FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 56
P482/21

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the petition of

GARTMORE HOUSE

Petitioners and Reclaimers

against

LOCH LOMOND & THE TROSSACHS NATIONAL PARK AUTHORITY

Respondents

and

THE SCOTTISH MINISTERS

Interested Parties

Petitioners and Reclaimers: Burnet KC; Gillespie Macandrew LLP
Respondents: MacColl KC; Anderson Strathern LLP
Interested Parties: N McLean (sol adv); Scottish Government Legal Directorate

20 December 2022

Introduction

[1] The Land Reform (Scotland) Act 2003 introduced new rights of public access to land. The new right comprises the right to be on land for recreational, educational and non-commercial purposes, and the right to cross land (s 1). This is known as the right to roam

(see *Anstalt* v *Loch Lomond & Trossachs National Park* 2018 SC 406). Access rights are restricted or prevented on specified parts of land; for example, land upon which a building is erected (s 6).

[2] Local and National Park authorities must uphold access rights (s 13). That includes devising a system of "core paths" to give the public reasonable access throughout their area (s 17). This is in addition to the general right to roam, which applies to many more paths and areas.

[3] This reclaiming motion (appeal) concerns the respondents' decision to amend the 2010 core path plan for the Loch Lomond & The Trossachs National Park. The amendments include the addition of two core paths, whereby users can go through land surrounding the petitioners' hotel and accommodation block on the Gartmore Estate. Following a local inquiry, the Scottish Ministers directed the respondents to adopt the amended plan. The petitioners challenge the addition of the paths. The Lord Ordinary found that both the direction and the adoption were lawful. He refused to reduce these decisions.

Statutory provisions and guidance

The Land Reform (Scotland) Act 2003

[4] The requirement upon local authorities and national park authorities to draw up a core paths plan is governed by section 17 of the 2003 Act, which is in the following terms:

> "**17 Core paths plan**
>
> (1) It is the duty of the local authority, not later than 3 years after the coming into force of this section, to draw up a plan for a system of paths ("core paths") sufficient for the purpose of giving the public reasonable access throughout their area."

In drawing up the plan, regard is to be had to: the likelihood that persons will exercise rights of way and access by using core paths; the desirability of encouraging them to do so; and the need to balance those rights with the interests of the landowner (s 17(3)).

[5] Section 20 governs amendments to a core paths plan. It provides:

> "**20 Review and amendment of core paths plan**
>
> (1) A local authority—
>
> (a) …
>
> (b) may review … a plan if they consider it appropriate to do so for the purpose of ensuring that the core paths plan continues to give the public reasonable access throughout their area."

If there is an objection to an amendment, section 20A(5) requires the interested parties to hold a local inquiry into whether the amended plan will "fulfil the purpose mentioned in section 17(1)".

[6] In relation to section 17, the interested parties' *Guidance* (for *Local Authorities and National Park Authorities on Part 1 Land Reform (Scotland) Act 2003* (2005)) states (p 40) that the core paths system should provide "the basic framework of routes" sufficient for the purpose of giving the public reasonable access throughout their area. It should link into, and support, wider networks of other paths. A well marked system of core paths is intended to encourage more people to enjoy the outdoors and to assist in the management of access. On section 20, the *Guidance* recommends (p 60) an "holistic" view whereby the initial plan would take into account the access requirement in such a way that there should be no need for frequent additions. However:

> "it is also recognised that circumstances will change over time, and the plan should not be seen as a finite document, but be capable of developing to reflect requirements".

Authorities should, when they consider it appropriate, review the plan to ensure that it meets the requirement for core paths "either through removals or diversions or through additional core paths".

