OUTER HOUSE, COURT OF SESSION

[2020] CSOH 107

P1176/19

OPINION OF LORD TYRE

in the petition of

ENERGIEKONTOR UK LIMITED

Petitioner

for

Judicial Review of (i) the policy of the Ministry of Defence in connection with safeguarding the Eskdalemuir Seismic Array, and (ii) the noise budget allocation table prepared and applied by the Ministry of Defence in that regard

Petitioner: Mure QC; Wright Johnston & Mackenzie LLP
First Respondent (Advocate General for Scotland): Crawford QC; Morton Fraser LLP
Third Respondent (CWL Energy Limited): Van der Westhuizen; CMS

23 December 2020

Introduction

[1] The petitioner is a developer of commercial wind farms. The first respondent is the Advocate General for Scotland, representing the Ministry of Defence ("MOD"). The third respondent ("CWL") is another developer of commercial wind farms who has entered the petition process as an interested party. The petitioner has applied for planning permission for a wind farm development within the consultation zone surrounding the Eskdalemuir Seismic Array ("the Array"). That application has been objected to by the MOD in accordance with a policy intended to prevent wind farm development from interfering with

the operational capabilities of the Array. In this petition for judicial review, the petitioner challenges the lawfulness of the manner in which the MOD's policy is currently operated.

[2] The petition initially came before me for a hearing, in terms of section 27B of the Court of Session Act 1988, as to whether it was equitable to extend the 3 month time limit in section 27A(1)(a) and grant permission for the application to proceed. That hearing took place prior to CWL's entry into process. My opinion dated 17 April 2020 granting permission to proceed is at [2020] CSOH 37. I have used my summary of the material facts in that opinion as the basis for the narrative below.

[3] The petition was set down for a substantive hearing which, due to Covid restrictions, was held remotely. Affidavit evidence was presented on behalf of all parties. I accept the evidence as credible and reliable.

The planning background

[4] The Array comprises an array of seismometers capable of detecting vibrations caused by nuclear tests. It is part of the verification regime provided for in the Comprehensive Nuclear Test Ban Treaty and operated under the surveillance of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organisation. There is an agreement dated 12 November 1999 (Cm 4675) between the UK and the Preparatory Commission on the conduct of activities relating to the International Monitoring Facilities for the Treaty. The Treaty presently has no force in UK domestic law. However, based upon its obligations under the Treaty and under the Vienna Convention on the Law of Treaties, it is the UK Government's policy to protect the Array for the purposes of the Treaty. The MOD takes the lead through its Safeguarding Department within the Defence

Infrastructure Organisation. That protection includes protection from seismic vibrations from other sources that could interfere with the Array's detection capabilities.

[5] The forces acting on wind turbines cause vibrations in their structure, some of which are transferred to the ground and can travel for many kilometres. A report commissioned in 2005 (the Styles Report) made recommendations regarding the siting of wind farms in the vicinity of the Array. The authors of the report recommended an aggregate seismic ground vibration threshold for all wind farms of 0.335 nanometres (nm) of ground displacement. This is known as the noise budget. In the light of the Styles Report, the MOD established two zones around the Array: (i) an exclusion zone of 10km within which the MOD would object to any wind farm development, and (ii) a consultation zone of 50km within which the MOD would require to be notified of relevant applications. Paragraph 3 of the Ministry of Defence (Eskdalemuir Seismic Recording Station) Technical Site Direction 2005 requires a planning authority to consult the MOD before granting any application for wind farm development within the 50km zone.

[6] The Eskdalemuir Working Group ("EWG") was established in 2004 to consider the potential impact of wind farms in the vicinity of the Array. It is funded by *inter alia* the MOD and Renewable UK (formerly the British Wind Energy Association) and is convened by the Scottish Ministers. Its members include a number of commercial wind farm operators including the petitioner and CWL. The EWG was responsible for commissioning the Styles Report and, in 2014, it commissioned a further report (the Xi Report) to re-examine the Styles methodology. The Xi Report concluded that the 2005 methodology should be replaced by a physics-based algorithm and that, if this was done, there was "headroom" for additional wind farm developments within the 0.335 nm noise budget threshold.

