Neutral Citation Number: [2019] EWCA Civ 1562

Case No: C1/2018/2332

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH ADMINISTRATIVE COURT
SIR ROSS CRANSTON
[2018] EWHC 2190 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 September 2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE SINGH
and
THE RT HON LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

THE QUEEN on the application of THOMAS LANGTON — **Appellant**
- and -
(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) NATURAL ENGLAND — **Respondents**

- -
- -

Richard Turney and Ben Fullbrook (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Hanif Mussa (instructed by **Government Legal Department**) for the **First Respondent**
Paul Luckhurst and Gayatri Sarathy (instructed by **Natural England**) for the **Second Respondent**

Hearing date: 2 July 2019

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JUDGMENT

The Lord Chief Justice, Lord Justice Singh and Lady Justice Nicola Davies:

1. In proceedings for judicial review the appellant challenged the decision of the Secretary of State dated 19 July 2017 ("the Decision") to publish "Guidance to Natural England: Licences to kill or take badgers for the purposes of preventing the spread of bovine TB ("bTB") under section 10(2)(a) of the Protection of Badgers Act 1992" insofar as it addressed "supplementary" culling ("the Guidance"). By an order dated 15 August 2018 Sir Ross Cranston, sitting as a Deputy High Court Judge, dismissed the claim.

2. The appellant is a scientist and ecological consultant experienced in wild animal and rural land management, including wildlife disease studies. He is a member of the Badger Trust and a Fellow of the Royal Society of Biology. The Secretary of State may issue guidance to Natural England relevant to the exercise of its function of granting licences pursuant to the policy to permit the licensed culling of badgers. Natural England, a statutory corporation, is the Government's advisor for the natural environment in England. It must have regard to that guidance although it is not obliged to follow it. It can impose conditions on licences to protect wildlife, for example, to prohibit shooting in specific areas during the bird breeding season.

3. The Guidance was published by the Secretary of State pursuant to section 15 of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"). It is given in relation to the exercise by Natural England of powers to grant licences to kill or take badgers pursuant to section 10(2)(a) of the Protection of Badgers Act 1992 ("the 1992 Act"). The grant of such licences forms an important part of the measures adopted for the purpose of preventing the spread of bTB in England. The Guidance contains provision, in particular, relating to the grant by Natural England of supplementary badger disease control licences in relation to areas where an effective "intensive" cull has already been carried out as a result of pro-active culling over a period of at least four consecutive years, with a view to maintaining or retaining disease control benefits achieved by the earlier cull. In this way it is intended to further the purpose of preventing the spread of bTB.

The Grounds of Appeal

4. The appellant sought permission to appeal the order of Sir Ross Cranston on three grounds. Ground 1 was based upon "unlawful consultation":

> "The Judge erred in law in finding that the First Respondent's consultation process on the adoption of the Supplementary Culling Policy was lawful; …

> (c) The judge erred in finding that the consultation was lawful notwithstanding the failure of the First Respondent to consider himself the consultation responses from the Claimant, the Badger Trust, and the Zoological Society of London."

Ground 2: *ultra vires*:

> "The Judge erred in finding that the Supplementary Culling guidance was lawful. The Judge erred in finding that the question of whether the guidance was lawful turned on the First Respondent's subjective view as to whether the proposal would prevent the spread of disease." (emphasis added by the appellant)

Ground 3: breach of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"):

> "The Judge erred in finding that there was no breach of the Habitats Regulations and/or in finding that any such breach should not give rise to relief …
>
> (d) The Judge wrongly found that the licence conditions were not mitigation measures and in finding that they could properly be taken into account in the 'screening' decisions."

5. Permission to appeal was granted by Leggatt LJ but limited to grounds 2 and 3(d). In providing reasons for refusal Leggatt LJ stated:

> "1. In relation to ground 1, there is no dispute about the legal requirements for a valid consultation and the judge was best placed to assess whether on the facts the consultation in this case satisfied those requirements. I see no real prospect that the Court of Appeal would interfere with the judge's findings, including his findings that there was in fact sufficient consultation on whether there should be supplementary culling, that the consultation document, considered as a whole, was not misleading, and that the only matter among those relied on by the appellant which it was mandatory for the Secretary of State to take into account was that supplementary culling was untested – which he knew."

6. The appellant sought to argue within Ground 2 that the Decision to give the Guidance was unlawful because the Secretary of State failed to have regard to a mandatory relevant consideration raised in a consultation response submitted by the Zoological Society of London ("the Zoological Society"), namely that in the earlier randomised trial "the greatest reductions in cattle TB were observed after the culling ended". The appellant did not have permission to argue this

point. His application to rely on this submission was opposed by the first respondent and refused by the court. Leggatt LJ's refusal on Ground 1 had identified the only so-called mandatory consideration relied upon by the appellant of relevance. He expressly refused the appellant permission to pursue any argument relating to the consultation response of the Zoological Society. It was not appropriate to try to reintroduce an argument in respect of which permission had been refused and no application to renew made.

Background

7. Bovine TB is a serious animal health problem in England and requires infected cattle to be destroyed at considerable cost. Badger culling is a controversial means of preventing the spread of bTB. Badgers can act as a wildlife reservoir for bTB which they transmit to cattle. The Badgers Act 1971 and the 1992 Act were introduced to combat the widespread persecution of badgers in England. However, the role played by badgers in the spread of bTB resulted in a provision in both Acts for the grant of licences for the killing of badgers for the purpose of preventing the spread of the disease.

8. Much of the scientific analysis relating to the culling of badgers is based on the results of the Randomised Badger Culling Trial ("the RBCT") carried out between 1998 and 2007. The RBCT sought to identify the effects of annual proactive culling and reactive culling but not supplementary culling. The results of the RBCT were published in 2007 in a report of the Independent Scientific Group on Cattle TB. It concluded that although badgers contributed to significant bTB in some parts of the country, no practical method of badger culling could reduce its incidence to any meaningful extent and several culling approaches might make matters worse. Inside proactive cull areas there was an estimated 23% reduction in cattle TB incidents during the lifetime of the trial. However, in the two-kilometre ring outside proactive areas there was a 25% increase, badger numbers were only slightly depleted yet ranging behaviour increased. The report hypothesised that the reason for the increase in bTB incidents in the two-kilometre ring was that both infected and uninfected badgers disturbed by culling began to range more widely, thereby coming into contact with infected and uninfected badgers both within the cull boundaries and the surrounding area and increasing the disease burden. This is known as a perturbation effect.