The Equality Act 2010

[7] Section 149 imposes an equality duty on all public authorities:

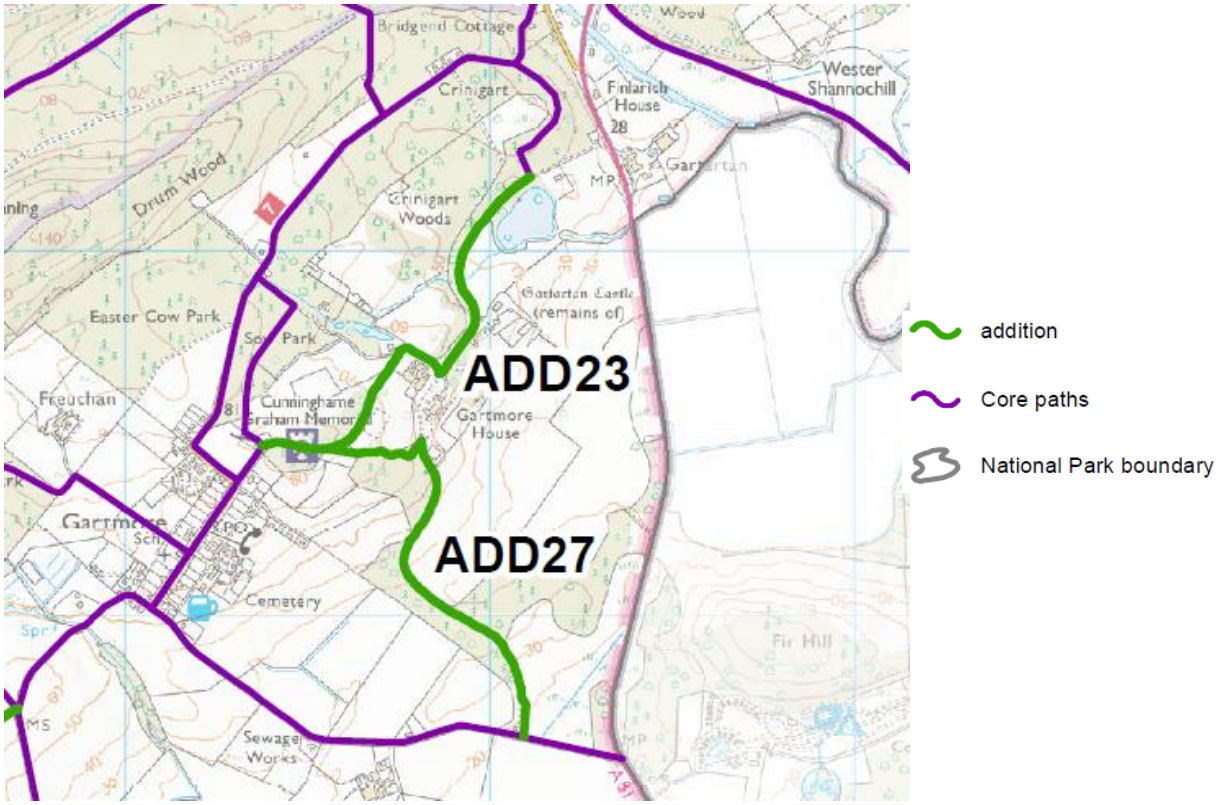
> "**149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …"

The relevant protected characteristics include: age; disability; and religion or belief.

Procedure

[8] The petitioners are a charity. They own and operate an hotel and an adjacent accommodation block (the Craigmore Centre) on the Gartmore Estate. The property is used frequently to accommodate groups of children, including vulnerable ones, and by religious groups that require privacy. For example, Green Routes, another charity, provides teaching and support in outdoor activities to persons with learning disabilities.

[9] A core paths plan was first adopted by the respondents in 2010. In 2018, they began a formal consultation to amend the plan by adding further core paths as shown in green on the following plan.



[10] By letters dated 15 February and 28 October 2019, the petitioners objected to the addition of paths ADD23 and ADD27. The respondents refused to remove them and submitted the objections to the Ministers, who appointed a reporter to carry out a local inquiry (2003 Act, s 18(4) and s 20A(5)).

