Hilary Term

[2015] UKSC 4

On appeal from: [2014] CSIH 60

JUDGMENT

Sustainable Shetland (Appellant) v The Scottish Ministers and another (Respondents) (Scotland)

before

Lord Neuberger, President

Lord Sumption

Lord Reed

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

9 February 2015

Heard on 18 December 2014

Appellant	Respondent (1)
Sir Crispin Agnew QC	Malcolm Thomson QC
Donald Cameron	David Sheldon QC
(Instructed by Richard Buxton Environmental and Public Law Solicitors (as agents for R & R Urquhart LLP, Forres))	(Instructed by Scottish Government Legal Directorate Litigation Division)

Responden
Alisa Wilso
Marcus Mc
(Instructed
Gillespi
Macandrew

LORD CARNWATH: (with whom Lord Neuberger, Lord Sumption, Lord Reed and Lord Hodge agree)

Introduction

1.
The appellants, Sustainable Shetland, are an unincorporated association concerned in the protection of the environment of the Shetland Islands. By these proceedings they challenge a consent granted on 4 April 2012 by the Scottish Ministers for the construction of a windfarm. The consent was under section 36 of the Electricity Act 1989, and was accompanied by a direction that separate planning permission was not required (Town and Country Planning (Scotland) Act 1997 section 57(2)). Although the appellants' objections in earlier exchanges had related to the impact of the development on the environment generally, the focus of their challenge in the courts has related to the alleged failure of the ministers to take proper account of their obligations under the Birds Directive, in respect of the whimbrel, a protected migratory bird. Their challenge was upheld by the Lord Ordinary (Lady Clark of Calton) on other grounds which are no longer in issue, but she indicated that she would if necessary have upheld the challenge also under the directive. The ministers' appeal was allowed unanimously by the Inner House.

2.
The proposed windfarm was on a very large scale. In its amended form it would have had 127 turbines (reduced from 150), located in three areas (Delting, Kergord and Nesting), covering a total area of some 50 square miles, of which some 232 hectares would be physically affected. Associated infrastructure would include 104 km of access tracks, and anemometer masts, and borrow pits. The original application was made in May 2009. It was accompanied by an Environmental Statement, as required by the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (SSI 2000/320).

3.
The whimbrel population of the Shetlands is highly significant in national terms, representing (at 290 pairs on the basis of a 2009 survey) around 95% of the total UK population. Of this some 56 pairs breed in the central mainland area, where the windfarm would be sited, 23 pairs within the development site. 31 pairs breed in the Fetlar Special Protection Area. Between 72 and 108 adult whimbrel from the Shetlands die annually from existing causes. The 2009 survey showed a decline in the Shetlands region over the previous 20 years of 39% overall, but with wide variations across the region; the decline in Central Mainland was only 6%, compared to between 54% and 80% in the Fetlar SPA.

4.
The potential impact on the whimbrel population emerged as an important issue in early objections from, among others, Scottish Natural Heritage ("SNH"). There followed a series of detailed exchanges between SNH and the developers on both the assessment of the likely impact of the development on the whimbrel population and mitigation measures. It is unnecessary to do more than summarise some of the main points. In response to SNH objection, the developers revised their Environmental Statement by submitting a new Addendum, including a chapter "A 11 Ornithology", which dealt in detail with the likely effects on whimbrel. It was said to be based on more than eight years of study, which gave "considerable confidence in the robustness of these assessments". It was acknowledged that the population processes of Shetland whimbrel were "poorly understood", and that, in the absence of previous windfarm developments in areas with breeding whimbrel, the likely impact had to be inferred from knowledge of responses of other related wader species, such as the curlew. It predicted that operational disturbance would result in the long term displacement of 1.8 pairs, which might be able to resettle elsewhere; and a collision mortality rate of 2.1 whimbrel per year.

5.

The Addendum included a Habitat Management Plan ("HMP"), which contained detailed assessment of the factors affecting the whimbrel population, and proposed habitat management actions. For example, the "single most important action" to increase whimbrel breeding success was said to be the control of the likely main nest predator, the hooded crow, over sufficiently large areas during the nesting season. The HMP was said to have

"a high likelihood of more than off-setting any adverse effects of the windfarm and a reasonable likelihood of causing the Shetland whimbrel population to partially and possibly fully recover over the lifetime of the Viking Wind Farm."

