OUTER HOUSE, COURT OF SESSION

[2022] CSOH 24

P482/21

OPINION OF LORD CLARK

In the Petition of

GARTMORE HOUSE

Petitioner

for

Judicial Review of a decision of Loch Lomond and the Trossachs National Park Authority dated 14 June 2021 to adopt a proposed Amended Core Paths Plan

Petitioner: Burnet QC; Gillespie Macandrew LLP
Respondent: MacColl QC; Anderson Strathern LLP
Interested party: McLean (sol-adv); Scottish Government Legal Directorate

4 March 2022

Introduction

[1] The petitioner is a charitable organisation. It owns and operates a hotel with an adjacent accommodation block in Gartmore Estate, near the village of Gartmore, within the Loch Lomond and Trossachs National Park. The petitioner's property is used frequently to accommodate groups of children (including vulnerable children) and groups of people from a religious background. Those who attend take part in a variety of activities, including using the grounds for recreation and outdoor events.

[2] The respondent is the Loch Lomond and Trossachs National Park Authority. In terms of the Land Reform (Scotland) Act 2003, the respondent is the Access Authority for the

area in which the petitioner's property is situated. In that capacity, in 2021 the respondent adopted what is described as an amended Core Paths Plan for the Loch Lomond and Trossachs National Park. The Scottish Ministers directed the respondent to adopt it. The amended Core Paths Plan allows public access through routes located within the grounds of the petitioner's property.

[3] The petitioner seeks reduction of the amended Core Paths Plan and, if deemed necessary, reduction of the direction from the Scottish Ministers. Reduction is sought on the basis that the adoption was unlawful because the respondent and the Scottish Ministers failed to apply the correct test for the addition of new paths under the 2003 Act (ground 1) and, separately, also failed to comply with their duties under the Equality Act 2010 (ground 2). The respondent lodged answers to the petition, denying these contentions, as did the Scottish Ministers who entered the process as the interested party. A preliminary point was also raised by the respondent, that its decision to adopt the amended Core Paths Plan was not amenable to judicial review as the respondent was bound by statute to follow the direction of the Scottish Ministers.

Background

[4] In 2010 the respondent adopted the original Core Paths Plan for the area, which did not include any core paths across the petitioner's property. Between November 2018 and April 2019, the respondent carried out a formal public consultation in relation to proposed changes to the original Core Paths Plan. Among other things, the respondent proposed two additional core paths (proposed paths ADD23 and ADD27), situated in part within the petitioner's property, to be added to the network of core paths for the area. The proposed added paths would run through the petitioner's property close to the accommodation block

and the land used by visiting groups. In a letter to the respondent dated 15 February 2019 and in a further letter from its agents dated 28 October 2019 the petitioner objected to the additional core paths being added to the network. The respondent refused to amend the proposed amended Core Paths Plan and submitted the petitioner's representations to the Scottish Ministers as an outstanding objection. The Scottish Ministers directed that a public inquiry be held. The Ministers appointed one of their reporters to hold an inquiry. The petitioner's agents made written submissions to the Reporter on 16 April 2020 and 11 June 2020.

[5] The Reporter submitted his report and recommendation to the Scottish Ministers on 10 December 2020. The report recommended that the proposed additional paths within Gartmore Estate be included in the amended Core Paths Plan. The Reporter's conclusions in relation to the objections of the petitioner include the following:

> "8. I agree that the village of Gartmore is already well-provided with core paths. However, three of these utilise public roads, and so are not ideal, in my mind, for the purpose of giving public access to the area surrounding the village. I therefore consider that the addition of paths ADD23 and ADD27 will provide a significant benefit to the sufficiency of the network by giving the public a better opportunity to access the area off-road.
>
> …
>
> 17. It is important that the safety and wellbeing of guests and clients is safeguarded, particularly children and vulnerable people. However it does not seem to me unusual to have such groups undertaking activities, in a managed setting and in line with appropriate safeguarding measures and risk assessments, in areas to which the public is also encouraged to take access. Examples include the activities of cubs and brownies, and school sports days that can take place in public parks.
>
> 18. Above, the authority describes how this interaction could be managed with, for instance temporary signage and diversions while activities are taking place, and having staff on-hand to provide advice and manage any interactions. The authority has offered to work with the objectors to prepare an access management plan. All-in-all, for the reasons stated, I do not consider that the difficulties raised by the objectors appear insurmountable".