[11] The petitioners made representations to the reporter. Their principal concern was that the paths would run through their property, close to the accommodation block and land used by visiting groups. As part of the risk assessment for the activities carried out on the land with children and vulnerable groups, the petitioners required to control access. They would be unable to offer the level of assurance required by local authorities under relevant child protection guidelines. Over half of their users would be affected.

[12] Green Routes maintained that the new paths would severely restrict their activities in the walled garden. The easternmost section of ADD27, which was known as the Ladies'

Walk, was severely overgrown through disuse. ADD27 would lead walkers onto the busy, high speed A81, which had no verges and was not appropriate for walkers. ADD23 would lead walkers onto an unrestricted road with no verge. It would not link settlements or form a key link. Neither path was suitable for the promotion of public access.

[13] On 10 December 2020, the reporter submitted his report to the Ministers. He recommended that ADD23 and ADD27 be included in the new plan. On 23 March 2021, the Ministers accepted the recommendations and directed the respondents to adopt the amended plan. On 14 June 2021, the respondents' board resolved to do so.

The inquiry report

[14] The main issue at the inquiry was whether the proposals would provide a system of paths sufficient for the purpose of giving the public reasonable access throughout the respondents' land (s 17(1)). The reporter reasoned that the village of Gartmore was already provided with core paths, but three of these used public roads and were not ideal for access to the surrounding area. The additions would provide a significant benefit to the sufficiency of the network. A proposed alternative route for both paths was unsuitable. Promoting Ladies' Walk, the turn off to which was not obvious to those unfamiliar with the area, would assist in diverting members of the public away from Gartmore House and its associated parkland.

[15] Both new paths would provide useful links. ADD23 would link Gartmore to the campsite at Cobleland and on to the Aberfoyle to Drymen cycle route, as well as a loop for walkers who could return from Cobleland via a minor public road, which was itself a core path. ADD27 would provide a mainly off-road route from Gartmore to the Trossachs

Holiday Park in conjunction with a short section of existing core path, and a loop back to the village via a minor public road, which was also a core path.

[16] The petitioners' concern, that the additions would lead to path users encountering guests or clients of the petitioners or Green Routes, required to be balanced with access rights. ADD23 was already well-used by walkers and cyclists. It would pass close to Gartmore House but would avoid its immediate curtilage. There was potential for an increase in usage and encounters between the public and the petitioners' service users, but it was not unusual for children and vulnerable groups to undertake activities in areas to which the public has access. They did so in a managed setting and in line with safeguarding measures and risk assessments. The respondents had offered to work with the petitioners to prepare an access management plan. They had suggested the use of temporary signage and diversions, when activities were taking place, and the provision of staff to manage interactions.

The decision at first instance

[17] The Lord Ordinary held that the reporter had not misinterpreted or misapplied the test in section 17(1). The report should not be subjected to detailed textual analysis (*Moray Council* v *Scottish Ministers* 2006 SC 691 at para [28]). It specifically addressed the statutory tests. The reporter described his task as determining whether the system of paths was sufficient. That accorded with section 20A(5). He explained that he had drawn on the other sections of the 2003 Act, including section 20, and the relevant guidance. He had considered how the additions would minimise the need for the public to be on open roads. He had not been able to identify suitable and better alternatives. The fact that the original 2010 plan was considered sufficient was not conclusive. It did not mean that the plan had to remain as it

was. Section 20(1)(b) recognised that a core paths plan may be reviewed. This did not require a change in circumstances.

[18] The reporter had balanced the interests of the petitioners against those who would be exercising access rights. He had specifically taken into account the fact that ADD27 would divert walkers away from the more sensitive parts of the petitioners' property. Any difficulties regarding groups undertaking activities in publicly accessible areas could be mitigated and were not insurmountable. The reporter had given proper, adequate and intelligible reasons (*North Lanarkshire Council* v *Scottish Ministers* 2017 SC 88). The informed reader could be left in no substantial doubt as to what they had been (*South Bucks DC* v *Porter (No. 2)* [2004] 1 WLR 1953 at paras [35]–[36]; *Moray Council* v *Scottish Ministers* at paras [28]–[30]; *Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345 at 348).

