

# Is Reverse Ferreting Unlawful?

## A. THE REVERSE FERRET

One of the colourful phrases attributed to the notorious tabloid newspaper editor Kelvin MacKenzie is the “reverse ferret”. Scenting a story discrediting a public figure, MacKenzie would investigate by ordering his journalists to “stick a ferret up [the target’s] trousers”. If he later scented that the story would not find favour with his readership, MacKenzie would order a “reverse ferret”. Recent and impending major developments in judicial review have been and will be shaped by the willingness and ability of the Labour Government that gained power as recently as 5 July 2024 on a manifesto in which “Accelerating to Net Zero” was central, to reverse ferret over that commitment.

Over the past forty years, the UK has played a leading role in establishing the international legal framework for global mitigation of climate change, and for most of that time has legally enshrined the world’s most demanding policy of domestic emissions reduction. Within the last two years, however, the costs of this have become an acute political issue, with cross-Party consensus breaking down as the Conservative Party, the emergent Reform Party, the former Labour Prime Minister Sir Tony Blair, and major trades unions affiliated to the Labour Party have all called for revision or abandonment of net zero. The Government has affirmed its commitment to net zero, but ineradicable doubt about claims that such a commitment will not impede, or indeed will increase, economic growth is central to the breakdown of consensus,<sup>1</sup> and the Government, which has also very strongly committed itself to economic growth, now faces a choice between competing objectives.<sup>2</sup> But

<sup>1</sup> R Colville, “Miliband’s Wind Plan Has Left Him Hostage to Suppliers” (11 May 2025) *The Sunday Times* 24: “it is more likely that when Miliband claimed there was no tension between clean power, cheap power, and reliable power, he was simply wrong”.

<sup>2</sup> F Harvey, “After Blair’s Bombshell, Will Labour Stick with or Abandon Net Zero?” (11 May 2025) *The Guardian*, available at <https://www.theguardian.com/news/ng-interactive/2025/may/11/will-labour-stick->

should it order a reverse ferret, the Government will find that the positive law makes this choice extremely difficult, and a crisis of the constitutionalised politics of the new regulatory state looms in Scotland over North Sea oil.

The Supreme Court's 20 June 2024 judgment in *R (Finch on Behalf of the Weald Action Group) v Surrey County Council*<sup>3</sup> is currently the focus of controversy over net zero. Generally being interpreted to require that a consent to fossil fuel extraction must take "downstream emissions" into account, *Finch* poses an enormous obstacle to coal and oil developments.<sup>4</sup> In *Friends of the Earth Ltd v Secretary of State for Levelling Up, Housing and Communities*,<sup>5</sup> issued on 13 September 2024, consent to a Cumbrian coal mine was found to be unlawful after *Finch*. And on 29 January 2025 in *Greenpeace Ltd v Advocate General*,<sup>6</sup> in which the environmental activists Greenpeace Ltd and Uplift UK challenged the consents to the Jackdaw and Rosebank North Sea oil and gas fields, Lord Ericht in the Outer House considered the form of remedy to be granted after the parties had agreed that, after *Finch*, the consents were unlawful.<sup>7</sup>

The move in *Greenpeace* from consideration of liability to consideration of the remedy to be given for unchallenged liability consolidates a most important recent shift in the law of climate change judicial review, as the courts must now shape an established law of enormous

[with-or-abandon-net-zero](#): "If the Prime Minister is really preparing to go into battle for net zero, as he promised, his real difficulties may lie ... next door".

<sup>3</sup> [2024] UKSC 20; [2024] 4 All ER 717; noted in D Campbell, "Climate Change and the Threat of Inundation" (2025) 29 Edinburgh Law Review 337.