9. The authors of the RBCT research concluded that badger culling could only be successful if carried out in accordance with strict minimum criteria. Subsequent analysis of the results found that once culling was halted the beneficial effects were greatest immediately after it ended but declined over time and were no longer detectable four years after the last annual cull.

10. In April 2011 a meeting involving the Government's chief veterinary officer, the chief scientific advisor to the Department for Environment, Food and Rural Affairs ("Defra"), an Expert Group of various scientific experts, recorded that the RBCT provided the best scientific evidence from which to predict the effects of future culling policy. If culling was not conducted in a coordinated, sustained and simultaneous manner, according to minimum criteria, this would result in a smaller benefit or even a detrimental effect on confirmed cattle bTB incidents.

11. At [17] to [19] of the judgment the judge set out the badger culling policy published in July 2011:

> "***The Badger culling policy***
>
> 17. The new government published its policy, Bovine TB Eradication Programme for England, in July 2011. Cattle measures and good biosecurity alone would not be enough, it said, and unless the transmission of TB from badgers to cattle was reduced bTB would never be eradicated. The government was therefore committed to introducing a carefully managed and science-led policy of badger control. The RBCT was clear that culling badgers could reduce the incidence of TB in cattle, although if not done properly culling could make matters worse. The document proposed a package of measures, including a proposal to pilot the controlled shooting of badgers in areas with a high incidence of bTB.
>
> 18. There then followed in December 2011 publication of The Government's policy on Bovine TB and badger control in England. That document reviewed the findings of the RBCT and analysis of what had happened at its end. The RBCT demonstrated, it said, that the benefits of culling in the RBCT persisted far beyond the culling period, with the negative effects disappearing within 12-18 months after culling stopped. Thus among the measures proposed was the licensing of annual pilot culls over a six week period for four years to test the effectiveness of culling in respect of animal welfare (humaneness of killing methods) while reducing bTB. Culling would need to remove 70% of the badger population in the first of the four years of a licence.
>
> 19. To implement the policy, the Secretary of State issued guidance to Natural England in 2011 as to licences to take and kill badgers in identified areas, using controlled shooting, cage trapping and shooting in an annual cull in each year over a four-year period (or for such period as it might specify)."

12. In 2012, in accordance with the 2011 Guidance, Natural England granted licences to cull badgers in two initial areas, Gloucestershire and Somerset. Culling commenced in the following year and continued thereafter with a view to completing four consecutive years.

13. Analysis of the results from the post-RBCT period to March 2013 demonstrated that following the completion of an intensive cull, the disease control benefits achieved would likely diminish over time, being eliminated after 7.5 years.

14. In April 2014 Defra published "The Strategy for Achieving Officially Bovine Tuberculosis Free Status for England". Badger culling was included in the Strategy. Pilot culls were to continue for the remainder of the four-year licence period and the Secretary of State would consider the possibility of extending culling to additional areas in the future. The Strategy noted that policy development in this area would have to be "adaptive" because of the limited expected availability of direct evidence at the time decisions would need to be made on new interventions.

Policy of Supplementary Culling

15. Between May 2015 and December 2016 Defra conducted a review of its approach to licensing the culling of badgers which included how strategy should be developed in areas where an intensive cull had been implemented. By 2016 the culls conducted in Gloucestershire and Somerset would be into their fourth year and there was a need to consider how the expected disease control benefits achieved by those culls could be maintained. The review was an extensive exercise, involving detailed consideration of the existing evidence and input from the chief veterinary officer and Defra's chief scientific advisor, experts at the Animal and Plant Health Agency, Defra and others.

16. Following the review, a recommendation was made to the Secretary of State, subject to consultation, to give guidance to license supplementary culling. The basis upon which the recommendation was made included the following (as set out in the first respondent's skeleton argument):

> "(1) The conclusion of a successful intensive cull lasting at least four years was predicted to significantly reduce the badger population with the result that there would be a reduction in cattle TB incidents within the cull area to persist for at least 7.5 years following the last cull. … However the benefit declined over time and would return gradually to pre-cull levels…
>
> (2) It was recommended that with a view to preserving those benefits, licencing supplementary badger control was preferable to an alternative policy of taking no further badger control

> measures until oral bait badger vaccine was ready, which was not expected for many years and during which time ground would be lost in combatting bovine TB…
>
> (3) The [chief veterinary officer and chief scientific officer] had advised that there was a clear disease control rationale in keeping the badger population at the level achieved at the end of an effective intensive cull and that an appropriate form of ongoing licence population control would be beneficial in this area…
>
> (4) As to that rationale it was noted that:
>
> > (i) There was international evidence that supported long-term wildlife culling to control a TB wildlife reservoir but there was limited direct evidence from England about the effect of ongoing badger removal after several annual intensive culls and the approach had not been used before.
> >
> > (ii) Despite the lack of direct data from England, maintaining the badger population at the level achieved by an intensive control operation was considered to be a defensible, logical disease control approach, as it would maintain the reduced rate of infection achieved in the badger population and would reduce the potential for infectious contacts between badgers and cattle.
>
> (5) The Secretary of State was informed of the risk of perturbation effects that may arise particularly if the badger population was allowed to recover after an intensive cull and before commencing supplementary culling…
>
> (6) The Secretary of State was informed that the proposed approach was untested and that individual licensing decisions would have to be made by Natural England on the basis of good evidence and subject to an evaluation of its effectiveness…"

17. The Secretary of State accepted the recommendation and decided to consult on the proposal to license supplementary culling in areas where an effective intensive cull had already been carried out.