[19] The Equality Act case also failed. The reporter properly considered that matter, put it in the balance and gave weight to it. It did not outweigh other relevant factors. Neither the respondents nor the Ministers had set out in writing that they had had regard to the 2010 Act, but a decision was not erroneous simply because reference had not been made to the statutory language or test (*R (Garner)* v *Elmbridge BC* [2011] EWHC 86 (Admin), at para [11]). There was no requirement for separate documentation setting out parties' respective positions on equality. Following an inquiry, the Ministers were in the position of deciding whether or not to accept the reporter's reasoning and recommendations. The report addressed the issues in section 149.

Submissions

Petitioners

[20] The Lord Ordinary erred in law in his interpretation and application of, first, the test under the 2003 Act and, secondly, the duty under the 2010 Act.

[21] The reporter ought to have been considering the test in sections 17(1) and 20A(5); ie whether the proposals were sufficient for the purpose of giving the public reasonable access throughout their area. The review exercise should have been about whether the original network *continued* to provide sufficiency; not whether that network could be improved. The reporter ought to have taken into account the original plan. In that plan, the network had been deemed to be sufficient without additional paths within the petitioners' property. The reporter had stated that the area was already well provided for in terms of core paths, but that the proposals would provide a significant benefit to the sufficiency. Those words did not mean anything and did not represent the correct test.

[22] The reporter failed to consider whether the public already had reasonable access to the area. He had not compared the original plan with the amended plan. Although there was no need for a change in circumstances, there should be consistency in decision-making. If a different decision were reached, an explanation had to be given (*Ogilvie Homes* v *Scottish Ministers* 2021 SCLR 99 at paras 39–42). In particular, the reporter required to explain why the position had changed (*R (Mid Counties Co-Operative)* v *Forest of Dean DC* [2013] JPL 1551 at para 16).

[23] With regard to the second ground of appeal, equality duties were important in the context of anti-discrimination legislation. Recording the steps taken by a decision-maker was evidentially significant (*Bracking* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at paras 26(1) and (2)). The decision-maker had to consider the duty rigorously

(paras 26(5)(i) and (8)) but here there was no mention of this by the reporter. He and the Ministers had a duty to have regard to the equality objectives in the 2010 Act (*R (Sheakh)* v *London Borough of Lambeth* [2021] EWHC 1745 (Admin) at paras 146–148). Having recognised that his decision would have an adverse effect on persons with protected characteristics, the reporter ought to have determined whether he needed to do anything differently in relation to those groups. The Ministers erred in simply adopting all of the recommendations of the reporter, who had failed even to record that the petitioners had made representations in relation to the 2010 Act.

Respondents

[24] The petitioners had been able to put their arguments to the reporter at an inquiry. These had been considered and rejected. Both grounds of challenge sought to prioritise form over substance. They failed to give the report a proper reading in the context of the statutory framework and had drawn out individual sentences and set them acontextually. The report should be read fairly and as a whole, without excessive legalism (*Abbotskerswell Parish Council* v *Secretary of State for Housing, Communities and Local Government* [2021] Env LR 28 at para [53]); *North Lanarkshire Council* v *Scottish Ministers* at para [27]).

[25] Sufficiency was not a bare minimum. The reporter had identified that the existing plan was not ideal. The additions were appropriate to give the public reasonable access through the area surrounding Gartmore village. The reporter addressed himself to section 17(1) and considered whether the additional paths would appropriately be included within the plan so as to provide a system of paths sufficient for the statutory purpose. He took into account the representations from the petitioners and considered the impact of the paths on those making use of the petitioner's property, including children and vulnerable

groups. He noted that ADD27 would divert walkers away from the more sensitive parts of the petitioners' property.