[7] MOD policy is to allocate noise budget on a first come first served basis. The basis upon which the MOD decides whether or not to object to a wind farm development application is whether the granting of the application would or would not cause the noise budget threshold to be exceeded. In order to assess whether this would be so, the MOD uses an Excel spreadsheet called the Noise Budget Tool. This spreadsheet lists all existing and proposed wind farm developments within the consultation zone, together with *inter alia* their capacity, mean distance from the Array, and calculated amplitude (in nm). The effect of a wind farm development on the noise budget will depend primarily upon the number of turbines and their proximity to the Array. When a proposed new wind farm development is added to the spreadsheet, the Noise Budget Tool re-calculates the cumulative amplitude of the new development together with all of those already appearing in the spreadsheet. By this means the MOD assesses whether the amplitude of a further proposed development would cause the cumulative total to exceed the noise budget; if so, an objection will be lodged. It is very unlikely that a development objected to by the MOD on this ground would receive planning permission without the MOD having subsequently given its approval.

[8] The spreadsheet can be used to produce a table, in electronic or print form, containing details of all existing and proposed windfarm developments within the consultation zone, as at the date when the information is requested. A version of the table produced for the purposes of the present proceedings has had added to it a further column entitled "status" (eg "constructed" or "granted"). Proposed developments intimated after the noise budget has been exceeded are not entered in such a table, but are instead placed by the MOD, on the same first come first served basis, on a "waiting list" entitled "Eskdalemuir Applications Since Budget Breached".

[9] The statutory procedure for obtaining planning permission for a wind farm development differs according to whether or not the capacity of the proposed development exceeds 50 megawatts (MW). For a development exceeding that capacity, consent must be given by the Scottish Ministers under section 36 of the Electricity Act 1989 (an application requiring such consent is referred to as a section 36 application). The local planning authority is a statutory consultee. In terms of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, certain (but not all) section 36 applications must be accompanied by an environmental impact assessment (EIA) report. In terms of regulation 12(1) of the 2017 Regulations, a developer may (but is not obliged to) ask the Scottish Ministers to adopt a scoping opinion, which advises on what should be included in any EIA report accompanying a section 36 application. Where a scoping opinion is requested, the Scottish Ministers consult the MOD on the proposal.

[10] For a development with a capacity not exceeding 50MW, there is no requirement for a section 36 consent, and the application for planning permission is made to the local planning authority under the Town and Country Planning (Scotland) Act 1997. Again, certain applications must be accompanied by an EIA report, and the developer may (but need not) ask the planning authority to adopt a scoping opinion which advises on what should be included in such a report. If a scoping opinion is requested, the MOD will be consulted.

[11] The issue in the present petition arises out of a distinction drawn in the policy of the MOD, as regards the allocation of noise budget, between the treatment of applications for developments with capacity greater than 50MW and of those with capacity not exceeding 50MW. In relation to a proposed development whose capacity does not exceed 50MW, noise budget is allocated to the development when the MOD is notified by

the local planning authority of the developer's planning application. However, in relation to a proposed development whose capacity exceeds 50MW, noise budget is allocated to the development when the MOD is notified by the Scottish Ministers of a scoping request by the developer in relation to an EIA report. The petitioner's contention in these proceedings is that this difference in treatment creates a preference in favour of larger (capacity > 50MW) proposed developments, which will be allocated noise budget at an earlier stage of the planning process than smaller proposed developments.