<u>The 2016 Consultation</u>

18. In December 2016 Defra published its consultation. At [53], the judge identified the proposal for a supplementary form of licensed badger culling as being addressed in section 4 of the consultation. He referred to a number of points made in that section, which included:

> "(i) The Secretary of State would decide to amend the guidance in the way proposed, as informed by the scientific and veterinary evidence available, experience from the badger control operations to date, and responses to the consultation …
>
> (ii) The aim of a supplementary cull 'is to prolong the disease control benefits from a completed licensed cull', which 'would be achieved by keeping the badger population at, or below, a level consistent with that achieved by the end of that cull' …
>
> …
>
> (iv) Applications for a supplementary culling licence would only be considered if the prior cull was judged effective in achieving a population reduction likely to reduce disease transmission to cattle …
>
> (v) Since the statutory purpose of a licence was to prevent the spread of disease, Natural England would take appropriate steps to evaluate the effectiveness of the licensed activity in terms of such things as numbers achieved and effort deployed …
>
> (vi) The onus would be on applicants to demonstrate to Natural England how they would plan and deliver effective supplementary badger control …
>
> (vii) A licence would be granted for five years, if Natural England was satisfied that the annual operation was effective in maintaining a reduced level of badger population, but there would be ongoing monitoring of the badger population for this purpose and to prevent local extinction, and a licence could be revoked at the annual evaluation or at any other time on reasonable grounds …
>
> (viii) Supplementary badger control had to start in the year following the conclusion of a prior cull, since allowing the badger population to recover and then undertaking control risked causing a perturbation effect and undermining the disease control benefits achieved …."

19. In his response to the consultation the appellant stated that he was opposed in principle to supplementary culling for reasons which included the fact that it would not result in disease control benefits. He expressed concern at the misleading way data were presented in the consultation document and that the document did not explain the significant departure from the guiding methodology in the RBCT. Culling badgers after a four to five-year period of

intensive culling was said effectively to create an indiscriminate general licence to cull for such areas based on unevidenced disease control benefit. There was no evidence to support the proposed supplementary cull.

20. At [58] to [61] of his judgment the judge identified the detail of other responses which included the Zoological Society and the Badger Trust, both of whom stated that there was no evidence to support the proposal of supplementary culling.

21. Following receipt of the responses a submission was made by Defra to ministers in June 2017, referred to at [63] of the judgment:

> "… 'These supplementary culls maintain disease control benefits in an area after completion of the four-year "intensive culls".' Based on evidence-led advice from the chief veterinary officer and chief scientific adviser, a consultation had been conducted. The submission stated that in the absence of deployable non-lethal methods of badger control, and without supplementary culling, the benefits of intensive culling would cease after about seven years. It explained that the majority of consultation responses opposed culling in principle, and that those that addressed the specific consultation questions did not provide evidence to change the proposal on which consultation had been undertaken."

22. On 3 July 2017 the Secretary of State agreed to the recommendation that supplementary badger culling be introduced. On 19 July 2017 the Secretary of State published the Guidance.

23. The Guidance specifies the criteria that should be met before a supplementary badger disease control licence may be granted by Natural England. Supplementary culling can only be licensed in an area where an intensive cull has already been carried out. The supplementary culling must commence in the year following completion of the effective intensive cull in order to prevent the badger population recovering and thereby minimising the risk of perturbation effects. Applicants must satisfy Natural England that they can deliver an effective supplementary cull. Natural England should determine the maximum number of badgers to be removed with a view to ensuring the survival of the population. Supplementary badger disease control licences are to have a maximum initial duration of five years, however a licence may be revoked "following a progress evaluation or on reasonable grounds".

24. At [69] to [73] the judge summarised the evidence provided to the court by the Secretary of State in respect of supplementary culling of badgers which included the evidence of Defra's chief scientific advisor who said that:

> "… the supplementary culling of badgers represented a coherent and logical progression of the current badger control policy. … Defra wanted to avoid the pattern observed in the RBCT where the benefits from culling in terms of the occurrence of disease in cattle were maximised in the years immediately after culling ended, but then began to decline, eventually returning close to pre-culled levels of disease in the 7.5 years after the RBCT ended. That effect almost certainly happened because of the recovery of the badger population."

Defra's approach needed:

> "… to be driven by data, as there is uncertainty about the effect of intensive culling. … data should be collected on the disease in both badgers and cattle in cull areas, and the ongoing analysis of the epidemiology in the cull zones relative to unculled areas would inform the development of policy. It was … important for Defra to avoid being in a position where it could not move forward with a new, or modified, policy unless it had carried out an experiment beforehand."

The chief scientific advisor noted the results of previous reports and trials but stated that:

> "Much had happened since then and Defra and those carrying out the culls were much more experienced than at the time of the RBCT."

25. Reference was also made to the evidence of the chief veterinary officer as follows:

> "72. In his witness statement for the hearing, the UK's chief veterinary officer 2008-2018, Mr Gibbens, accepts that in the RBCT there was no net benefit of culling when the results in the culling area and perturbation ring were taken together. Jenkins 2010 and the SE 3279 report showed that the overall net benefit of culling only emerged after culling had finished. He states that when his initial views on supplementary culling were sought in September 2015, there was no reason not to rely on the long-term results from the RBCT in the SE3279 report, which also showed a gradual reduction in the benefits of culling. In that discussion, his view was that once the badger population reduction target was achieved, there were theoretical options. At that point the imperative to address the risk of the perturbation effect was reduced or removed since the potential for transmission was

significantly reduced. That opened up the option of maintenance culling, combined with monitoring of the badger population to show that it remained low.

73. Mr Gibbens states that he also considered vaccination as an option, as well as a 'do nothing' approach. It was suboptimal: while the disease control benefits of intensive culling were expected to last for a period, eventually the benefits would evaporate, so that another intensive cull would be necessary, the start of a cycle of intensive culls. There was no data on supplementary culling, but it 'is a logical option which is biologically plausible and which will, in my opinion, maintain the benefits from the first four-year cull.'"