6.
Although the revised proposals led SNH to withdraw some of their objections to the proposals, those in respect of whimbrels were maintained. In their letter of 11 February 2011 they referred to a "high likelihood of a significant adverse impact of national interest …". They made specific reference to the EU Birds Directive:

"Whimbrel are subject to certain general provisions of the EU Birds Directive which apply to all naturally occurring birds in the wild. These include articles 2, 3(1), 3(2)(b) and the last sentence of article 4(4). Achieving and maintaining favourable conservation status of the national population is in line with these provisions and obligations. In this case our advice is that the proposed Viking wind farm is highly likely to result in a significant adverse impact on the conservation status of the national population of whimbrel."

7.
They expressed doubts as to the likely success of the HMP, given the "unproven and experimental" nature of some of the proposed mitigation measures, and the "scale and location of the project" which were not comparable to other mainland restoration sites. In later correspondence they described the ornithological assessment as "associated with a high degree of uncertainty in several critical respects". They disagreed with the predicted collision mortality rate, which they put at 4.2 for 127 turbines, or 3.7 if the Delting turbines were removed. They welcomed the HMP as offering "the possibility of significant biodiversity benefits" and as "an excellent opportunity to explore various habitat management methods" as yet untested in the Shetlands; but advised that it contained a "qualitative assurance which cannot be relied on with certainty to significantly mitigate these impacts". They regretted that in spite of the significant efforts made in cooperation with the developers they had been unable to resolve all their concerns.

8.
The Scottish Ministers gave their decision by letter dated 4 April 2012. They recorded the representations of various consultees, statutory and non-statutory (including those of SNH and RSPB, relating to effects on birds). They also noted the receipt of a total of 3881 public representations, of which 2772 were objections and 1109 were in support of the development; the objections "raised concerns on a number of subjects including habitat, wildlife, visual impact and infrastructure". In view of the "apparently insurmountable aviation issues" associated with the 24 turbines in the Delting area, it would not be appropriate for those to be included in any consent, but there remained the option of granting consent for the remaining 103 turbines.

9.
The letter stated that the ministers had had regard to "their obligations under EU environmental legislation" and to "the potential for impact on the environment, in particular on species of wild birds". It noted that the peatland ecosystem was in serious decline, and that the restoration proposed

by the Habitat Management Plan would “offer benefits to a whole range of species and habitats”. It was “far more ambitious and expansive” than plans accompanying previous windfarm proposals encompassing an area in total of 12,800 hectares, and had been welcomed by SNH as offering the possibility of significant biodiversity benefits.

10.
In a section headed “Whimbrel” the letter discussed the respective submissions and the supporting evidence on this subject. The estimate of 3.7 collision deaths per year was regarded as “very small” when considered in the context of the 72-108 annual deaths from other causes. Of the view of SNH and others that the development would result in a “significant impact of national interest”, the letter commented:

“Ministers are not satisfied that the estimated impact of the development on whimbrel demonstrates such a level of significance. In addition, Ministers consider that the potential beneficial effects of the Habitat Management Plan (HMP) can reasonably be expected to provide some counterbalancing positive benefits.”

11.
It was accepted that the beneficial effects of the HMP could not be predicted with certainty, for the reasons given by SNH, but the letter continued:

“Ministers note that the HMP will take one third of the UK population of whimbrel under active management, and will target some 100 whimbrel ‘hotspots’. Based on the detailed environmental information provided in the environmental statement and addendum, Ministers are satisfied that the measures proposed by the HMP are likely to have a positive value to the conservation status of the whimbrel. These measures include a variety of management techniques, including predator control, habitat restoration, protection and management. Ministers are satisfied that an HMP which includes significant predator control from the outset, as well as ongoing habitat restoration, protection and management, is likely to counteract the relatively small estimated rate of bird mortality. Further reassurance is gained from the commitment to ongoing development and improvement built into the HMP as understanding of its effect improves, and from the fact that this commitment will be required by condition.

In any case, if, despite the implementation of the HMP, the estimated negative impact on the species were to remain, Ministers consider that the level of impact on the conservation status of the whimbrel is outweighed by the benefits of the project, including the very substantial renewable energy generation the development would bring and the support this offers to tackling climate change and meeting EU Climate Change Targets.