[6] By letter dated 23 March 2021 the Scottish Ministers accepted the Reporter's recommendation and directed the respondent to adopt the amended Core Paths Plan in line with the recommendations in the report. On 14 June 2021, the respondent's board resolved to adopt the amended Plan.

Statutory provisions and guidance

Ground 1

[7] The concept of "Core paths" was introduced by section 17 of the Land Reform (Scotland) Act 2003:

> "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.
>
> …
>
> (3) In drawing up the plan, the local authority shall have regard to-
> (a) the likelihood that persons exercising rights of way and access rights will do so by using core paths;
> (b) the desirability of encouraging such persons to use core paths; and
> (c) the need to balance the exercise of those rights and the interests of the owner of the land in respect of which those rights are exercisable."

[8] Section 18 of the 2003 Act requires each local authority, or Access Authority such as the respondent, to undertake a formal public consultation exercise prior to adopting a Core Paths Plan for its area. To be effective a Core Paths Plan requires to be adopted by the Access Authority in terms of the 2003 Act. It is only on adoption by the authority that a Core Paths Plan or amended Core Paths Plan comes into effect.

[9] Further provisions are made in relation to the review and amendment of a Core Paths Plan, under sections 20 and 20A of the 2003 Act (as amended and introduced by the Land Reform (Scotland) Act 2016):

> "20 Review and amendment of core paths plan
>
> (1) A local authority
> (a) must review the plan adopted under section 18 (or that plan as amended under this section or section 20C) if Ministers require them to do so,
> (b) may review such 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.
>
> …
>
> (6) Where, following a review of a plan under subsection (1) above, the local authority consider that the plan should be amended so as to include a further path, waterway or other means of crossing land such as is mentioned in section 17(2) above, the authority shall draw up an amended plan…
>
> 20A Review and amendment of core paths plan: further procedure
>
> (1) Where, following a review of a plan under section 20(1), the local authority consider that a plan should be amended, the local authority must—
> (a) give public notice of the amended plan and any maps it refers to,
> (b) make the original plan and the amended plan and any such maps available for public inspection for a period of not less than 12 weeks, and
>
> …
>
> (3) If an objection is made and not withdrawn, the local authority must not adopt the amended plan unless Ministers direct them to do so.
>
> …
>
> (5) Where an objection remains unwithdrawn, Ministers must not make a direction without first causing a local inquiry to be held into whether the amended plan (or, as the case may be, the modified amended plan) will, if adopted, fulfil the purpose mentioned in section 17(1).
>
> …
>
> (8) Following the publication of the report by the person appointed to hold the inquiry, Ministers may (but need not) direct the local authority to adopt the amended

plan (or, as the case may be, the modified amended plan) either as drawn up under section 20 or with such modification as Ministers specify in the direction.

(9) On adopting the amended plan, the local authority must—

(a) give public notice of the adoption of the amended plan…"

[10] The Scottish Government issued guidance, entitled "Part 1 Land Reform (Scotland) Act 2003 - Guidance for Local Authorities and National Park Authorities". In relation to section 17, the guidance states:

> "The planning of a core path system which is 'sufficient' for this purpose under the Act should be based on local consultations. The local authority in drawing up the plan should particularly involve the local access forum as a major consultee. Core paths should aim to meet the needs of the whole community, including visitors, and the system should contribute to achieving key public policy objectives including health, sustainable transport, social inclusion and rural regeneration. The system will need to be achievable and sustainable, so will also take account of resource availability".

In relation to section 20(1), the guidance states:

> "It is expected that when drawing up the core path plan, local authorities will need to consider what the access requirement will be and to take a 'holistic' view of those requirements to ensure that they are met within the plan. This should ensure that there should not be a frequent need for local authorities to add new paths to the core path plan.
>
> 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 their core paths plans to ensure that at any given time they continue to meet the current requirements for core paths in their areas, either through removals or diversions or through additional core paths."

