of the inquiry, as a result of which the respondents are minded to depart from the recommendations of the reporters, then common law principles of natural justice and procedural fairness would require the respondents to afford the applicant, the planning authority and any other party appearing at the inquiry the opportunity to make representations before coming to any decision at variance with the reporters' recommendations. Rule 21 of the Town and Country Planning (Inquiries Procedure) (Scotland) Rules 1997 sets out a similar procedure for public local inquiries in relation to called-in applications and appeals under the Town and Country Planning (Scotland) Act 1997. Such a procedure, so far from being a distortion of the system set up by the relevant legislation, would in fact be in implement of that system. If the ultimate determination of the petitioner's application were to be delayed, as a result of following such a procedure, then the respondents would not be particularly well-placed to complain, having taken so long themselves to reach a decision.

[40] Having rejected this preliminary submission of the respondents, the question inevitably arises of how any new facts or evidence are to be communicated to the decision-makers. In the submission and annexes issued to the Cabinet Secretary on 8 October 2025, there was no reference to any of the information now being relied upon by the petitioner. Nor can it be assumed that any information, of which the ECU officials were aware, was *ipso facto* within the knowledge of the respondents (*HMRC v Tooth* [2021] 1 WLR 2811 at paragraph 70 per Lord Briggs and Lord Sales JJSC; *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 at paragraphs 23-38 per Sedley LJ). In his oral submissions at the substantive hearing, senior counsel for the petitioner disavowed any suggestion that officials might be required simply to convey to the Cabinet Secretary, as it

were, unfiltered, each and every piece of evidence or new fact arising since the close of the inquiry. He accepted that at most officials need only provide a summary of such information, as he put it, “so that the Cabinet Secretary could understand that events had moved on”. However, that concession presupposes that it is both necessary and sufficient that the officials make a judgment about what is truly new information, and also whether it is likely to be material to the respondents’ decision-making, and these are precisely the questions at the heart of the present dispute between the parties.

[41] In addressing these questions, I begin by recalling that parties were agreed as to the nature of the duty of inquiry incumbent on the respondents. In short, the obligation is only that the decision-makers take such steps to inform themselves as are reasonable, subject to review on public law grounds. It is for the public body and not the court to decide on the manner and intensity of the inquiry to be undertaken. The court should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, at paragraphs 99-100).

[42] It will be recalled further that the reporters had been aware of the issuing, on 28 March 2024, of the draft 7th edition of CAP 764. They were aware that the draft proposed minimum standards for an ADLS. The draft specified performance parameters in relation to matters such as range, vertical coverage, probability of detection, and backup in the event of complete or partial system failure. The draft did not specify how these standards would be met, since that would be for the operator to propose when seeking a permission from the CAA. Against that background, the reporters noted that it was not clear to them whether the petitioner’s proposed ADLS system would meet those standards. They had emphasised the need for the Mark Hill trial to be complete and the results analysed before ADLS could

proceed. As at the date of their report, then, the trial had yet to begin, with the reporters noting that the petitioner expected it to start in the summer of 2024.

[43] So far as new information is concerned, the petitioner founded heavily on its letter of 21 February 2025, informing the ECU that, in the petitioner's view, the primary purpose of the temporary TMZ around the Mark Hill farm was to establish the minimum requirements for an ADLS, in the absence of any guidance to that effect in the then current version of CAP 764. With the publication of the draft, the need for the temporary TMZ had, in the petitioner's opinion, been "largely negated". However, notwithstanding the withdrawal of the TMZ, "additional flight trials" were to take place with such aircraft as would have already been fitted with a transponder or other EC device, in order to assess the capabilities of the petitioner's system when viewed against the new draft requirements. The petitioner summarised the position by saying that the "technical" phase of the trial was "still ongoing", even though it had originally been scheduled to have been completed in December of the previous year. The petitioner advised the ECU that there would then be a further phase, involving the installation of a "further independent system", beginning in the second quarter of 2025, and scheduled to run for a six-month period, allowing for a detailed report to be completed by the end of 2025.

[44] Of course, the draft CAP 764 had already been issued, and consulted upon, by the time the Carrick wind farm report was published; and yet there had been no reference in that report to the temporary TMZ around the Mark Hill wind farm having been assessed by the petitioner as unnecessary. Indeed, it is unclear from the petitioner's letter whether it had made such an assessment before the Carrick wind farm inquiry had concluded, and if it had, why it appears not to have been mentioned by the reporters. It is also unclear from the letter what was meant by the reference to the need for a temporary TMZ around the Mark Hill

wind farm having been “largely” negated. It might be that, notwithstanding the publication of the draft CAP 764, the TMZ was continued only in order to allow the trial, as originally conceived, to be completed. Be that as it may, the letter did not provide the respondents with materially new information. In my view, it would have been perfectly reasonable for the respondents to have concluded that there had been a delay in concluding the Mark Hill trials, as they had originally been conceived, and that a new set of trials was being planned, with no promise of a report until the end of 2025 at the earliest.