Licensing decisions made pursuant to the Guidance.

26. In August 2017 Natural England granted two supplementary badger disease control licences in respect of Area 1 in Gloucestershire and Area 2 in Somerset ("the licences"). Under the licences the continuation of culling has to be re-authorised each year by Natural England and there is an annual assessment of the effectiveness of the supplementary culling undertaken.

27. Supplementary culling commenced in the autumn of 2017 pursuant to the licences and continued in 2018. The Guidance has been relied upon and the policy of licensing supplementary culling already implemented in areas that have completed successful intensive culls. Further licences have been issued.

28. The issuing of licences for culling is a plan or project for the purposes of Regulation 61 of the Habitats Regulations. A number of licensed cull areas contain or are close to European Sites protected under this legislation. Culling presents a risk of harm to these sites, and particularly those designated for ornithological interest, arising from (a) disturbance caused by shooting and other activity associated with culling and (b) an increased risk of predation from foxes. The rationale is that the fox population increases as the badger population falls.

The Judge's Findings

29. At [110] the judge criticised the consultation document but concluded that there was sufficient information overall to satisfy the Secretary of State's consultation duty. In addition to the text of the document readers could access through the internet a variety of reports identified in the footnotes. The document "fell short in suggesting" that supplementary culling was *necessary* but it set out the rationale for supplementary culling, namely that, based on the RBCT, the

disease control benefits achieved by a period of intensive culling were expected to decline to nothing over time.

30. In the following paragraphs the judge set out his findings as to the validity of the consultation process:

> "111. The purpose of supplementary culling was to try to preserve or extend the disease control benefit. It was not inappropriate to refer to the chief veterinary officer's view on this at paragraph 2.2, when we have seen that both he and Defra's chief scientific adviser supported supplementary culling. Any overstatement in paragraphs 3.2 is counteracted by the more qualified language of paragraph 3.3, and the warning in paragraph 3.10 that there was no evidence yet available on the effects of the longer-term control of badgers in Gloucestershire and Somerset.
>
> 112. It is not surprising that there was an absence of information from the intensive culls, given that they were only coming to an end. In fact it was not until 2017 that the Brunton study of their first two years (2013-2015) of intensive culling was published. Moreover, it is not immediately clear to me what difference the provision of information on the disease control benefits achieved by these two culls could have made to a consultation on a different policy of supplementary culling.
>
> …
>
> 115. As to how the Secretary of State addressed the consultation responses, for unlawfulness the claimant must establish that a matter was such that no reasonable decision-maker would have failed in the circumstances to take it into account as a relevant consideration: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, [60]-[63], per Sedley LJ; *R (Khatib) v Secretary of State for Justice* [2015] EWHC 606 (Admin), [49]-[53], per Elias LJ. In my view none of the matters the claimant raises fall into that category.
>
> 116. The starting point is paragraph 2.3 of the Summary of responses, which albeit broadly deals with the points the claimant now raises. Then there is the evidence of the senior Defra official, Mr Ross, quoted earlier, that the responses received to the consultation, including ZSL's and those like the claimant's opposed to supplementary culling, were considered by officials within Defra and factored in prior to the final

decision, even when not mentioned in the summary of responses. Mr Ross also explains that responses were referred to the TB experts within Defra if they canvassed scientific points.

117. Further, as outlined earlier in the judgment, the points raised by those such as the claimant and [the Zoological Society] had been considered over the years prior to the consultation and in some cases rejected in favour of supplementary culling, which was seen as a logical extension of the existing policy. As the decision-maker in June 2017, the Secretary of State had already been provided with the draft consultation document and guidance at the time of the December 2016 submission. With the June 2017 submission was the draft summary of responses as well. The fact was that the Secretary of State knew that supplementary culling was untested - the main thrust of [the Zoological Society's] response and a point made in paragraph 3.10 of the consultation document. None of the other matters raised by the claimant were mandatory factors which a rational decision-maker was bound to take into account.

Protection of Badgers Act, section 10

118. Under this head Mr Turney submitted that the licence-granting power under section 10(2)(a) of the Protection of Badgers Act had to be read in its statutory context, which was an Act whose goal was to stop the widespread persecution of badgers. It was a derogation from the general protection afforded. Moreover, the section did not confer a broad discretion on the licensing authority, since licences had to be 'for the purpose of preventing the spread of disease'. That meant that there had to be an evidence base for granting a licence to demonstrate that it would serve the statutory purpose of preventing the spread of disease. Mr Turney cited authorities such as *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5; [2003] 2 AC 430, [7], per Lord Bingham, [99], per Lord Millett; *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142; [2004] ICR 1364, [93], per Carnwath LJ; and *R (on the application of Badger Trust) v Welsh Ministers* [2010] EWCA Civ 807, [57]-[58], per Pill LJ, [77], [87], Smith LJ ('[h]unch and anecdote would obviously not be sufficient; nor would impermissible extrapolation').

119. In this regard Mr Turney also relied on the *Tameside* line of cases, that the Secretary of State as the decision maker was required to take reasonable steps to acquaint himself with the

relevant information to enable him to make his decision correctly (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014).

120. In Mr Turney's submission, the Secretary of State's case that supplementary culling followed logically or rationally from what had gone before it was not enough to engage the section. There needed to be some objective evidence capable of sustaining the Secretary of State's decision. The Secretary of State had lost sight of the point from the RBCT that the greatest reduction in bTB occurred immediately after culling ceased. Albeit that the benefits of culling would diminish over time, Mr Turney continued, that did not support, either as a matter of epidemiology or logic that prolonging culling at a lower intensity would lengthen the benefits of intensive culling. In April 2015 [the Animal and Plant Health Agency] made clear that supplementary culling was not supported by the evidence, that the international evidence was unreliable, and that there was support in the evidence for a "do nothing" policy following intensive culling. Quite apart from such matters being left out of account, Mr Turney submitted, there was no proper evidential basis for concluding, as required by section 10, that supplementary culling would prevent the spread of disease. As the [Zoological Society] had observed in its submission to the consultation, supplementary culling might undermine the benefit derived from stopping culling and make matters worse.