Ground 2

[11] Section 149 of the Equality Act 2010 ("the Equality Act") provides:

> "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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to–

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are–

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation."

Submissions

Submissions for the petitioner

Preliminary point

[12] The present proceedings challenge the administrative act of the adoption of the amended Core Paths Plan rather than only the decision taken by the respondent's board on 14 June 2021 to formally approve the adoption. If (as is contended by the petitioner) the adoption is based on a direction that was unlawful on the basis of the grounds identified in the petition, the petitioner is entitled to seek reduction of the plan. Reference was made by analogy to the right to challenge the adoption of a local development plan on the basis of failings in the procedure leading to the adoption of that plan: *Eadie Cairns Ltd* v *Fife Council* [2013] CSIH 109. In any event, duties under the Equality Act 2010 are continuing duties, imposed by primary legislation, that require to be considered at all stages of the process. Given the petitioner's criticisms of the respondent in its submissions to the Reporter, the respondent could have and should have considered that issue again on 14 June 2021.

Ground 1: Misinterpretation and misapplication of the statutory test under the 2003 Act

[13] Paragraph 8 of the Reporter's conclusions (quoted above, at para [5]) indicated that the Reporter had accepted that the village of Gartmore is already well provided with core paths and the additions are to improve the choice and quality of core paths in the area as opposed to being required to reach a sufficiency. The Reporter failed to apply the correct test in terms of section 17(1) of the 2003 Act, that is, to consider whether the public already have reasonable access to the area. He thereby misinterpreted or misapplied the relevant criteria for adding a path to the Core Paths Plan as opposed to providing it as part of the

original network. His final conclusion that the proposals "meet the Ministers' expectations" for core paths also indicated that he did not concentrate on the question of the sufficiency of the existing network without the proposed additions as opposed to the question of whether the additions would be a desirable improvement.

[14] The question the Reporter, the Scottish Ministers and the respondent required to address was whether the additional paths are necessary to make the network sufficient, not whether it would be improved by the additions. They failed to proceed on that basis and in doing so erred in law. They also failed to give proper, adequate and intelligible reasons for the adoption of the amended Core Paths Plan. The Reporter required to balance the interests of the landowner (and those using the land) against the interests of those who would be exercising the access rights over the core paths not whether, as he said at paragraph 18 (also quoted above at [para [5]) the difficulties for the landowner would be "insurmountable".

Ground 2: Breach of statutory duty under the Equality Act 2010

[15] A decision-maker ought to record the steps it takes to meet the statutory requirements under the Equality Act 2010 in order to demonstrate it has discharged its duty: *Bracking* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [25]. The duty is upon the decision-maker personally. The decision-maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores)* v *Department of Health* [2005] EWCA Civ 154, at [26]-[27]. The decision-maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and

not merely as a "rearguard action", following a concluded decision: *Kaur & Shah* v *LB Ealing* [2008] EWHC 2062 (Admin), at [23]-[24].

[16] The petitioner objected to the addition of the additional core paths *inter alia* on the basis that the respondent had failed to properly consider and apply its obligations under the Equality Act 2010. The Reporter, the Scottish Ministers and the respondent failed even to record that the petitioner had made representations to them in relation to their duty under the 2010 Act in relation to the use of the petitioner's land. The Ministers failed to have due regard to the matters set out in section 149 of the 2010 Act and thereby breached their statutory duties under the Act. They also failed to give proper, adequate and intelligible reasons for the decision to adopt the amended Core Paths Plan.

[17] The EQIA dated 29 October 2018 undertaken by the respondent in relation to its proposal to amend the original Core Paths Plan was not adequate to fulfil the respondent's duty when adopting the amended Plan. The respondent's duty and the Ministers' duty under section 149 of the 2010 Act required them to give consideration to the adverse effects which adding core paths could have on persons with protected characteristics, not just to consider whether there were barriers to such persons making representations.