<sup>4</sup> This writer has long believed that there is no limit in principle to the type of project against which properly framed climate change challenges could successfully be brought, and saw *Finch*, and some prior decisions of the Administrative Court which it eclipsed, as the realisation of this. However, after the current article was submitted for publication, permission for a poultry rearing unit was quashed on *Finch* downstream reasoning about ammonia and nitrogen pollution arising from the subsequent use of manure produced by the unit: *R (Alison Caffyn) v Shropshire CC* [2025] EWHC 1497 (Admin). Though it is submitted that this extension of *Finch* reasoning beyond carbon emissions to, it seems, environmental impacts assessments generally is open to challenge, one perhaps should have expected it. *Caffyn*, [17] draws authority from the use in *Finch*, [160]-[163] of *R (Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env LR 36, a previous poultry manure case, to illustrate downstream effects. But the fundamental question is how much this extension is in the spirit of the constitutionalisation of climate change policy, and it is submitted it is.

<sup>5</sup> [2024] EWHC 2349 (Admin); [2025] JPL 838.

<sup>6</sup> [2025] CSOH 10; 2025 SLT 303; 2025 SCLR 198; 2025 GWD 5-45.

<sup>7</sup> Two other grounds of review were dismissed: *ibid*, [26], [49]-[66].

obstructive potential. The way this is done will be of national economic and political importance; but the legal issue of even greater importance to the UK polity is how the courts have come to assume such a role.

## **B. THE REMEDY GRANTED**

If developed, Jackdaw and Rosebank would make up 7% of UK oil and 11% of UK gas production,<sup>8</sup> and billions of pounds have already been invested in them.<sup>9</sup> Their would-be developers are UK members of, in regard of Jackdaw, the Shell plc group, and, in regard of Rosebank, the Equinor ASA group, with a “non-operating” party, Ithaca SP E & P Ltd, having a financial holding in Rosebank.<sup>10</sup> As all these investors accepted the consents were unlawful but intended to continue development, the question for the Outer House was the remedy to be granted. Lord Ericht put the question this way:

Should the [consents] be quashed and made again on a proper and lawful basis taking into account downstream emissions. Or should the court grant declarator rather than reduction, so that the [consents] stand and the projects proceed despite the [consents] being unlawful.<sup>11</sup>

The petitioners sought reduction and the defenders declarator,<sup>12</sup> but it is submitted that they, and therefore the Outer House,<sup>13</sup> placed too much weight on clearly distinguishing these remedies, which was not really an issue in the circumstances of the case, which demanded that a “pragmatic approach” be taken.<sup>14</sup> And, most importantly, Lord Ericht paid insufficient attention to the assumption that the consents could be “made again on a proper and lawful basis” on which the remedy he devised rests. It is submitted that, after *Finch*, the legal

<sup>8</sup> Ibid, [9], [17].

<sup>9</sup> Ibid, [10], [20].

<sup>10</sup> Ibid, [5], [14].

<sup>11</sup> Ibid. [5].

<sup>12</sup> Ibid, [67]-[69], [72]-[82], [99].

<sup>13</sup> Ibid, [100]-[103].

<sup>14</sup> CT Reid, “Remedy for Unlawful Environmental Assessment” [2025] Scottish Planning and Environmental Law 34, 35.

obstructions to development will be unmanageable, and so the remedy granted will prove fruitless.

A “bare” declarator is a declaration of a legal right without any order to the defender to do anything further. The pursuer can, should it so choose, act on the declared legal position. In light of this, one can see what the defenders sought and what Lord Ericht was driving at when he said that, even if declarator was made that the consents were unlawful, those consents would stand, and the projects proceed. But a bare declarator, which “does not get rid of the decision”,<sup>15</sup> surely is not what the petitioners wanted, and it would be wrong that their arguments, if sustained, should have a null effect, leaving it aside that this presumably would merely invite further litigation.