The whimbrel is in decline on Shetland. Ministers consider that the HMP represents an opportunity - currently the sole opportunity - to try to improve the conservation status of the species. Without the Viking Windfarm HMP, there currently appears to be no prospect of any significant work being undertaken to reverse the decline of the whimbrel in the UK.”

12.
It was considered that conditions on the consent would ensure comprehensive monitoring of the effects of the development and the success or otherwise of the mitigation measures, which work would also “inform ongoing initiatives for the conservation of whimbrel …”. The letter went on to consider other issues, under the headings “Landscape and visual”, “Economic and renewable energy benefits”, and “Other considerations”; before concluding that “environmental impacts will for the

most part be satisfactorily addressed by way of mitigation and conditions, and that the residual impacts are outweighed by the benefits the development will bring", and that consent should therefore be granted.

Statutory requirements and the Birds Directive

13.
By paragraph 1 of Schedule 9 of the Electricity Act 1989, developers are required in formulating their proposals to have regard to "the desirability … of conserving flora, fauna and geological or physiographical features of special interest …", to "do what (they) reasonably can to mitigate any effect" which the proposals would have on such flora, fauna or features; and, in considering their proposals, the ministers are required to have regard to the extent of compliance with those duties. There is no allegation in this appeal of non-compliance with these duties by the developers or the ministers.

14.
In addition, as is common ground, the ministers were required to take due account so far as relevant of the obligations of the United Kingdom under the Birds Directive. The directive currently in force, which dates from 2009 (2009/147/EC), was a codification of provisions originally found in the 1979 directive (79/409/EEC) with subsequent amendments. As such they have been discussed in a number of cases in the European Court of Justice. Detailed analysis can be found in the opinions of Advocate-General Fennelly in C-44/95 R v Secretary of State for the Environment, Ex p Royal Society for the Protection of Birds [1996] ECR I-3805 ("the Lappel Bank case") and C-10/96 Ligue Royale Belge pour la Protection des Oiseaux ASBL v Région Wallonne [1996] ECR I-6775.

15.
As has been seen, SNH drew particular attention to "articles 2, 3(1), 3(2)(b) and the last sentence of article 4(4)". To understand the arguments here and in the courts below, it is necessary to set these in their context. By article 1 the directive applies to

"the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies …"

By article 2 -

"Member States shall take the requisite measures to maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."

Article 3.1 requires member states "in the light of the requirements referred to in article 2" to take the requisite measures "to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in article 1"; such measures to include (article 3.2(b)):

"(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;"

16.
Article 4.1 requires "special conservation measures" to be taken in respect of the species mentioned in annex I of the directive, "in order to ensure their survival and reproduction in their area of distribution", and requires member states to "classify in particular the most suitable territories in

number and size as special protection areas" for the conservation of these species. Article 4.2 requires "similar measures" for regularly occurring migratory species not listed in annex I. It is common ground that whimbrel, though not listed in annex I, are subject to the requirement for "similar measures" for migratory species under article 4(2). The Fetlar SPA was designated pursuant to this duty.

17.
It was established by the European Court in the Lappel Bank case that, notwithstanding the reference in article 2 to "economic and recreational requirements", such factors were not relevant in choosing or defining special protection areas under article 4. The precise relevance of such factors to the scope of the duties under article 2 is a matter of debate. In Commission v Belgium C-247/85 [1987] ECR 3029, para 8, the European Court observed:

"... article 2 of the directive ... requires the Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature ..." (emphasis added)

However, in the later Lappel Bank case, the Advocate-General (para 57) took the view that this balance was relevant under article 2, not to the level at which the population of the particular species was to be maintained, but only to the measures required to achieve it. The court did not express a view on that point, confining itself to ruling on article 4.

18.
Article 4.4, to the last sentence of which SNH referred, provides:

"4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats."

19.
In the same passage SNH made reference to the aim of achieving "favourable conservation status" for a relevant species. This expression does not appear in the Birds Directive itself. The concept is taken from the Habitats Directive (92/43/EEC), and is of direct application to the obligations of states in relation to the European network of special areas of conservation under article 3 of that directive ("Natura 2000"). For this purpose, article 1(i) defines the "conservation status" of a species as "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory ...". Conservation status is taken as "favourable" when:

"- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis."