[18] In any event, the duty is on the decision-maker themselves, and it is a continuing and non-delegable duty. In reaching their own decision the Ministers required to consider their own duties under the 2010 Act. They were not entitled to rely on the respondent or the Reporter. Moreover, no mention is made by the Reporter of him being aware of any duty on him, the Scottish Ministers or the respondent as public authorities in terms of the 2010 Act. The Reporter was not considering the protected characteristics of vulnerable children on which the petitioner's submissions were based.

Submissions for the respondent

Preliminary point

[19] The petition should be refused as it seeks reduction of a decision of the respondent which is not susceptible to judicial review. The Scottish Ministers, under and in terms of the 2003 Act, directed the respondent to adopt the amended Core Paths Plan and the 2003 Act required the respondent to comply with that direction. The respondent had no discretion whether or not to comply with the direction.

Ground 1: Misinterpretation and misapplication of the statutory test under the 2003 Act

[20] The Reporter had directly (and properly) addressed himself to the provisions of section 17(1) of the 2003 Act. The Reporter also clearly and properly addressed himself to the issue of the potential impact of the proposed paths on children and vulnerable groups making use of the petitioner's property. He noted in plain terms the petitioner's objections. He then went on to address them in his analysis. Having approached matters in this way, the Reporter was entitled to reach the conclusions he did and to make the recommendations contained in his report. The Reporter provided proper, adequate and intelligible reasons for his recommendations in the Report.

Ground 2: Breach of statutory duty under the Equality Act 2010

[21] The relevant considerations under the Equality Act 2010 were fully taken into account and addressed in the course of the process leading to the adoption of the amended Plan. The potential impact of the proposed paths on those with protected characteristics under the 2010 Act (particularly children and vulnerable groups making use of the

petitioner's property) was a matter that was drawn to the attention of the Reporter and specifically addressed by him in his analysis.

[22] Furthermore, from an early stage in the process, the respondent considered the potential impact of the proposed amended Core Paths Plan on the petitioner's property. Reference was made, for example, to the letter from the respondent to the petitioner dated 12 August 2019. Moreover, the respondent undertook an EQIA on 29 October 2018 in advance of undertaking its consultation on the proposed amended Core Paths Plan. That assessment sought to identify and address barriers to participation in the consultation process. No such barriers existed and representations were made to, and considered by, both the respondent and the Reporter.

[23] The respondent had due regard to the matters under section 149 of the 2010 Act throughout and by way of the process leading to the adoption of the amended Core Paths Plan. So far as the respondent was aware, the Reporter and the Scottish Ministers also had due regard to those matters. Consideration of the adverse effects which adding core paths could have on persons with protected characteristics was addressed in the process leading to the adoption of the amended Core Paths Plan. The approach of the petitioner was to elevate issues of form over those of substance. Looking at the process as a whole, the requirements of section 149 of the 2010 Act were met. Reference was made to *R (on the application of Garner)* v *Elmbridge BC* [2011] EWHC 86 (Admin), at [11].

Submissions for the interested party

Ground 1: Misinterpretation and misapplication of the statutory test under the 2003 Act

[24] The Scottish Ministers' role was limited to appointing, in appropriate circumstances, a person to resolve outstanding objections at a local inquiry, and to make a direction

following the resolution of those objections (sections 18(4) and 20A(5) and (8) of the 2003 Act). The petitioner's first ground of challenge required the report by the Reporter to be read in an overly restrictive way. The Reporter directly and properly addressed himself to the provisions of section 17(1) of the 2003 Act. Reading the report as a whole, it was clear that the Reporter considered the representations made, applied the correct test, and that there was no error of law in his approach.

[25] The Reporter was entitled to reach his conclusion based on the information before him and exercising his own planning judgement. The guidance recognised that a Core Paths Plan will change with circumstances over time and that the respondent has a wide discretion to review the plan for its area. There was no obligation on the Reporter to consider why paths ADD23 and ADD27 had not been part of the original Core Paths Plan. The Reporter's decision on the addition of core paths ADD23 and ADD27 was made having considered the objections from the petitioner, representations from the respondent, representations from members of the local community, and the Reporter's own observations as part of his site visit on 6 July 2020.