The petitioner's planning application

[12] From about 2015 the petitioner became interested in carrying out wind farm developments with capacities of less than 50MW at locations within the consultation zone. In September 2017, the petitioner applied to the local planning authority (Dumfries and Galloway Council) for a scoping opinion in relation to a proposed windfarm of 14 turbines at Little Hartfell, near Langholm. The planning authority consulted the MOD who advised that the noise budget would be "allocated to planning application" [sic] on a first come first served basis, and that if the budget had been fully allocated at the time of submission of the application, it was possible that the MOD might object. On 9 February 2018, the petitioner applied for planning permission for a wind farm at Little Hartfell. The application was intimated to the MOD. On 26 February 2018 the MOD added the application to its waiting list. On 13 April 2018, the MOD submitted an objection to the application "due to the potential unacceptable impact of the wind farm on the [Array]", on the ground that the limit of the noise budget had already been reached. That had occurred by virtue of the Faw Side application having been allocated noise budget, as narrated below.

[13] On 9 June 2020, Dumfries and Galloway Council granted planning permission for the Little Hartfell wind farm development. The grant of permission is subject *inter alia* to a condition that

> "…no part of any turbine shall be erected unless and until a Mitigation Scheme to address the impact of the development upon the Eskdalemuir Seismic Array has been submitted to and approved in writing by the Council as planning authority (in consultation with MoD)".

CWL's planning application

[14] On 4 December 2017, CWL submitted a request for a scoping opinion to the Scottish Ministers' Energy Consents Unit (ECU) in relation to a proposed wind farm development consisting of 49 turbines with a maximum generating capacity of 315MW situated at Faw Side, approximately 11km from the Array. The request was submitted to the MOD by the ECU on 18 January 2018. On that date, in accordance with the policy narrated above, the MOD allocated noise budget to the proposed Faw Side development. However, as a consequence of its location and capacity, the amplitude of the proposed development (0.674nm) caused the noise budget to be exceeded. By letter dated 6 February 2018, the MOD informed the ECU that it would object to the development. The ECU issued its scoping opinion to CWL on 5 April 2018. On 22 May 2019, CWL submitted an application to the Scottish Ministers for a section 36 consent. By letter dated 26 June 2019, the MOD objected to the application, on the ground that the reserved noise budget had been reached. The MOD have since confirmed that the budget would be breached if more than two turbines were to be built at Faw Side. The application for section 36 consent has not yet been determined.

Remedies sought by the petitioner

[15] In these proceedings for judicial review, the petitioner seeks:

(i) declarator that the MOD's policy in respect of the allocation of noise budget to proposed wind farm developments within the consultation zone is unreasonable, *ultra vires* and unlawful; and

(ii) reduction of the MOD's decision in respect of allocation of noise budget to CWL's proposed Faw Side windfarm development, and of the "waiting list" produced as a consequence of that decision.

The petitioner initially sought reduction of the current table containing the details of noise budget allocation. However, following clarification in an affidavit lodged by the MOD of the status of the table as, in effect, no more than an expression of the operation of the Noise Budget Tool at any given time, and consideration of the MOD's note of argument prepared in the light of that clarification, the petitioner refined its submission to seek reduction of the allocation decision and its immediate consequence for the petitioner's application.

[16] The MOD does not object to the granting of the declarator sought by the petitioner. It concedes that its current approach to the allocation of noise budget is unlawful because (a) it does not have a record of the reasons therefor, and (b) the chronological order of allocations was not known by developers until about 2018. It makes no concession that its approach is unlawful for any other reason. Senior counsel for the MOD assured the court that its intention was to consult in early course on a new approach. The MOD does, however, oppose the granting of any decree of reduction. For its part, CWL opposes the granting of both declarator and reduction.