121. In *R (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1904 (Admin), Ouseley J held that the words of section 10(2)(a) did not have a technical or specialist scientific character, and that the Secretary of State had acted lawfully when her purpose subjectively, and judged by its intended effect, was to prevent the spread of disease [35], [43]. Mr Turney attempted to distinguish the case: Ouseley J's consideration of section 10(2)(a) had been in the context of an argument that the power could only be exercised for the purpose of preventing the spread of disease and, it was said, the Secretary of State intended to act for a different purpose of preventing the transmission of disease and reducing its incidence. Despite the particular context in which Ouseley J had to construe the section, I am bound by his interpretation unless I think it wrong. There is no basis to think that it is; there is nothing in the legislation to suggest that Parliament's words have other than their natural meaning.

122. In this case the purpose of the Secretary of State's policy of supplementary culling, stated in his Summary of responses to the consultation at paragraph 3.2, quoted earlier, was that it would 'prolong the expected disease control benefits' of the intensive culling. That disease control purpose was expressly stated in the December 2016 consultation document (see in particular paragraph 4.2), is evident in the internal discussions within government before its publication, and is confirmed in the witness statements before the court of Professor Boyd, Defra's chief scientific adviser, and Mr Gibbens, the government's chief veterinary officer. Whatever [the Animal and Plant Health Agency] might have thought of supplementary culling in April 2015, by the time of the June 2016 meeting of Defra's TB Strategy Implementation Group, APHA's chief executive officer was in support.

123. Thus the Secretary of State acted for the proper purpose for which the legislative power in section 10(2)(a) was conferred. In the words of Ouseley J in approving the policy on supplementary culling, and guidance to Natural England, his actions subjectively, and judged by their intended effect, were to prevent the spread of bTB. Despite the views its officials had expressed the previous year, [the Animal and Plant health Agency] was formally in support. Importantly, both Defra's chief scientific adviser and the government's chief veterinary officer considered that supplementary culling had a logical and defensible rationale, which was to maintain the reduced weight of infection achieved in the badger population at the end of an intensive cull. There was evidence that it was immediately following intensive culling that its benefits were greatest, but there was also evidence that its disease control benefits declined over time.

124. The issue thus becomes whether in acting in this way under his statutory power the Secretary of State's actions were otherwise flawed in public law terms. In my view it cannot be said that he acted irrationally in a public law sense, that he failed to take relevant factors into account, or that he took into account irrelevant factors. The scarcity of evidence about supplementary culling was acknowledged in the December 2016 ministerial submission and made clear in the consultation document. When the international evidence was put to the Secretary of State, it was that it supported the longer term control of a TB wildlife reservoir, not that it was evidence supporting supplementary culling. The same applied to its summary in the 2016

> Consultation document. As I have said, both the Secretary of State's chief scientific adviser and the government's chief veterinary officer were in support. Against this background a policy of maintaining a reduced badger population through supplementary culling cannot be said to be irrational when coupled with the commitment to change tack as evidence became available.
>
> 125. As to the so-called *Tameside* duty, that takes its colour from the statutory context. If the logic of the statute does not compel certain considerations to be taken into account, it is for the Secretary of State to make the primary judgment as to what should be considered in the particular circumstances, with the court exercising a secondary judgment where a matter is so obviously material that it would be irrational to ignore it: *R (on the application of DSD, NBV, Mayor of London, News Group Newspapers Ltd) v Parole Board of England and Wales* [2018] EWHC 694 (Admin), [141], per Sir Brian Leveson PQBD, Jay and Garnham JJ. Even if the point about benefits being greater after the end of an intensive cull was not put to the Secretary of State, I am not persuaded that this was a relevant consideration against the background of the other matters or that, for the reasons given in the previous paragraph, it was irrational for it not to be taken into account."

Legal Framework

The Protection of Badgers Act 1992

31. The 1992 Act prescribes offences in relation to various forms of unauthorised interference with badgers. For present purposes, a person is guilty of an offence pursuant to:

    i) Sections 1(1), 3, and 4 respectively if, "except as permitted by or under this Act" he "wilfully kills, injures or takes, or attempts to kill, injure or take a badger", "interferes with a badger sett" by committing one or more of a list of specified acts, or "has a live badger in his possession or under his control"; and

    ii) Section 5 if, "except as authorised by a licence under section 10 below, he marks or attaches any ring, tag or other marking device to a badger other than one which is lawfully in his possession by virtue of such a licence".

32. Section 10 provides:

> "(1) A licence may be granted to any person by the appropriate conservation body authorising him, notwithstanding anything in the foregoing provisions of this Act, but subject to compliance with any conditions specified in the licence—
>
> (a) for scientific or educational purposes or for the conservation of badgers—
>
> (i) to kill or take, within an area specified in the licence by any means so specified, or to sell, or to have in his possession, any number of badgers so specified; …
>
> …
>
> (2) A licence may be granted to any person by the appropriate Minister authorising him, notwithstanding anything in the foregoing provisions of this Act, but subject to compliance with any conditions specified in the licence –
>
> (a) for the purpose of preventing the spread of disease, to kill or take badgers, or to interfere with a badger sett within an area specified in the licence by any means so specified …"

33. The power to grant such a licence is vested in "the appropriate Minister", defined in relation to England as the Secretary of State (section 10(5)(a)). The Secretary of State has the power pursuant to section 78 of the 2006 Act to enter into an agreement with Natural England to authorise it to perform the function of granting licences pursuant to section 10(2)(a) of the1992 Act.

Natural Environment and Rural Communities Act 2006

34. Section 15 provides:

> "(1) The Secretary of State must give Natural England guidance as to the exercise of any functions of Natural England that relate to or affect regional planning and associated matters.
>
> (2) The Secretary of State may give Natural England guidance as to the exercise of its other functions.
>
> …
>
> (4) The Secretary of State must publish any guidance given under this section as soon as is reasonably practicable after giving the guidance.
>
> …

> (6) In discharging its functions, Natural England must have regard to guidance given under this section."