Ground 2: Breach of statutory duty under the Equality Act 2010

[26] The petitioner's position was not supported by a relevant averment. The petitioner's objections provided limited detail or specification as to how the adoption of the proposed additional paths ADD23 and ADD27 would adversely impact those with protected characteristics. It was clear, reading the decision as a whole, that the Reporter engaged with the petitioner's representations on equalities issues (such as they were) and therefore complied with the 2010 Act as a matter of substance. He recognised the equalities issues raised by the petitioner but his conclusion was one which he was entitled to reach based on

the information before him and exercising his own planning judgement. Even if the Scottish Ministers failed to comply then it was highly likely that their decision would not have been substantially different. Reference was made to *R (on the application of Danning)* v *Sedgemoor District Council* [2021] EWHC 1649, at [61]-[63]. If there had been a breach of the public sector equality duty by the Scottish Ministers the court should exercise its discretion not to quash the direction.

Decision and reasons

Preliminary point

[27] Senior counsel for the respondent preferred to rest his case on the substantive issues and did not seek to develop the brief points made in written submissions on the preliminary matter. In my view, while the respondent was directed by the Scottish Ministers to adopt the amended Core Paths Plan, the respondent still went through a decision-making process. As explained further below, a paper prepared on behalf of the respondent for approval of the Core Paths Plan Review was presented and the board agreed to give approval. Moreover, even taking the direction to mean that there was no decision reached in relation to the additional paths, if the direction was based upon unlawful conclusions by the Reporter that would be a relevant factor in relation to the action of the respondent. If the petitioner were to succeed on its second ground, again that would suffice to allow the decision to be challenged, even though it followed upon a direction. The preliminary point made by the respondent does not therefore succeed.

Ground 1: Misinterpretation and misapplication of the statutory test under the 2003 Act

[28] A similar approach to that taken when considering review of planning decisions falls to be applied to the report issued by the Reporter. Thus, the report must be read (i) fairly and in good faith, and as a whole; (ii) in a straightforward down-to-earth manner, without excessive legalism or criticism; and (iii) as if by a well-informed reader who understands the principal controversial issues in the case: *Abbotskerswell Parish Council* v *SOSHCLG & others* [2021] EWHC 555 (Admin), Lang J at [53], under reference to several earlier authorities. The document setting out the decision should not be subjected to detailed textual analysis and criticism: *Moray Council* v *The Scottish Ministers* 2006 SC 691, Lord Justice-Clerk (Gill) at [28].

[29] The Reporter was required to exercise his judgment having considered all of the material before him, including the objections from the petitioner. The report began with a covering letter in which the Reporter expressly noted that the main question for the inquiry, in compliance with section 18(4) of the 2003 Act, was whether the changes, if adopted, fulfil the purpose mentioned in section 17(1) of providing a system of paths sufficient for the purpose of giving the public reasonable access throughout the authority's area. That is his task, as stated in section 20A(5). He explained that he had drawn upon other relevant sections of the Act and guidance, including "Part 1 Land Reform (Scotland) Act 2003: Guidance for Local Authorities and National Park Authorities", published in 2005. He noted that the existing Loch Lomond and the Trossachs Core Path Plan was adopted in 2010 and then made specific reference to section 20 of the 2003 Act and its key terms.

[30] The letter referred to the formal public consultation process, that ran from November 2018 to April 2019. The Reporter had requested and received written submissions and supplementary written submissions on behalf of the petitioner. The

report then set out summaries of the petitioner's objections and the respondent's response made to the Reporter. In the section headed "Reporter's Conclusions", he sets out, in 24 paragraphs, his conclusions and his reasons for reaching them. A recurring theme in his report is that the additional Core Paths will minimise the need for the public to be on public roads when, for example, walking between various locations. In particular, in paragraph 8 (quoted above) he decided that the addition of the paths "will provide a significant benefit to the sufficiency of the network by giving the public a better opportunity to access the area offroad". The reference to "sufficiency" reflects and addresses the requirements of section 17(1) of the 2003 Act, which he had already identified as having to be met. He was not able to identify a suitable and better route than the proposed added paths. It is clear that he was not addressing himself only to the question of improving access; rather, he was directly and specifically addressing the tests as set out in the statute.