Argument for the petitioner

[17] On behalf of the petitioner it was submitted that the MOD's policy to list section 36 proposals by reference to the date the MOD is consulted in respect of a scoping request, but to list 1997 Act applications by reference to the date when the planning authority consulted the MOD in accordance with the Direction was unreasonable, *ultra vires* and unlawful. Distinctions between different groups had to be drawn on a rational basis. The MOD's policy discriminated without any rational basis between (a) proposals where the developer requested a scoping opinion for a proposed development requiring section 36 consent from the Scottish Ministers and (b) proposals where the developer requested a scoping opinion for a proposed development requiring planning permission from a local planning authority. At the same time, it discriminated without any rational basis between (a) applications made to the Scottish Ministers under section 36 and (b) applications for planning permission made to planning authorities. In contrast, the policy failed to discriminate (as it ought to do) between requests for a scoping opinion and applications for planning permission. A scoping request might or might not lead to a later application for section 36 consent or planning permission. Years might pass between the scoping request and any eventual planning application. There was no obligation on developers to request a scoping opinion; but every developer had to lodge an application for section 36 consent or planning permission. Protection of the Array did not require the policy currently being operated. The policy and its effects were also irrational because the MOD's role was purely to protect the Array and not to promote particular wind farm proposals. The effect of the policy was to hamper proper planning within the consultation zone in a way that was not necessary for the Array's protection.

[18] The MOD did not seek to defend its current policy and offered no justification or explanation for it. The justifications proposed by CWL were irrelevant. They mostly consisted of planning considerations which were of no concern to the MOD. The example of Faw Side itself, a large windfarm close to the exclusion zone in respect of which no application for consent had been made at the time when it was allocated noise budget, was a clear demonstration of the irrational nature and consequences of the policy. The development was obviously not presently deliverable and was preventing the construction of smaller developments further from the Array. In all of these circumstances the declarator sought should be granted.

[19] The court should also exercise its discretion to grant decree of reduction in the revised terms sought; there were no special circumstances to justify withholding it. The MOD's policy had always been unlawful and fell to be treated as null from the start. The MOD had the power to take fresh decisions in respect of noise budget allocation. In order to prepare the ground for that process, and in any event to ensure that the petitioner had the opportunity of being treated equally with other developers, the court should reduce the unlawful decision. Reference was made to the observations of Lord Glennie in *Council of the Law Society of Scotland* v *Scottish Legal Complaints Commission* 2017 SC 718 at paragraph 82.

[20] In the circumstances of the present case, reduction was appropriate. It made clear to the MOD that it was within its power to re-determine past allocations of noise budget that had been made pursuant to the unlawful policy, and provided clarity for the anticipated consultation process. It provided an appropriate remedy for the petitioner and an opportunity for the MOD to treat the Little Hartfell and Faw Side proposals equally. It ensured that future planning decisions would not be affected by decisions made under an unlawful policy. It did not dictate what the MOD's future policy should be. It did not

disturb allocations of the current noise budget made by the MOD in the past in respect of any party not represented in these proceedings. It did not affect the MOD's power to object to any wind farm proposal that might prejudice the Array, or interfere with any existing letter of objection. It did not seek to prejudge any issues that might arise as a result of any re-determination by the MOD of prior allocations. On the contrary, if reduction were not granted, the court would be stepping in to preserve the consequences of an unlawful decision. Granting reduction accorded with good public administration. If CWL had a legitimate expectation in respect of any new policy, that was a matter between the MOD and CWL and was not an issue for these proceedings.

Argument for the MOD

[21] On behalf of the MOD it was confirmed that there was no opposition to the granting of the declarator sought by the petitioner, but it was submitted that it was unnecessary and inappropriate for the court to grant reduction as sought by the petitioner. It would be academic and serve no useful purpose. The MOD's objections to the various outstanding planning applications would remain in place unless and until withdrawn. The condition attached to the petitioner's planning permission would not change. The "logjam" of planning applications objected to by the MOD would not be removed.