[26] The petitioners were seeking to advance a new and inconsistent ground which did not feature in the petition; that the reporter did not address whether the original core paths plan continued to give the public reasonable access. It was not open to the petitioners to seek to advance a new argument in a reclaiming motion. In any event, the new ground was without merit. Section 20A(5) of the 2003 Act made it plain that the task for a reporter was to assess whether an amended plan would fulfil the purposes mentioned in section 17(1). The reporter addressed himself to that task. He did not require to consider whether there had been a change in circumstances.

[27] Section 149 of the 2010 Act imposed an obligation on public authorities to have due regard to the need to meet the various equality principles. That duty was complied with as a matter of substance. The reporter addressed himself to the potential impact of the proposed paths on children and vulnerable groups. From an early stage in the process, the respondents had considered the potential impact of the proposed plan on the petitioners' property. Their EIA sought to identify and address barriers to participation in the consultation process; representations were made to and considered by both the respondents and the reporter.

The Ministers

[28] In determining a planning challenge, the court was concerned with the legality of the decision-making process, not with the merits of a decision. Matters of planning judgement were within the exclusive province of the planning decision-maker (*Tesco Stores* v *Environment Secretary* [1995] 1 WLR 759 at 780). The interpretation of policy, which was

appropriate for judicial analysis, and the application of planning judgement to policy, which was within the province of the planning decision-maker, were distinct (*Hopkins Homes* v *Communities Secretary* [2017] 1 WLR 1865 at paras [26] and [73]).

[29] The petitioners were attempting to introduce a new argument that the reporter failed to consider; whether the original core paths plan continued to provide the public with sufficient access. The court should not entertain the new argument. In any event, it was without merit. When the reporter said the area was already well-provided for, he simply meant that there were already core paths in place. The Scottish Government's *Guidance* made it clear that core paths should aim to meet the needs of the whole community. The Lord Ordinary was correct to hold that the reporter's reference to sufficiency reflected and addressed the requirements of section 17(1). He correctly identified that section 20(1)(b) of the 2003 Act recognised that the position may be reviewed, and that that section was not to be read as requiring a change in circumstances.

[30] There was no error in the approach of the Lord Ordinary to the 2010 Act. Each case was fact sensitive. The petitioners' objections had provided limited detail on how the adoption of the paths would adversely impact on those with protected characteristics. The complaints were general and lacking in specification. The reporter engaged with the complaints. He had complied with the duty as a matter of substance (*Baker* v *Communities and Local Government Secretary* [2009] PTSR 809 at para 36). There was no need for the interested parties to set out their own position on the duty in a separate document. Even if they had failed to comply with their duty, their decision would not have been substantially different if they had done so (*Bolton MBC* v *Environment Secretary* (1991) 61 P & CR 343 at 352; *Bova* v *Highland Council* 2013 SC 510 at para [57]; *Carroll* v *Scottish Borders Council* 2016 SC 377 at para [66]).

Decision

[31] In reviewing a decision which flows from a reporter's recommendations in the planning context, the court is seeking only to determine whether that decision is lawful or not. It will be unlawful only if the decision-maker has: made a material error of law; taken into account an irrelevant consideration; failed to take account of a material consideration; made a critical finding in fact without any basis for doing so; or has reached a decision which no reasonable decision-maker could have reached (*Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-348). In this case, the petitioners' contentions are primarily based on the first and last considerations. The contention in relation to the reporter's approach to the Land Reform (Scotland) Act 2003 is adequately covered by the pleadings.

[32] The 2003 Act imposed an obligation on the respondents to draw up a plan for core paths "sufficient for the purpose of giving the public reasonable access throughout their area" (s 17(1)). The respondents did this. The adoption of the plan did not carry with it an assumption, or a presumption, that there was thereby a sufficient core paths network in the area; merely that the identified core paths contributed to the statutory purpose of giving reasonable access and balanced the factors, including the interests of land owners, required by section 17(3). A plan which was put forward for adoption as contributing to the statutory purpose could hardly have been rejected because it did not create a sufficient or saturation level of core paths.