[31] The petitioner founds upon the fact that the original plan (in 2010) must have been considered sufficient for the purpose of giving the public reasonable access throughout the area. Under section 20(1)(b) of the 2003 Act, the authority may review the plan, for the purpose of "ensuring that the core paths plan continues to give the public reasonable access throughout their area". The guidance refers to the possibility of a change in circumstances as a basis for adding further paths. But it cannot, in my view, be correct that absent a change in circumstances the previous decision as to what paths were required is somehow conclusive and binding and must remain as it was, without additions. There is nothing in the wording of the statute, or the guidance, to that effect. Rather, section 20(1)(b) recognises that the position may be reviewed and that provision is not to be read as requiring a change in circumstances. It simply allows a review which may result in a different and additional approach to achieving sufficient reasonable access.

[32] In paragraph 17, as quoted above, the Reporter refers to children and vulnerable groups. He makes reference to two examples, which as senior counsel for the petitioner observed differ from the kind of persons using the petitioner's grounds. But these were simply examples and do not in my view, when reading the whole report, in any way undermine the approach he took. One of the factors which the Reporter specifically took into account in relation to proposed path ADD27 is that it will divert walkers away from the more sensitive parts of the petitioner's property.

[33] In relation to the reference to "insurmountable" in paragraph 18 of the report, when read in context the Reporter was simply saying that there were ways, proposed by the authority, to assist the petitioner in respect of its concerns about groups undertaking activities in the areas to which the public also had access. Any difficulties regarding that specific point could be mitigated and in that respect were not insurmountable. He was referring to practical ways of dealing with the petitioner's concerns when considering how the provision of the added paths would interact with or affect groups using the grounds. When read in the context of the report as a whole, paragraph 18 simply formed part of the balancing exercise carried out by the Reporter. He properly balanced the interests of the landowner (and those using the land) against the interests of those who would be exercising the access rights over the additional core paths.

[34] I see no real force in the petitioner's further point that the Reporter failed to give proper reasons for the adoption of the Plan. His reasons meet the test of being proper, adequate and intelligible: *North Lanarkshire Council* v *Scottish Ministers* 2017 SC 88, Lord Drummond Young, giving the Opinion of the court, at [27]-[32]. The informed reader is left in no substantial doubt: *South Bucks DC* v *Porter (No 2)* [2004] 1 WLR 1953, Lord Brown at [35]-[36]; *Moray Council* v *The Scottish Ministers* 2006 SC 691,

Lord Justice-Clerk (Gill) at [28]-[30]; *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 Lord President (Emslie) at 348. The fact that he expressed the decision reasonably succinctly is of no moment: *Taylor* v *Scottish Ministers* 2019 SLT 681, Lord President (Carloway) at [46], citing with approval *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed at [48].

[35] The Reporter was entitled to reach the conclusions he did and to make the recommendations contained in his Report. There was no misinterpretation or misapplication of the statutory test under the 2003 Act and no error of law. I therefore conclude that the petitioner's first challenge is not well-founded and must fail.

Ground 2: Breach of statutory duty under the Equality Act 2010

[36] Parties were in agreement about the relevant legal principles to be applied. Various cases in which key points are summarised were referred to in submissions, including *Bracking* v *Secretary of State for Work and Pensions*, McCombe LJ at [24]-[26]) and *Hotak* v *London Borough of Southwark* [2015] UKSC 30, [2016] AC 811, Lord Neuberger at [74]-[75]. It suffices simply to note the following points from particular cases. It is clear that a decision will not be erroneous in law simply because the statutory language or statutory test has not specifically been referred to in it: *R (on the application of Garner)* v *Elmbridge BC* [2011] EWHC 86 (Admin), Ouseley J at [11]. The question is whether, having regard to the substance of the decision and its reasoning, the decision-maker has had due regard to the relevant statutory need: *R (on the application of Baker)* v *Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, Dyson LJ at [37]. The requirement is to have due regard to the policy objectives in section 149 and if these are properly considered and put in the balance it is for the decision-maker to decide what weight to give to them: *R (on the*

application of Sophia Sheakh) v *London Borough of Lambeth* [2021] EWHC 1745 (Admin), Kerr J at [146]-[147].