[22] The petitioner's concern that without reduction the declarator would have little practical effect was unfounded. The issues arising in relation to the MOD's policy were best resolved by the imminent consultation process, against a background in which the court's declarator (if granted) had cleared the ground. Lord Glennie's observations in the *Council of the Law Society of Scotland* case explained that an *ultra vires* act can be remedied by the person responsible. The MOD intended to do so after consultation with interested parties. It was

not for the court to express a view on what the outcome of that consultation should be. In *Salvesen* v *Riddell* 2013 SC (UKSC) 235, the Supreme Court had allowed an opportunity for an unlawful Act of the Scottish Parliament to be put right; the same approach should be followed here. Reduction would add nothing to the process of reconsideration of the policy. A refusal of reduction would not restrict the scope of the reconsideration, whereas the order sought might have the effect of prejudging the outcome. It was not the MOD's position that consultation would only take place if reduction was granted.

Argument for CWL

[23] On behalf of CWL it was submitted that the orders sought by the petitioner should be refused. It was obvious that the real target of the petition was the MOD's allocation of noise budget to Faw Side in preference to the petitioner's proposed developments at Little Hartfell and two other sites. CWL was also developing a windfarm at Scoop Hill which would have a maximum generating capacity of over 500MW and which, like Faw Side, had been allocated a place in the MOD's noise budget queue in accordance with the current policy. The Scottish Government's renewable energy policies were not about the number of wind farms but about the amount of renewable energy that could be generated. It was in the public interest that wind farms contributed to the ambitious renewable energy targets and that renewable energy capacity was maximised. To date £1,495,839 had been spent in developing Faw Side and a further £1,546,652 in developing Scoop Hill. In addition, £1.5 million had been spent on research analysing the MOD's current noise budget allocation algorithm with a view to demonstrating to the MOD that there was greater capacity available. That research would be shared with the MOD and the EWG in due

course. CWL was optimistic that this would enable Faw Side and Scoop Hill to be developed fully.

[24] UK domestic law did not recognise equal treatment as a distinct principle of administrative law. Inequality had to be irrational before it was justiciable. The greater the policy content of a decision the more hesitant the Court ought to be in holding the decision to be irrational. The Court's discretion in deciding whether or not to grant or withhold relief in judicial review proceedings was broad and could take into account many considerations including the needs of good public administration, the delay in bringing a challenge, the effect on third parties and the utility of granting the relief sought.

[25] Given that the MOD's current policy had been operated since 2005, the absence of any explanation for why it was introduced did not mean that it was irrational. The size of the allocation of noise budget to Faw Side was a consequence of its size and proximity to the Array, and not a consequence of the policy under challenge. The petitioner had known since at least 2015 that there was a risk that the noise budget could be exceeded at any time. The MOD's policy was not irrational. Retaining it was one of the options considered in an options paper prepared by the Scottish Government for the EWG in 2019. The two categories covered different sizes of wind farms which were already distinguished in terms of planning consent procedure. Proposals for larger developments were generally more time consuming and costly, and it was preferable for developers to have certainty with regard to noise budget allocation before incurring those costs. The majority of smaller (capacity ≤ 50MW) developments that had already been allocated noise budget had only one or two turbines and relatively low capacity. It was reasonable to assume that most of the wind farm development proposals notified to the MOD by local authorities were unlikely to involve a scoping opinion application, whereas the majority of those notified by the ECU

were likely to have one. In these circumstances, the MOD's approach in distinguishing between the two categories in relation to the timing of the allocation of noise budget could not be said to be so irrational as to violate the common law principle of equality.

[26] Even if, as the petitioner contended, the MOD's approach protected larger proposals that had not reached and might never reach the stage of an application for planning permission to the detriment of smaller proposals that had reached the stage of an application for planning permission, that would not mean that the MOD's approach was irrational. A proposal (large or small) in respect of which noise budget had been allocated, and which had received section 36 consent or planning permission, was not guaranteed to be developed. That would similarly be to the disadvantage of other proposals and would not be a consequence of the MOD's policy. In any event, a smaller (capacity ≤ 50MW) development could use more of the noise budget than a larger (capacity > 50MW) development if it was closer to the edge of the Array. The petitioner's criticism accordingly related to how and when, once a development had been allocated a place in the noise budget queue, it could be removed from the queue, and did not relate to the timing of allocations. The petitioner had failed to demonstrate that the MOD's approach was counter to the need for consistency in public administration or that it gave rise to unintended consequences and losses.