[45] So far as the draft CAP 764 was concerned, the petitioner’s letter referred to advice having been given by Andy Wells of the CAA that it was “awaiting final sign-off prior to release”. The letter conceded that “no definitive timeline” had been given, but that the petitioner considered that there had been indications that it would be released imminently.

At a meeting on 7 March 2025 to discuss the 21 February 2025 letter, Alan Brogan of the ECU advised representatives of the petitioner that he would have a discussion with the CAA to clarify matters relating to the draft. According to their affidavit evidence, Mr Brogan and Catherine Cacace had an informal meeting with Mr Wells of the CAA on 3 April 2025, at which Mr Wells could provide no certainty as to when the draft CAP 764 would be formally adopted. He advised that, although he considered it unlikely that there would be changes to the draft, he could not be certain of that. On 4 July 2025, the UK Government’s Department for Energy Security and Net Zero published its Onshore Wind Taskforce Strategy. That document gave a “delivery timeline” for CAP 764 of Autumn 2025. However, by the time the respondents issued their decision on 5 November 2025, CAP 764 had still not been finalised. Of course, as we now know, CAP 764 was eventually finalised and published on 17 December 2025, in substantially the same terms as the draft. But if it were being suggested that the respondents acted unreasonably in not delaying their decision still

further until CAP 764 had been published, then I would reject that submission. Nor can it be suggested, simply on the basis that CAP 764 was eventually published with only minor alterations, that the respondents had been unreasonably cautious in their approach to the regulatory environment. That seems to me to be a judgment made with the benefit of hindsight.

[46] Regarding CAP 1616, and the CAA guidance on the airspace change application process, this was information that had already been before the reporters. I have already noted the reporters' conclusions that the guidance appeared to be designed to speed up the process of applying for an airspace change, rather than to implement a more favourable policy. Having reviewed the guidance, I consider that characterisation to be broadly accurate, notwithstanding the petitioner's insistence, in its note of argument, on describing CAP 1616 as a "liberalisation" of the regulatory approach. If anything, the guidance imposed greater regulatory demands on sponsors, in the interests of providing a structured and predictable framework for deciding whether to approve a change to UK airspace. I am reinforced in that assessment by the supplementary affidavit from Mr van Hoogstraten.

[47] In his affidavit, Mr Brogan illustrated the uncertainty involved in the application for an airspace change proposal by reference to a number of applications for an airspace change that had been in progress for more than five years. Mr van Hoogstraten, in his supplementary affidavit, and Mr Douglas in his further supplementary affidavit, took issue with the examples given by Mr Brogan as not being illustrative of the process that would typically be assigned to an application for a TMZ surrounding an onshore wind farm. Mr van Hoogstraten explained that the CAA assigned different "levels" to permanent airspace change proposals, ranging from Level 1, the most significant level, attracting the greatest regulatory scrutiny, to Level 3, for lower impact proposals, which followed a

streamlined process. The level to which an application was assigned would affect the extent of consultation, the number of assessments, the documentary burden, and ultimately the overall timeline from application to decision. In his view, the examples relied upon by Mr Brogan involved extensive, strategic, Level 1 proposals involving issues of national airspace modernisation, whereas the type of proposal associated with the Carrick wind farm would be more limited, “operationally focussed and proportionate in nature”. By analogy with planning applications, Mr Douglas said that Mr Brogan was comparing a new dormer window to a large settlement expansion.

[48] In this proliferation of affidavit evidence, neither party addressed the court in any detail on what CAP 1616 actually says about the different levels that are assigned to permanent airspace change applications. In particular, although Mr van Hoogstraten testified that the airspace change for Carrick wind farm would “almost certainly” be assigned to Level 2B or Level 3 (pre-scaled), he did not elaborate on his reasons for this by reference to the definitions provided in CAP 1616 itself, which are in the following terms:

“Permanent airspace change proposal level definitions

Level 1

2.26 A change to the notified airspace design that has the potential for a high impact on aviation and/or non-aviation stakeholders.

2.27 We would expect changes that have the potential to alter flight behaviours below 7,000 feet (above mean sea level) over land to fall within this level.

Level 2

2.28 A change to the notified airspace design that has the potential for a medium impact on aviation and/or non-aviation stakeholders.