Ground 2

The Appellant's Case

35. Section 10 of the 1992 Act permits authorised derogation from its provisions only for the purpose of the prevention of the spreading of disease. The judge concluded that section 10(2)(a) is met where the Secretary of State's "purpose subjectively, and judged by its intended effect, was to prevent the spread of disease". The appellant contends that this treats the question solely as one of improper purpose: in other words, a decision to authorise or support culling through guidance to Natural England pursuant to section 10(2)(a) could only be rendered unlawful if the Secretary of State's true purpose were not to prevent the spread of disease.

36. Further, the appellant contends that Parliament requires more than a subjective intention. As to what is meant by "subjective" the appellant posed this question: is there an evidential basis for the conclusion that supplementary culling would serve the purpose of preventing disease and is there proper consideration of the evidence for and against the issue as to whether it would prevent the spread of disease in a meaningful and measured way?

37. The appellant accepts that the Secretary of State's express purpose was to prevent the spread of disease but submits the Guidance was *ultra vires* section 10(2)(a) for other reasons, in particular because there was no objective or scientific evidence to support the policy of supplementary culling, only opinion.

38. The judge identified the fact that there was a scarcity of evidence. Supplementary culling is not supported by the RBCT which concluded that no practicable method of badger culling could reduce its incidence to any meaningful extent and several culling approaches might make matters worse. A Defra report in 2013 analysing results from the post-RBCT period concluded that the benefit of proactive culling continued for up to 7.5 years after the final culls, gradually reducing over that time. The chief veterinary officer accepted that in the RBCT there was no net benefit of culling when the results in the culling area and perturbation ring were taken together. A 2010 report (Jenkins) concluded that the overall net benefit of culling only emerged after the culling had finished.

39. It is the appellant's case that the process of assessing the efficacy of supplementary culling was "unevidenced". The scientific judgment was that it might work, it recommended an adaptive process to see if it did. Scientific

experiments can be legitimate, however this is not experimentation, it is a policy to cull on a large scale which will continue until the disease is under control.

40. Further, the appellant contends that the approach of the judge was inconsistent with that of the Court of Appeal in *Badger Trust v Welsh Ministers* [2010] EWCA Civ 807. The Court of Appeal considered the lawfulness of an order made by the Welsh Government pursuant to section 21(2) of the Animal Health Act 1981. The relevant order authorised destruction of badgers throughout the whole of Wales including in areas where there was no bTB. The evidence before the decision-maker only set out a justification for culling in an area of north Pembrokeshire where bTB was a particular problem. Prior to judgment being handed down the Welsh Ministers accepted that the relevant order was unlawful and that the appeal should be allowed because the order applied to areas where it could not be justified.

41. At [77] Smith LJ, having set out the issues before the court and the background to the appellate hearing, said:

> "I do not think that it is disputed that the section 21 consideration of whether the destruction of members of a wild species is necessary to eliminate or reduce the incidence of a disease in animals must be based on scientific evidence. Hunch and anecdote would obviously not be sufficient; nor would impermissible extrapolation. In the present case, the scientific evidence put before the Minister was derived very largely from the randomised badger culling trial (RBCT) which had been reported by Jenkins et al in the International Journal of Infectious Diseases in 2008."

42. The appellant accepts that the court was considering a different statutory provision but submits that the issue was the prevention of the spread of disease. Reliance is placed upon the words of Smith LJ for the need for scientific evidence rather than impermissible extrapolation. It is the appellant's case that scientific evidence means "scientifically proven" not that an experiment has shown some benefit.

The Respondent's Case

43. The Guidance could only be given consistently with the purposes for which licences could be granted by Natural England under section 10(2)(a). Natural England could not be authorised or encouraged to grant licences to cull for some other purpose. In ascertaining whether the Guidance was lawfully given two issues arose:

i) Whether the Secretary of State's purpose in giving the Guidance, judged by the intended effect of licensing in accordance with the Guidance, was to prevent the spread of disease;

ii) Whether the Secretary of State was rationally entitled to take the view that the licensing by Natural England of supplementary culling in accordance with the Guidance would serve to further the purpose of preventing the spread of disease.

44. The judge did not find that the Guidance could only be rendered unlawful if the Secretary of State's true purpose was other than to prevent the spread of disease. He expressly held that it was also necessary to consider whether the decision to give the Guidance was unlawful as a result of other public law error. The judge considered whether the Secretary of State was rationally entitled to give the Guidance and concluded that he was so entitled.

45. Further, the suggestion that the Guidance was *ultra vires* section 10(2)(a) of the 1992 Act due to an absence of evidence is incorrect. The judge was entitled to conclude that the Secretary of State was rationally entitled to issue the Guidance for the reasons the judge gave and also because the nature and extent of the evidence required to sustain the decision as rational depends on the context of the decision. The Secretary of State identified the following matters as informing context:

i) It had already been recognised that the epidemiology of bTB was uncertain;

ii) The disease control benefits achieved at the conclusion of an intensive cull were known to decline over time with elimination over a period of 7.5 years. If no further action were taken in areas that had undergone an intensive cull bTB was bound to spread again. The objective sought to be achieved was to preserve or maintain disease control benefits obtained at the conclusion of an intensive cull;

iii) No viable alternative option to supplementary culling had been identified for maintaining or preserving disease control benefits. The choice was either between trying supplementary culling or doing nothing;

iv) Given that intensive culls undertaken in Areas 1 and 2 would conclude by 2017 the decision on what happened next could not be postponed;

v) Direct evidence on the effects of supplementary culling could not in any event be obtained without undertaking supplementary culling in an area that had already completed an intensive cull. The absence of direct

evidence on the effects of supplementary culling was not a sufficient reason for declining to license it;

vi) If the licensing of supplementary culling were permitted its effects would be continually monitored.

In this context there was sufficient evidence to justify the Guidance.