[27] As regards the granting of an order for reduction, the petitioner's late change of position demonstrated that the Faw Side allocation (which the petitioner was now too late to challenge) had been the real target all along, and the petition ought to have been intimated to CWL at the outset. If it had been, permission to proceed might not have been granted. There had been no indication at that time that the MOD might conduct a further consultation. Reduction of the Faw Side allocation and the waiting list would cause

prejudice not only to CWL but also to other developers whose proposed developments were on the waiting list. Because of the first come first served priority that it conferred, a place on the waiting list was almost as important as an allocation of noise budget, and those developers were not parties to these proceedings. CWL should not be penalised for having entered the process.

[28] In any event the court should exercise its discretion to refuse reduction. Even if the MOD were to re-allocate the noise budget, Faw Side would remain as a large development requiring noise budget allocation, and would be listed in the Table and/or in the waiting list. In this regard, Faw Side would continue to absorb a large slice of existing or future budget, which was contrary to the petitioner's suggestion that the MOD's current approach discouraged smaller schemes and undermined renewable energy targets, and the implication that this would be ameliorated by reduction. The petitioner had made an application to vary a condition of its Little Hartfell permission, which would require a new planning application and would put it back behind Faw Side in the noise budget queue. The petitioner's delay in bringing proceedings should be taken into account by the court as an adverse factor.

[29] Any decree with retrospective effect would cause serious prejudice to CWL. The development of Faw Side first began in 2016 when the Eskdalemuir area was identified as a target for development. Scoping applications were submitted as early as possible for both Faw Side and Scoop Hill *inter alia* because obtaining an allocation of noise budget from the MOD was a critical factor in the projects. Following the EWG consultation in 2019, it was assumed that the issue regarding the MOD's approach to the allocation of noise budget had been settled. CWL had reasonably assumed that if the Faw Side allocation had not been

challenged within 3 months, it could be relied upon. Since scoping, costs of £918,467 had been incurred.

Decision

[30] As Lord Hoffmann observed when delivering the judgment of the Privy Council in *Matadeen* v *Pointu* [1999] AC 98 at page 109, the fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle. It is now settled that the principle of equality, in so far as justiciable, simply means that distinctions between different groups must be drawn on a rational basis, and is therefore no more than an example of the application of *Wednesbury* rationality: see *R(G)* v *Nottinghamshire Healthcare NHS Trust* [2010] PTSR 674 (CA) at paragraph 90; *R (Gallaher Group Ltd)* v *Competition and Markets Authority* [2019} AC 96, Lord Carnwath at paragraphs 24-28. It follows that when expressions such as unlawful and *ultra vires* are used in this context they should be taken to mean irrational. That is the test that must be applied in relation to the policy under challenge in these proceedings.

[31] In my opinion the test of irrationality - or *Wednesbury* unreasonableness - is met by the MOD policy in so far as it allocates noise budget to larger (> 50MW capacity) wind farm developments by reference to the date of a scoping request, but allocates noise budget to smaller (≤ 50MW capacity) by reference to the date of the planning application. It is common ground that the planning merits of wind farm applications are of no interest to the MOD. Whether a proposed development is above or below the 50MW threshold is similarly a matter of indifference to the MOD. It plays no part in the furtherance of the renewable energy policies of the Scottish Government and has no view on whether or not those policies are better promoted by larger windfarm developments. The MOD's only concern is

protection of the operating capacity of the Array, which it does by intervening in the planning process when a proposed development would cause the noise budget to be exceeded. In this regard it must be borne in mind that the maximum generating capacity of a proposed development is not the only factor in the noise budget calculation; proximity to the Array is also critical. A large development remote from the Array might require to be allocated less noise budget than a smaller development close to the Array.