20.
There are links between the two directives. By article 3 of the Habitats Directive, special protection areas designated under article 4 of the Birds Directive were also included in the Natura 2000 network, and (by article 7) such areas were subject to the same obligations in respect of conservation measures as defined by article 6 of the Habitats Directive. However, there appears to be nothing in either directive to link the concept of “favourable conservation status” as such to the general obligations under article 2 of the Birds Directive, which apply to all wild birds, not just those defined for special protection under article 4 or otherwise.

The courts below

21.
On 24 September 2013, the Lord Ordinary gave judgment reducing the ministers’ decision on the grounds (apparently first raised by the court itself) that in the absence of a licence granted under section 6 of the Electricity Act the ministers had no power to grant consent. That ground of decision was not supported by these appellants or any other party to the present proceedings, and it was not followed by Lord Doherty in a later case: Trump International Golf Club Scotland Ltd v Scottish Ministers [2014] SLT 406. The Inner House (para 19) agreed with his reasoning. It is unnecessary to consider the point further.

22.
The Lord Ordinary held in the alternative that the ministers had failed to take proper account of their obligations under the Birds Directive. She criticised the ministers for failing to “address explicitly legal issues arising out of the [directive] and explain their approach to decision making …” (para 239). In a long section (paras 245-291) she undertook her own detailed interpretation of provisions of the directive, followed by a discussion of their application to the facts of the case. Without disrespect, I hope it is sufficient to highlight what appear to be the key points in the discussion.

23.
She identified what she understood to be the respective positions of the parties:

“[258] In summary, the fundamental dividing line between the interpretation put forward by the petitioners compared with that advanced on behalf of the respondents and interested party is that the petitioners maintain that article 2 sets down a common standard which requires to be met that the population of the species, in this case whimbrel, are to be maintained at a level which corresponds in particular to ecological, scientific and cultural requirements and that obligation rests on the State. … There is discretion in how article 2 is to be implemented but not discretion as to whether it is to be implemented or not.

[259] In contrast, the respondents submit that the reference to maintaining the population in article 2 is subject to other considerations … (which) at a minimum included economic and recreational requirements. It is a balancing exercise … The final position of the respondents was to say in effect that wind farm energy production contributing to climate change targets out-balanced or outweighed ‘the obligation’ of maintaining the population of whimbrel to the level specified in article 2.”

24.
In resolving that issue she attached particular weight to the opinion of Advocate-General Fennelly in the Lappel Bank case (see above) as to the limited role of economic and recreational requirements even under article 2 (paras 260-264). She also attached weight to the obligation of the state in respect of migratory species under article 4(2). The accepted position was that, despite the existence of the

Fetlar SPA, whimbrel were not in “favourable conservation status” in the Shetlands or the United Kingdom. This raised the question whether the designation of that area was fulfilling the obligations of the United Kingdom under that article, and if not “what the implications of that were for the decision making in this case”. It was necessary for the decision maker to give “some indication that they have addressed the issues as envisaged in the Directive”. Taking account of “the problems with the existing conservation status of whimbrel”, there was no reasoning to explain why the Fetlar SPA site provided sufficient protection and exhausted their obligation under article 4(2) of the directive (para 272).

25.
As to the HMP, there was no explanation as to why the ministers, departing from the view of SNH, and “in a situation where it is not disputed that the reasons for the whimbrel decline are not known and the habitat management plan is untried and untested in Shetland in relation to whimbrel”, were able to conclude that the HMP would provide “some unspecified level of mitigation” (para 285). Further, in her view, there was “the fundamental difficulty” that the ministers had failed to take the directive as “the starting point” for consideration of the facts. Article 2 imposed an obligation to take requisite measures to maintain whimbrel at “an appropriate level”, which, in her opinion, would involve “addressing the issue of what is required by article 2 in respect of whimbrel in this case”. These were not pure questions of fact, but “matters of mixed fact and law”. The ministers had failed to address these issues, except by way of a “balancing exercise” taking account of the benefits of the project in relation to meeting EU climate change targets – an exercise which in her view was not permitted by the directive (paras 286-289).