Approaching the question from the other direction, a reduction which fully negated the consents would require the permanent closure of the fields, and though this is just what the petitioners want, it obviously is inconsistent with the reduction being ordered in contemplation of consents being sought again. If development eventually is resumed, steps taken towards permanent closure obviously will inflict a waste upon the defenders and the public when a discretion to avoid such waste runs through, leaving aside the specific public law position,<sup>16</sup> the entire law of remedies bearing on the direct enforcement of primary rights,<sup>17</sup> the striking feature of this case being the size of the waste. The broadly inevitable conclusion therefore reached by Lord Ericht was to order reduction,<sup>18</sup> but to suspend it until a decision is made about the new consents.<sup>19</sup> During the suspension, no oil or gas may be

<sup>15</sup> *Brown v Hamilton DC* 1983 SC (HL) 1, 46.

<sup>16</sup> *Greenpeace v Advocate General* [2025], [83]-[98].

<sup>17</sup> *Grahame v Swan and Others (Magistrates of Kirkaldy)* (1882) 9 R (HL) 91, 92 (Lord Watson); cited, with a different emphasis, in *Greenpeace v Advocate General* [2025], [91].

<sup>18</sup> *Ibid*, [151].

<sup>19</sup> *Ibid*, [152]-[162], [167].

extracted.<sup>20</sup> Suspension of this nuanced sort unarguably is an order which the Outer House is competent to make.

In 2021, the Inner House had, it is submitted impeccably, upheld a refusal of a downstream emissions challenge Greenpeace had brought against the Vorlich North Sea oil field.<sup>21</sup> This case is four square with *Greenpeace v Advocate General* [2025], and Lord Ericht felt obliged to chart the effect *Finch* was having on the law<sup>22</sup> whilst *Greenpeace v Advocate General* [2025] wound its way to the Outer House<sup>23</sup> in order to respond to the concern which respect for legality must generate that such a challenge succeeding would frustrate the investors' legitimate expectations based on the previous case. Lord Ericht argued that as the investors were aware that successful challenge was a possibility, they proceeded with development at their own risk.<sup>24</sup> Lord Ericht did not merely disregard any responsibility of a government granting consent,<sup>25</sup> but he very disturbingly opined that refusal of leave to appeal the Inner House's Vorlich decision did not mean that that decision was certain in the sense that it could be relied upon by the investors.<sup>26</sup> In doing this, Lord Ericht simply demonstrated what is wrong about where we now are: it has been accepted that in *Finch* the Supreme Court was at liberty to change the law.

And what lies in the future for the investors? Lord Ericht's remedy must be seen as an invitation by the Outer House to remake their applications, and this is defensible only if those applications could possibly succeed. Lord Ericht was insistent that the eventual decision about consent could go either way,<sup>27</sup> the choice being "a matter for" the UK Government.<sup>28</sup>

<sup>20</sup> Ibid, [160], [167].

<sup>21</sup> *Greenpeace Ltd v Advocate General (representing the Secretary of State for Business, Energy, and Industrial Strategy)* (2021) CSIH 53; 2021 SLT 1303, [63]-[68].

<sup>22</sup> The brief mention of the Vorlicht case in *Finch*, [116] was, it is submitted, sufficient to indicate that it would have been decided otherwise on the law laid down in *Finch*.

<sup>23</sup> *Greenpeace v Attorney General* [2025], [31]-[48].

<sup>24</sup> Ibid, [48], [117]-[121], [123]-137].

<sup>25</sup> See nn 30, 33 below.

<sup>26</sup> Ibid, [121].

<sup>27</sup> Ibid, [105].

<sup>28</sup> Ibid, [101].

But after *Finch* the latter is so only up to a point, and whilst consideration of *Finch* was unnecessary in relation to the admitted unlawfulness of previous consents, it was essential to the formulation of a remedy bearing on prospective consents.

*Finch* concerned an on-shore oil field, and planning law made consent for such a project a matter for a local authority. It was not claimed that downstream emissions would not be generated, but that it was beyond the competence of a local authority to take these into consideration when making a planning decision. It has been simply accepted that *Finch* requiring such consideration applies to coal and to off-shore oil and gas fields,<sup>29</sup> and if this is so, then the Jackdaw and Rosebank consents must be unlawful because the parallel national planning law also did not require downstream emissions to be taken into consideration, and, on the direct advice of government,<sup>30</sup> Equinor's and Shell's environmental statements indeed did not do so.