[32] For these reasons it is, in my view, clear that there is no rational justification for the current policy in that in allocating noise budget it adopts different dates in the planning process for larger and smaller developments respectively. In so doing it fails to treat like cases alike and unlike cases differently. The effect of the policy is to afford developers of larger developments an opportunity to obtain an allocation of noise budget at an earlier stage of the process than developers of smaller wind farm developments, simply by making an application to the Scottish Government to adopt a scoping opinion. In circumstances where, for the reasons discussed, the maximum generating capacity of a development is not determinative of the matter with which the MOD is concerned, namely whether there is any headroom within the noise budget, this distinction is irrational, and the breach of the principle of equality is therefore justiciable. The irrationality goes beyond the two features accepted by the MOD, namely that the reasoning behind it cannot now be traced and that it was insufficiently publicised. The MOD has not submitted any rationale at all for allocating noise budget according to the date of application for a scoping opinion in one category of case and not in the other.

[33] I am not convinced that any of the explanations suggested by CWL supplies a rational basis for the policy. In my opinion the petitioner is correct to describe them as mainly consisting of planning considerations that are of no interest to the MOD. Even if it

were the case, as CWL suggested, that applications for scoping opinions are more likely to be made in relation to larger applications, that would provide no rational justification for selecting them as the priority date for larger but not for smaller applications. It goes beyond the ambit of this court's function to express a view on whether the use of an optional step in the planning process (application for a scoping opinion) would be an appropriate criterion for allocating noise budget if applied to all applications; no doubt that is a matter that can be considered in the forthcoming consultation. But to use such an optional step in relation to one category of applications and not the other, thereby conferring an advantage on the former, has not, in my view, been demonstrated to be capable of rational justification.

[34] On the other hand, I am not entirely persuaded by the petitioner's submission that the circumstances of the present case demonstrate that the MOD's current policy has an adverse effect on the planning of wind farms generally because it can result, as here, in the allocation of a very large amount of noise budget to a wind farm proposal that has not reached the stage of a planning application and may not do so for some time to come. That might be regarded as an adverse effect of allocating noise budget by reference to the date of a scoping request, but that is not of itself the inequality that I find amounts to irrationality. The same effect could occur if, for example, the inequality were removed by allocating noise budget as soon as a scoping request was intimated, regardless of the size of the development. The circumstances of the present case afford a somewhat extreme example because the Faw Side development is both large and very close to the exclusion zone, but such a development would be likely to create a log-jam effect regardless of the priority date used by the MOD, until such time as either (a) it was removed, for whatever reason, from the table and the waiting list or (b) the noise budget was increased, for whatever reason, to a level that would more than accommodate it. It has been correctly emphasised by all parties

that it is not for this court to direct the MOD as to the policy that it should adopt, or to prejudge the consultation process, beyond making a finding that the policy currently being operated is unlawful in the sense of being irrational or *Wednesbury* unreasonable. The latter is achieved by granting declarator in the terms sought by the petitioner.

[35] I am also satisfied that the petitioner is entitled to more than a bare declarator. In circumstances where a court holds that administrative action has been unlawful, it is usual to grant a practical remedy and not merely to make a declaration of the unlawfulness. In *Council of the Law Society of Scotland* v *Scottish Legal Complaints Commission*, Lord Glennie (with whom Lord Turnbull agreed) affirmed the existence of the power of a decision-maker to revisit and to correct a decision that has been shown to be wrong in law, without the need for court action to set aside the original decision. In particular, Lord Glennie observed (at paragraph 82), having reviewed the authorities, that

> "…it is right and consistent with good public administration that in such circumstances the decision maker should not only apply the correct interpretation of the law in the future but should consider whether and to what extent to apply it retrospectively without everyone affected by the mistaken decisions having to bring proceedings to correct them."