[37] The equality issue that arose here, as referred to in the submissions on behalf of the petitioner made to the Reporter, was the potential impact of the additional paths on children and vulnerable groups. No express reference was made in the report to the public sector equality duty under the 2010 Act but, as already indicated, the Reporter properly considered that matter in reaching his conclusions. Looking at the substance of his decision and reasoning, he therefore recognised and had due regard to the equality issue raised. He put it in the balance, giving weight to the point, but concluded that it did not outweigh the other relevant factors.

[38] Turning to the alleged failures by the respondent and the Scottish Ministers to comply with the public sector equality duty, it is correct (as the authorities make clear) that the duty is non-delegable. Senior counsel for the petitioner submitted that the decision-maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice (under reference to *R (National Association of Health Stores)* v *Department of Health* [2005] EWCA Civ 154, Sedley LJ at [26]-[27]. He also relied upon the point that the assessment on equality must be done before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: *Kaur & Shah* v *LB Ealing*, Moses LJ at [23]-[24].

[39] It is correct that neither the respondent nor the Scottish Ministers issued a document which made reference to them having had due regard to the requirements of section 149 of the 2010 Act. However, by their letter to the respondent dated 23 March 2021, the Scottish Ministers stated that they had considered the Reporter's findings and recommendations and accepted his recommendations. At the meeting of the respondent's board on 14 June 2021 a

paper for approval of the Core Paths Plan Review was presented. Among other things, the paper referred to the inquiry, the report and the letter of direction from the Scottish Ministers, and recommended that the board formally adopt the amended Core Paths Plan. The report was appended to the paper. The paper noted that the Reporter agreed with the respondent's position relating to all outstanding objections. The board members agreed to formally adopt the amended Plan.

[40] In my view, there is no requirement, whether in the 2010 Act or identified in the authorities, for the respondent or the Scottish Ministers to set out in a document their own respective positions in relation to the equality issues. The report, and the Reporter's reasoning and conclusions, formed an integral part of the overall process and were plainly fundamental to the decisions of the respondent and the Scottish Ministers. The inquiry is the specified approach under the 2003 Act. Thereafter, the Scottish Ministers were in the position of deciding whether or not to accept the Reporter's reasoning and recommendations. These were accepted in full. The respondent was directed to adopt the recommendations. In those circumstances, the core underlying document, expressly accepted and adopted by the Scottish Ministers and at least by clear implication also by the respondent, suffices if it addresses in substance the issues in section 149. It does so. Properly viewed, it is inherently part and parcel of the reasons why the respondent and Scottish Ministers reached their decisions. They were not relying on what they thought was in the mind of officials, nor were they taking a "rearguard action". There was no need to carry out, as it were, a form-filling exercise stating that regard had been had to the provisions of the 2010 Act when the adopted report clearly did so.

[41] The respondent's EQIA focused upon whether there were barriers to the making of representations by or on behalf of persons with protected characteristics, which I accept

would not itself have sufficed. However, as explained, the Reporter's decision and reasons properly addressed the public sector equality duty and can be relied upon for that purpose by the respondent and the Scottish Ministers. Rather than failing to give proper, adequate and intelligible reasons for the decision to adopt the amended Core Path Plan, they plainly did so by accepting and adopting the Reporter's decision and reasons.

Disposal

[42] I shall therefore sustain pleas-in-law 5, 7 and 9 for the respondent, and pleas-in-law 3, 4, 5 and 6 for the interested party, and I shall refuse the petition, reserving in the meantime all questions of expenses.