2.29 We would expect changes that have the potential to:

- alter flight behaviours above 7,000 feet (above mean sea level) or
- alter flight behaviours below 7,000 feet (above mean sea level) over sea and not alter flight behaviours below 7,000 feet (above mean sea level) over land to fall within this level.

Level 3

2.30 A change to the notified airspace design that has the potential for a low impact on both aviation and non-aviation stakeholders.

2.31 Some airspace change proposals have already been identified as Level 3 and are listed in CAP 1616h, Guidance on Airspace Change Process for Level 3 and Pre-Scaled Airspace Change Proposals.

2.32 However, a change sponsor may explain why they consider a proposed change not on that list is a Level 3 change, with a suitable supporting argument, for consideration by the CAA.”

The first thing to note is that CAP 1616 does not appear to provide for a Level 2B, as suggested by Mr van Hoogstraten. Further, since Level 1 applies to changes that alter flight behaviour “below 7,000 feet over land”, it is not immediately obvious why this would not be the level to which a proposed TMZ around an onshore wind farm should be allocated.

Mr van Hoogstraten compared the proposed TMZ for the Carrick wind farm to the TMZ for Seagreen wind farm, to which Level 2 had been assigned, but since Seagreen is an offshore wind farm, it is not immediately obvious why this would be the most appropriate comparison.

[49] The affidavit evidence illustrated that there were issues of fact dividing the parties that could not properly be explored in the context of the substantive hearing. Neither counsel expressed any enthusiasm for a proof, or what would have been called a second hearing in former judicial review procedure, and I consider that they were right not to do so, as it would risk dragging the court into an assessment of the merits of the respondents’ decision-making. In any event, as I have already stated, the reporters had already been aware of CAP 1616, and therefore of the criteria that would be used for deciding the weight and intensity of the regulatory burden to be assigned to any particular air space change proposal. Their concerns were related not just to uncertainty in the time that would be taken to process an application but to the uncertainty in whether it would be successful.

[50] In the foregoing paragraphs, I have focussed on those parts of the petitioner's argument that seemed to me to be the more substantial, those relating to the Mark Hill trials, CAP 764 and CAP 1616. More generally, however, I am not persuaded that there was any basis upon which I could properly conclude that the information relied upon by the petitioner was new, or at least new in any material respect. Nor do I consider that the respondents unreasonably failed to make further inquiries. The reporters' conclusion had been that there were significant uncertainties regarding whether the ADLS scheme could be implemented within five years or within a reasonable time. Albeit that the respondents' decision was issued over a year after the conclusion of the Carrick wind farm inquiry, there had been no material change in the fundamental uncertainties to which the reporters had referred, in particular, those concerning the outcome of trials at the Mark Hill wind farm, the finalisation of CAP 764, and whether approval to an air space change proposal would be granted.

The duty to take into account relevant considerations

[51] The petitioner argued that the respondents failed to mention, and therefore failed to have regard to, material considerations that were relevant to the principal determining issue. The law governing when a decision-maker acts unlawfully by not taking a particular matter into account as part of the decision-making process is well-established. The Supreme Court set out the relevant principles in *R (on the application of Friends of the Earth Ltd & others) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] PTSR 190 (Lord Hodge, DPSC and Lord Sales, JSC, at paragraphs 116-121, with whom Lord Reed, Lady Black and Lord Leggatt agreed). The court cited with approval the opinion of Cooke, J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172 to the effect that, other than in

situations where statute expressly or impliedly identifies considerations that require to be taken into account, there will be some matters “so obviously material” to a decision on a particular project that anything short of direct consideration of them by the decision-maker would be unlawful.

[52] Whether a consideration is so obviously material that it must be taken into account is of course the familiar *Wednesbury* irrationality test (*Friends of the Earth Ltd, op cit*, paragraph 119). And where the decision-maker makes no reference to the consideration, as had been alleged by the petitioner in this case, the Supreme Court affirmed that,

“unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. ... There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion” (*Friends of the Earth Ltd, op cit*, paragraph 120).

Applying these principles to the present case, the petitioner has not demonstrated that the considerations to which it referred were so obviously material to the decision that the respondents were required to make that any failure on their part to consider them would have rendered their decision unlawful.

[53] The petitioner relied specifically on the up-to-date information about the Mark Hill trials and the CAA’s position on ADLS. To that extent, its argument under this heading might be regarded as an alternative expression of the complaint previously considered, and if so, it falls to be rejected for similar reasons. However, the petitioner also argued, under this heading, that the respondents failed to have regard to the fact that a developer would only take forward an ADLS and TMZ, and hence demonstrate the operational efficacy of such a system, if it were already in possession of a section 36 consent and deemed planning permission that obliged its installation. I reject this argument. The decisions relating to the

Clauchrie, Narachan, and Carrick Forrest applications demonstrate that, at least insofar as ADLS is concerned, the respondents have refused to grant consent for the development of wind farms on broadly similar grounds. It cannot plausibly be argued that the respondents have simply failed to have regard to the commercial risks that they are effectively asking developers to assume. It may be that, in doing so, they can be criticised for taking too conservative an approach, but these are all matters of judgment with which the court cannot interfere.