[33] In due course, an adopted plan might be improved; whether by the addition of other paths or the substitution of different routes, provided that the plan, as amended, also contributes to the sufficiency of the network. That is the objective of the provision for

review (s 20(1)). The use of the phrase "continues to give… reasonable access" does not carry with it an implication that any previously adopted plan demonstrates the existence of a sufficiency which can never be improved. It would make no practical sense for a core paths plan to be set in aspic. The reporter asked the correct question of whether, under section 17(1), the new plan with the additional paths created a system which again contributed positively to the overall purpose of giving the public reasonable access; balancing in that equation the land owner's interest. It was not necessary for the reporter to carry out a comparison of the existing network with the proposed new one or to examine whether the network in place was already sufficient. That would be an unduly narrow and artificial exercise; it would run counter to the statutory policy of conferring on authorities a wide discretionary power to review, when they consider it appropriate, whether improvements are desirable in the interests of furthering the objective of promoting reasonable public access. The review exercise involves a consideration of whether the amended plan continues to provide reasonable access, not whether the existing plan was of itself sufficient. The latter might be an argument which a land owner might advance, and it is no doubt a factor to be considered, but that is all.

[34] The reporter explained the deficiencies in the existing plan, notably that some of the paths were along public roads. They did not give access to the areas surrounding the village, as distinct from the village itself. The new paths would improve access in a number of specific ways, including loops and links. There is no difficulty in understanding the reporter's reasoning to the effect that the new paths enhanced the existing network. The informed reader is left in no real and substantial doubt about the reporter's reasons or the material considerations which were taken into account (*Wordie Property Co* v *Secretary of State for Scotland*, LP (Emslie) at 348). This challenge accordingly fails.

[35] Prior to the inquiry, an Equality Impact Assessment had been carried out by the respondents in order to ascertain whether there were any barriers which prevented those with protected characteristics from participating in the process and presenting their arguments to the reporter. This had resulted in a consideration of the adequacy of the consultation process. The steps taken were duly recorded in the EIA.

[36] It is no doubt correct to state, at a high-level generality, that whatever might have been submitted to the reporter he remained under a duty to have due regard to the various factors specified in section 149 of the Equality Act 2010. The court agrees with *Baker* v *Communities and Local Government Secretary* [2009] PTSR 809 (Dyson LJ at para 36). However, the context in which the reporter was operating was a local inquiry for which measures had been taken to ensure equality in participation. The reporter heard submissions about those with a protected characteristic. It was then his function to reach a recommendation based on the submissions made to him by the respondents and the objectors, including the petitioners, rather than engaging in any inquisitorial frolic (*Taylor* v *Scottish Ministers (No. 2)* 2019 SLT 681, LP (Carloway), delivering the opinion of the court, at paras [34] and [35]).

[37] The reporter addressed the matters which were raised before him in relation to the public sector equality duty. These concerned the interruption, or disruption, of the activities of children, vulnerable persons and religious groups. The reporter reasoned that the limited scope of any interference, and the ability to temper the effects of such interference by taking temporary measures, was not such as justified a refusal to incorporate new paths which would enhance the access rights of all. The exercise was one of balancing the different weights to be attached to the matters raised and reaching a planning judgement on where the scales came to rest. The reporter reached a view on the relative weights; a matter which is not susceptible to review. There was no need for the reporter to make a specific reference

to the Equality Act 2010 when he had done what was important; addressed the specific problems raised by the petitioners and Green Routes in relation to those with protected characteristics (*Baker* v *Communities and Local Government Secretary*, Dyson LJ at para 37). Once more, there is no difficulty in understanding the reporter's reasoning and the material considerations which were taken into account. The challenge on this basis also fails.

[38] The court will refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary dated 4 March 2022 refusing the prayer of the petition as set out in statement 4.