26.
On appeal, the approach of First Division was radically different. In the single opinion of the court, delivered by Lord Brodie, they criticised the Lord Ordinary for addressing the wrong question:

“The question which should have been the focus of the Lord Ordinary’s attention was whether the grant of consent by the Scottish Ministers had been a lawful decision, once due account was taken of, inter alia, the Wild Birds Directive. Instead, the Lord Ordinary applied herself to the rather different question as to whether the Scottish Ministers, in their decision letter, had demonstrated that they had fully understood and complied with their on-going obligations under the Directive in respect of the United Kingdom population of whimbrel, irrespective of the likely effect on it of a consent to the development.” (para 26)

27.
Whether the development was likely to have a materially adverse effect on the bird populations protected by the directive was “an entirely factual question” for the ministers to determine. They had concluded that increased mortality was unlikely but in any event were not satisfied that, even without mitigation by virtue of the HMP, the impact was of significance in relation to the conservation of the species. In the view of the court:

“Once that conclusion was arrived at, the Wild Birds Directive, and any associated problems of interpretation and application, fell out of the picture as far as this proposal was concerned.” (para 27)

Although the decision letter had not referred expressly to the directive, it was clear to an informed reader that the decision had been made having regard to SNH’s assessment which referred to specific provisions of the directive (para 29). The Lord Ordinary’s criticism of the ministers’ reasoning in relation to their duties under article 4(2) reflected the erroneous view that they were required to satisfy themselves as to their performance of those duties as a preamble to consideration of the

application (para 30). Once they had decided that “the development would have no significant adverse impact, and might possibly be beneficial”, the issue of what was required by article 2 in respect of the whimbrel was “one that it was unnecessary to explore.” (para 31)

The issues in the appeal

28.
In this court, the appellants submit that the ministers approached the whimbrel on the wrong basis in law. In summary they make the following main points:

i)
The ministers considered the impact of the development on the whimbrel, but failed to take account of their positive obligations not merely to maintain the current level of the whimbrel population, but to adapt it to the appropriate level under article 2 - in effect to bring the whimbrel up to “favourable conservation status”.

ii)
More particularly, in the light of the detailed information made available in connection with the application, they should have appreciated that the mainland territory now appeared to be the most suitable territory for classification as a special protection area under article 4(2); and they should have considered what further “special conservation measures” were required, for example the closing down of the windfarm during whimbrel migratory or breeding months.

iii)
They acknowledge that SNH had made no reference to article 4(2), but this was an error which could not excuse the ministers’ failure to have regard to the obligation imposed on them by that provision.

iv)
In so far as the ministers relied under article 2 on “balancing” considerations relating to climate change benefits or other economic considerations, these were not relevant in law.

v)
Any doubts about the interpretation of the directive should be resolved by a reference to the CJEU.

Discussion

29.
The first two points reflect the principal difference between the courts below, which lay in their respective assessments of the role of the ministers in considering a proposal of this kind. The Lord Ordinary treated it as requiring them in effect to conduct a full review of their functions under the Birds Directive, with a view to considering how the present proposal would contribute to or fit in with those functions, and in particular the objective of bringing the whimbrel up to “favourable conservation status”. The Inner House took a more limited view. The directive was but one of a number of material considerations to be taken into account in reaching a lawful decision whether to grant consent under the Electricity Act 1989.

30.
In principle, in my view, the Inner House were clearly right. The ministers’ functions in this case derived, not from the directive, but from their statutory duty to consider a proposal for development under the Electricity Act 1989. The range of issues potentially relevant was apparent from their summary of the large number of representations for and against the proposal. As has been seen, the

Act contained specific reference to conservation of wildlife ("fauna") and mitigation of any adverse effects of a development. The Ministers were also required by the relevant regulations to take account of the information provided by the environmental assessment.

31.
The directive did not in terms impose any specific requirements in respect of this particular development proposal, but it was rightly accepted as part of the legal background against which its effects needed to be considered. In considering those matters the ministers would be expected to attach weight to the views of statutory consultees such as SNH, and other expert bodies such as the RSPB, but (as is accepted) they were not bound by their advice. I agree with the Inner House that although the decision-letter did not mention the directive as such, the detailed consideration given to the advice of SNH, with specific reference to its provisions, leaves no serious doubt that it was taken into account, as part of the "obligations under EU environmental legislation" to which the letter referred.

32.
I would not therefore agree with the Lord Ordinary that the "starting point" for consideration of this proposal was to establish the precise scope of the duties imposed by article 2, and for that purpose to determine "an appropriate level" for the whimbrel population. That was not the issue facing the ministers in the context of their consideration of this proposal under the Electricity Act 1989. Their duty was to determine whether to grant consent to a particular development proposal, taking account of all material considerations for or against, of which the directive formed part.