[36] That case, however, followed on from a previous decision of the court (*Anderson Strathern LLP* v *Scottish Legal Complaints Commission* 2017 SC 120) in which it had been held that a particular categorisation of complaints by the Commission was *ultra vires*, and the question in the *Council of the Law Society of Scotland* case was whether the Commission had power to re-categorise complaints that had been unlawfully categorised without the need for court proceedings. In the present case the MOD has made clear its intention to revisit its policy on noise budget allocation, and to take account of the decision of the court in the present case in so doing. In my opinion, however, the petitioner is entitled to more than a reconsideration. This application is already before the court, and it seems to me that the

proper comparison is with the *Anderson Strathern* case itself, in which the issue of the lawfulness of the categorisation was decided. The court did not simply declare the categorisation to be unlawful; it quashed the categorisation *quoad* the case before it. In the same way it appears to me that the appropriate course of action here is to grant decree of reduction of the practical manifestation, *quoad* the petitioner, of the application of the policy that I have held to be unlawful. After some reconsideration, the petitioner has fixed upon the MOD's decision to allocate noise budget to Faw Side, and of the "waiting list" produced as a consequence of that decision, as constituting such practical manifestation. I am content that that is correct and that I should grant decree of reduction in the terms now sought.

[37] On behalf of the MOD it was contended that the ground was more appropriately cleared for the forthcoming consultation process by the granting of declarator alone, and that the granting of decree of reduction could prejudice that process. I am not persuaded that this is correct. It is true that the effect of my decision is to take one option (the *status quo*) off the table for the consultation, but that is a necessary and obvious consequence of it having been held to be irrational, and does not depend upon the granting of reduction. If anything, it seems to me that the granting of reduction may be helpful to the MOD in putting beyond doubt that there is no need to include that option in the consultation process. As senior counsel for the MOD observed during the hearing, the MOD is in a sense caught up in an argument between rival developers, albeit that it is the author of its own misfortune by operating an irrational policy. By granting decree of reduction, the ground is cleared for consultation and, in due course formulation and application of a lawful policy which will allocate whatever noise budget was available at the time when it was, as I have held, unlawfully allocated to Faw Side on the basis of its scoping request.

[38] In exercising my discretion to grant reduction, I take account of the fact that such an order will have no adverse practical consequence as regards any wind farm development which has either been constructed or in respect of which planning permission has been granted. Regardless of whether reduction is granted, my decision clearly has an adverse consequence for CWL in that it loses (at least for the time being, pending implementation of a new MOD policy) the noise budget allocated to Faw Side on 18 January 2018, and arguably a further adverse consequence in that Scoop Hill's position in the waiting list may be affected. On the other hand, reduction will have no immediate practical consequences. At the time of the hearing, section 36 consent for the Faw Side development had not been granted. No construction work has taken place. Moreover, having regard to the fact that the amplitude of the proposed Faw Side development (0.674nm) is more than double the entire noise budget of the Array (0.335nm), it must have been apparent to CWL throughout the period since submission of the scoping application that the MOD would object to the development and that it would not be likely to proceed unless the calculation of the noise budget were to be subject to significant change. In that regard, CWL's optimism that it will be possible to show that there is greater capacity to allow wind farm development in the consultation zone and to develop Faw Side in full must, for the time being, be regarded as speculative. As regards the argument that CWL has proceeded on the basis that the current policy remained in place following the 2019 review, an affidavit by CWL's associate director, Mr Dafydd Rhys Thomson, confirmed that CWL was aware that the petitioner was continuing to contemplate court action notwithstanding that the 3 month time limit for commencing judicial review proceedings had elapsed. In my opinion, none of CWL's arguments, individually or collectively, outweighs the interests of good public

administration in rectifying the practical consequences of the operation of an irrational policy.

Disposal

[39] For these reasons I shall grant the orders for declarator and reduction sought by the petitioner. Questions of expenses are reserved.