Implementation of the development

[54] The petitioner argued that the respondents unreasonably concluded that there was no certainty that the development would be implemented within five years or at least a reasonable period. For this argument, the petitioner relies heavily on paragraph 146 of the decision, which it is necessary to set out in full:

“The Scottish Ministers have considered the option of imposing a suspensive condition, to secure the installation of an ADLS prior to construction of the proposed Development, but do not find that the evidence available to date on the matter affords the Scottish Ministers sufficient assurance that the proposed ADLS mitigation method would be capable of being installed on the proposed Development within the next 5 years. As such, taking account of the resulting uncertainty on timescales for the deployment of the proposed Development if it were to be consented, the Scottish Ministers consider it would not be appropriate to impose a suspensive condition.”

The petitioner makes a number of objections. The suspensive condition would not have required “installation” of an ADLS prior to construction of the proposed development. It would have required only that ADLS (as part of the petitioner’s aviation lighting mitigation measures as a whole) be *approved* prior to commencement of development. Further, the installation of ADLS would take place as part of the process of construction on site rather than being carried out “prior to construction”. Finally, condition 2 would have required

only that the development be “commenced” within five years of the granting of section 36 consent and deemed planning permission; to require the installation of ADLS to have been completed during that period would be to restrict the time for commencement of development to a period far shorter than five years.

[55] On this particular issue, the decision is not happily worded. The respondents use a variety of expressions to refer to whether, as a result of the perceived uncertainties to which I have already referred, the development would be “capable of being installed” (paragraph 146 of the decision) or “capable of being deployed” (paragraph 102 of the decision) within five years. However, the key to understanding this part of the decision is the respondents’ consistent reference to five years as “the usual” or “the appropriate” period for implementation of a consent and deemed planning permission. “Implementation” is of course yet another expression chosen by the respondents, but whether referring to the implementation, installation or deployment of the development, the reference to the five-year period can only be understood as a reference to the period during which the development must be commenced, as required by conditions 2 and 7. Those conditions had been entirely uncontroversial, having been agreed by the petitioner and the local authority, and they were included by the reporters in their schedule of recommended conditions. Moreover, the reason for the proposed section 36 condition, as noted in the schedule, was “[t]o ensure the consent is *implemented* within a reasonable period” (emphasis supplied). In other words, references to the implementation, installation or deployment of the development, within five years from the date of consent should be understood as a reference to the commencement of the development within that period. Understood in this way, the petitioner’s objection simply disappears. It is inherently unlikely that the respondents could have been labouring under the misapprehension that the proposed conditions would have

required the development to be completed rather than commenced within the usual five-year period.

Inadequate reasons

[56] Although a distinct ground of challenge, as had been conceded by the petitioner, the alleged failure to provide adequate reasons was linked to the other grounds of challenge.

Understandably, therefore, counsel spent little time on it during the debate, and it only occupied a small part of their written submissions. There was no dispute on the law, as summarised by Lord Brown of Eaton-under-Heywood in *South Bucks DC v Porter (No 2)*

[2004] 1 WLR 1953, at paragraph 36 of his speech, with which Lords Steyn, Scott, Rodger and Carswell agreed:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was decided. Reasons can be briefly state, the degree of particularity required depending entirely on the nature of the issues falling for decision. [...] The reasons need refer only to the main issues in the dispute, not to every material consideration. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision”.

[57] The petitioner focussed on the reference in paragraph 102 of the decision to the “inherent regulatory and technical uncertainties as to whether EC ADLS will be capable of being deployed” within the usual five-year period. The petitioner referred in particular to the evidence presented, or at least available, to the respondents that EC ADLS technology was widely used in other countries, that TMZs were already in place offshore within the UK, and that developments had taken place in the CAA’s approach to airspace change proposals. However, for the reasons already given, these were all matters that had been referred to in the report into Carrick wind farm. Since the respondents agreed with the reporters’

conclusions on these matters, the reader would not be left in any real or substantial doubt as to the reasons for the decision.

Disposal

[58] I shall therefore repel the petitioner's pleas-in-law and sustain the respondents' second and third pleas-in-law. The result is that I shall decline to grant the orders sought by the petitioner. I shall reserve any question of expenses.