33.
On the other hand, it does not follow that, once it had been decided that the impact on whimbrel population was not of significance, the directive (in the words of the Inner House) "fell out of the picture". If there had been evidence that the proposal, while having no significant effect in itself on the whimbrel population, might prejudice the fulfilment of the ministers' duties under the directive, that would have been a potential objection which required consideration. That in effect is the substance of the appellants' second point in the summary above, relying on the more specific obligations under article 4(2).

34.
Their difficulty is that their suggestions are unsupported speculation, and were not raised by anyone in the representations on this proposal - whether by the expert bodies or anyone else. As the appellants acknowledge, it was the investigations conducted in connection with this proposal, as reported in the environmental statement and its addendum, which highlighted the present status of the whimbrel in the area of the proposed windfarm and elsewhere in the islands. It appears to be the case, perhaps paradoxically, that one of the areas which has seen the largest decline has been the Fetlar special protection area itself, as compared to a smaller decline in the mainland area in which the proposal is situated. The reasons for that may be open to debate, but they were not in issue in this statutory process. If SNH (or indeed the appellants) had thought it necessary or appropriate to call for designation of further areas or other special measures under article 4(2), they could have raised that as an issue, and the developers would have had an opportunity to address it. There is no reason to think that SNH's omission to do so reflected, as the appellants imply, any misunderstanding of the law or the material facts.

35.

It is clear in any event that the ministers did have regard to the desirability of improving the conservation status of the whimbrel on the islands in general, rather than simply avoiding significant loss due to this proposal. They were entitled to attach weight to the fact that the HMP would result in one third of the whimbrel population of the UK being taken under active management, and to regard it as an exceptional opportunity to improve understanding of the species and its habitat and of the measures necessary to conserve it. This is not, as the appellants submit, to "rely on their own failure to fulfil their obligations under the Birds Directive as a reason for allowing the wind farm". There is no evidence of any allegation, by SNH or any other responsible body, of a failure by the UK to comply in this respect with its obligations under article 4(2). We have been shown post-decision correspondence of the Shetland Bird Club with ministers and with the European Commission, which shows that the status of SPAs in the Shetland Islands is under continuing review, but it contains no suggestion that the present position was or is regarded as having involved any breach of the directive. In any event, as I have said, the performance of the UK's duties under the directive was not in issue.

36.
In summary, the ministers were entitled to regard the limited anticipated impact on the whimbrel population, combined with the prospect of the HMP achieving some improvement to their conservation status more generally, as a sufficient answer to the objections under this head.

37.
The fourth point raised by the appellants relates to the ministers' reliance on "balancing considerations" - renewable energy and climate change benefits - to override any objections under the directive. The relevance in law of that balance was identified by the Lord Ordinary as a primary issue between the parties, which she determined in favour of the appellants. Although the parties have maintained their positions in this court, the ministers' primary submission, as I understood Mr Thomson, was that it is unnecessary for the court to determine that issue if they succeed on the other issues. It is clear, he submits, from the context of that passage in the letter that the balancing considerations there referred to represented a "fall-back position" which would only come into play if the primary reasoning were not to be accepted. As environment-related benefits, they in turn were distinguished from the more general "economic benefits" properly relied on in a later part of the letter as outweighing the remaining landscape and visual impacts of the development.

38.
I agree with this interpretation of the letter, and its consequences for the appeal. As the Inner House accepted, the interpretation of article 2 raises some difficulties, one of which is the precise role of the economic factors there referred to. Another is the obligation of member states in relation to setting an appropriate level for the maintenance of different species, which the Lord Ordinary identified as the starting point. Since article 2 applies to wild birds of all kinds, regardless of their scarcity or vulnerability, it seems unlikely that it was intended to require an equally prescriptive approach in all cases, by contrast for example with the more specific measures required for the particular species protected by article 4. Although some guidance is provided by the existing European jurisprudence, the need for a further reference may arise in an appropriate case in which the resolution of these issues is necessary for a decision. This is not such a case. In those circumstances it is better to leave further discussion in this court until then.

Conclusion

39.
For these reasons I would dismiss the appeal and confirm the order of the Inner House.