46. A number of subject matter experts had taken the view that there was at least a logical and defensible rationale for the licensing of supplementary culling and had specifically recommended that it should be licensed. Their views were elicited following a review lasting many months and were based on their interpretation of the RBCT results and inferences they drew from scientific analysis.

47. The Secretary of State was at least rationally entitled to conclude that the giving of the Guidance and the subsequent licensing by Natural England would serve to further the purpose of preventing the spread of bTB.

48. Section 10 of the 1992 Act did not require the Secretary of State to possess evidence in the form of a specific scientific study testing the effects of supplementary culling or equivalent evidence. The language of section 10(2)(a) does not impose any enhanced test in relation to the type of evidence upon which a decision to give guidance must be based. Licences may be granted "for the purpose of preventing the spread of disease". Parliament has not specified any additional requirement touching the nature and quality of the evidence upon which licensing decisions are to be made.

49. The reliance upon the authority of the *Welsh Ministers* is misconceived. It considered a different and more intrusive statutory provision. The words of Smith LJ do not apply to the facts of this case.

<u>Ground 3(d): Breach of the Habitats Regulations through reliance on mitigation measures at screening stage</u>

50. As part of the licensing process Natural England must be satisfied that the licence it is granting will not adversely affect species associated with "European Sites" located in and around cull areas. These include special protection areas and special areas of conservation.

51. Regulation 61 of the Habitats Regulations (implementing article 6(3) of Council Directive 92/43/EEC) requires a two-stage assessment. The first stage involves a screening exercise: the Competent Authority must ask itself whether the project is likely to have a significant effect on a European Site's conservation objectives. If the answer to the question is yes, the Competent Authority must proceed to undertake the second stage: an appropriate assessment.

52. To assist with the discharge of its obligations under the Habitats Regulations Natural England has developed a template known as an HRA template. It records Natural England's assessment of potential risks, its analysis and conclusions which could record the grant of permission for a project on either of the following bases, namely:

    i) That there is no risk of a "significant effect" on the Qualifying Features of the special protection areas or special areas of conservation such that no "appropriate assessment" is required. This is addressed in Part C of the template, the "screening decision";

    ii) That there is a risk of a "significant effect" but, having conducted an appropriate assessment, Natural England is of the view that the project will not adversely affect the integrity of the special protection areas or special areas of conservation. This is addressed in Part D of the template, the "appropriate assessment".

The Appellant's Case

53. It is the appellant's case that when conducting a screening assessment, the Competent Authority must adopt an approach which is no less stringent than that adopted for an appropriate assessment and should accordingly apply the "precautionary principle". The essence of that principle is that measures should be taken, where there is uncertainty about the existence of risks, without having to wait until the reality and seriousness of those risks becomes fully apparent. A Competent Authority may only approve a project at the screening stage without an appropriate assessment if it is certain that there is no risk of serious harm to a site's conservation objectives. This judgment must be made on the basis of objective information using the best scientific knowledge in the field. This is particularly relevant in this case because a number of the features which the appellant submitted were at risk from culling were known to use functionally linked land outside their corresponding European Site including land within cull areas.

54. The essence of this ground of appeal is that the judge failed properly to apply the judgment of the Court of Justice of the European Union ("CJEU") in *Case-323/17 People Over Wind v Coillte Teoranta* 12 April 2018 in holding that the licence conditions were not mitigation measures and in finding that they could properly be taken into account in the screening decisions. In *People Over Wind* the CJEU considered the relevance of measures which were designed to mitigate the harmful effects of a plan or project – "mitigation measures" or "protective measures". It concluded at [40] that it is "not appropriate, at the screening stage" to take account of such measures. The court found at [35] to [39] that the fact that mitigation measures were deemed necessary presupposed that the plan or project would be likely to have a significant effect and that therefore a

full and precise analysis of those measures was required. This must be done at the appropriate assessment stage because to do otherwise would deprive the assessment of its purpose and allow circumvention of this essential safeguard.

55. At [26] "mitigation measures" or "protective measures" should properly be understood as meaning measures intended to avoid or reduce the harmful effects of the plan or project on that site. At [83] of his judgment the judge identified a number of mitigating factors upon which Natural England relied in its screening assessments and which were applied in licences granted. At [156]-[157] he characterised such restrictions as integral features of the project because they specified the time and place at which culling was to take place and distinguished them from mitigating or protective measures. The appellant submits that his conclusion on this issue is in conflict with the *People Over Wind* case.

Natural England's Response

56. The point arising in ground 3(d) is said to be academic in that Natural England's standard practice is now to address all restrictions on licensed activity in Part D of HRA templates rather than Part C. This is said to be a pragmatic response to the uncertainty created by the *People Over Wind* case. It is a change of form rather than of substance. Natural England has not changed its ecological assessment of the actual risks posed by disturbance from licensed activity. Licences have been re-authorised following the completion of HRA templates in which relevant restrictions are addressed under an "Appropriate Assessment" heading in Part D of the template.

57. The licences in this case have been the subject of further assessments as a result of minor boundary changes and/or routine review and updating of licence conditions. In those assessments, restrictions on the location and timing of the licensed activity were considered under the heading of an "appropriate assessment" rather than a "screening decision". New assessments have been produced for Areas 11, 15, 16, 17 and 19. These include the assessments challenged in the claim and the further assessments which the appellant seeks to put in issue on appeal. In the revised assessments Natural England has in some cases widened, narrowed, rephrased or augmented previous licence conditions in line with updated views on best practice. In all cases Natural England concluded that there would be no adverse effect on the integrity of European Sites and that the licences should be authorised until their original expiry dates, subject to certain licence conditions.

58. It follows, submits Natural England, that the court may dismiss the appeal and/or refuse relief on the basis that ground 3(d) is academic. Reliance is placed on the authorities of *R (Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government & Anr* [2010] EWCA Civ 992,

and *R (C) v Nottingham City Council* [2010] EWCA Civ 790 and others. The approach of the courts is to take account of the fact that the original challenge has been overtaken by events and thus rendered academic. In *Stamford Chamber of Trade and Commerce* Mummery LJ stated at [17]:

> "… the interests of justice would not be served by entertaining an appeal on the fact-sensitive question of legitimate expectation of consultation which, by reason of the supervening events described by my Lord, no longer has any practical utility."