But *Finch* has changed the very meaning of “planning” in regard to the projects to which it applies, from a term requiring a restriction of focus to the in some sense local effects of constructing and running a project, to a term requiring an expansion of focus to the global effects of using a project's products or services. The informational and computational demands this globalised idea of planning places upon the decision-maker are huge, and *Finch* was, with respect, wrong to find it plausible to think that the existing planning regime could have placed this burden on a local authority. *Finch* follows from Lord Leggatt thinking it wrong of planning law to have taken this line in the first place.<sup>31</sup> One might question the Supreme Court believing it can change planning law in a way which only the legislature could possibly be competent to do. But a telling response to this is to say that *Finch* has merely developed the potential of the legislative creation of the climate constitution. Making

<sup>29</sup> *Ibid*, [30], [118].

<sup>30</sup> *Ibid*, [79].

<sup>31</sup> *Finch*, [28].

the courts ultimately responsible for net zero is exactly what was intended by enshrining it, and the government which has not defended a range of nationally important projects does not previously seem to have regretted this. But the inherent contradictions have now reached a critical point.

Despite understandable attempts to hold the line,<sup>32</sup> taking downstream emissions into account cannot be confined to a *Wednesbury* exercise. As the specific numerical target of net zero has been set, procedurally rational government action must not quantitatively, ie substantively, move away from the target. What should a court do if it was proven that a government had taken downstream emissions into account when granting a consent, but was allowing economic growth in a way inconsistent with net zero? Government will, of course, never frankly acknowledge such inconsistency, but one can see no limit to challenges to denials, however phrased and rephrased, of the undeniable *prima facie* inconsistency between the increases in emissions caused by major projects and progress towards net zero. The current writer deplores the use being made of the Administrative Court, but would insist that correctly framed challenges of this sort can be brought under the climate constitution after *Finch*.

#### **D. SOMETHING WILL HAVE TO BE DONE**

The senior courts have made the very large climate change litigation possible by reducing standing to a nullity. The UK government has made some of that litigation arguable by legally enshrining net zero, and has subsidised much of that litigation pursuant to the Aarhus Convention. Against this background, *Finch* being decided whilst *Jackdaw* and *Rosebank*

<sup>32</sup> Eg *R (Andrew Boswell) v Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 669, [95]-[96].

were still at a stage when it was legally competent for the Outer House to order their suspension has led to North Sea oil now threatening a crisis of the UK polity.

The current Government deciding, after *Finch*, not to defend a number of challenges to coal and oil projects creates a very difficult position. For previously government had “actively encouraged” the North Sea developments now not defended,<sup>33</sup> and the current Government, which has committed to these developments in the most public way,<sup>34</sup> is now actively encouraging the investors to invest again, including by, after consultation with industry, revising its guidance about making license applications so as to take *Finch* into account. No investor can doubt that if consents are granted, they will be challenged, and, after *Finch*, can an investor have confidence the consents will survive? In the light of Lord Ericht telling Equinor, Ithaca, and Shell that the encouragement of government and a favourable decision of the Inner House, leave to appeal which had been refused, gave them no certainty, how sensible would it be for investors to proceed?

If Jackdaw and Rosebank (and other projects) are to proceed, something will have to be done about *Finch*. But what? *Finch* is the law of enshrined net zero. Should consents be granted after a reverse ferret, they certainly will be repeatedly challenged, and the constitutional pressure built up caused by enshrining political issues will seek release.

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<sup>33</sup> Ibid, [22].

<sup>34</sup> A Walker, “Licenses to Drill Get Reeves’ Approval” (23 March 2025) The Sun on Sunday 6.