In *R (Howard League) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) Munby J observed at [140] that:

> "…the fact remains that the courts … exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy. Nor is it the task of a judge when sitting judicially … to set out to write a textbook or practice manual or to give advisory opinions."

59. Ground 3(d) is of purely historic interest because Natural England has made it clear that it has amended its process to avoid any uncertainty arising from *People Over Wind*. The restrictions imposed on culling activity (and formalised as licence conditions) will no longer be considered under the label of a screening decision, in Part C of the HRA templates.

R (Zoolife) v Lambeth LBC [2007] EWHC 2995 (Admin)

60. The appellant relies on this authority in support of the contention that even if the court were to find that the appeal is academic in the sense that it cannot result in any practicable relief being granted it should still be heard. At [36] Silber J said:

> "…academic issues cannot and should not be determined by courts unless there are *exceptional* circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in *Salem* (supra) that "a large number of similar cases exist or anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive."

61. The appellant contends that the Habitats Regulations assessments are common-place, made on a daily basis by local planning authorities and other public authorities. By this appeal the court is being asked to give guidance about the nature of a mitigation measure which will in turn dictate what assessment is

required under the Habitats Regulations. This is an important point of principle which is not fact-sensitive. If this matter is not determined now then other future challenges are inevitable and valuable court time will be taken.

62. Natural England does not accept the appellant's contentions in respect of the *Zoolife* case. First, there is no evidence of a large number of similar cases before the court, on the contrary, badger cull licensing is *sui generis*, Natural England is the only licensing authority and it no longer follows the approach impugned in this case. Secondly, this is a fact-sensitive case not involving typical planning disputes. They have to be fact-sensitive as they depend on the facts of the relevant measure. There are no other similar cases because Natural England has changed its practice to reflect the uncertainly created by the *People Over Wind* case.

Discussion and Conclusion

Ground 2

63. The appellant accepts that in providing the Guidance the Secretary of State's express purpose was to prevent the spread of disease. Such advice would be consistent with the purpose for which licences could be granted by Natural England under section 10(2)(a) of the 1992 Act. The appellant contends that the judge found that the Guidance could only be rendered unlawful if the Secretary of State's true purpose was other than to prevent the spread of disease. We do not accept that contention.

64. At [124] the judge considered whether in acting as he did under his statutory power the Secretary of State's actions were otherwise flawed in public law terms. The judge concluded that the Secretary of State acted rationally in a public law sense. He did not fail to take relevant factors into account or take into account irrelevant factors. The judge noted that the scarcity of evidence about supplementary culling was acknowledged in the December 2016 ministerial submission and made clear in the consultation document. The international evidence submitted to the Secretary of State was to support the longer-term control of a TB wildlife reservoir. The same applied to its summary in the 2016 consultation document. Both the chief veterinary officer and Defra's chief scientific advisor supported supplementary culling. Against this background the judge found that "a policy of maintaining a reduced badger population through supplementary culling cannot be said to be irrational when coupled with the commitment to change tack as evidence became available". The judge considered the evidence in the context of the public law rationality test. There is no substance in the first limb of this ground of appeal, namely that the judge treated the issue solely as one of improper purpose.

65. The second limb of the appellant's case is that the Guidance was *ultra vires* due to an absence of evidence. Section 10(2)(a) of the 1992 Act does not specify the nature or quality of the evidence necessary to support the grant of a licence "for the purpose of preventing the spread of disease". We do not find this surprising. It reflects the fact that this is an area of developing scientific knowledge. The wording of the section allows for consideration of relevant developments, practical and scientific.

66. The development of policy to combat bTB followed the results of the RBCT which identified the need to maintain a reduced rate of infection in the badger population at the end of an intensive cull. Further reporting and analysis were performed involving relevant experts. The evidence before the Secretary of State was that the disease control benefits achieved at the conclusion of an intensive cull were known to decline over time and would be eliminated over a period of 7.5 years. If no further action were taken in areas that had undergone an intensive cull, bTB was bound to spread. At the time the Decision was made and the Guidance was given, no viable alternative option to supplementary culling had been identified for maintaining or preserving the disease control benefits achieved at the conclusion of an intensive cull. The Secretary of State was faced with a choice between trying supplementary culling or doing nothing.

67. There was a timing imperative for the Secretary of State in that intensive culls undertaken in Areas 1 and 2 would conclude by 2017. If supplementary culling were to be licensed, the evidence demonstrated that it ought to take place immediately following the conclusion of an intensive cull. Direct evidence on the effect of supplementary culling could not be obtained without undertaking supplementary culling in an area which had completed an intensive cull.

68. The Secretary of State and the judge accepted that supplementary culling was untested. However, before the Secretary of State were the scientific judgments of the chief veterinary officer, Defra's chief scientific advisor and other experts from specialist agencies. These acknowledged the limited evidence available but concluded that there was a logical and defensible rationale for the licensing of supplementary culling and recommended that it should be licensed. We agree that the Secretary of State was rationally entitled to rely upon such independent and informed scientific opinion, based as it was upon an analysis of available evidence, in arriving at the decision which he did. These were the experts who were particularly qualified to question and carry out the relevant analysis. The unspoken submission is that these experts were themselves acting irrationally. The Secretary of State is, of course, not obliged to adopt expert advice but he cannot be criticised for doing so.

69. By its very nature, scientific knowledge is a developing concept. Contrary to popular thinking, scientific knowledge cannot always deliver certainty. Experts may not know that a specific experiment will achieve an identified result; but

based on their experience and expert knowledge they are properly able to conclude that an experiment is logically justified on the information available. In the circumstances of this case, what was proposed was an adaptive process which would be monitored. The monitoring and the results would be used to evaluate the effectiveness of the activity which would add to existing knowledge of the effect of supplementary culling as a means of controlling the spread of disease. There is nothing in section 10 which states that the procedure is lawful only if the outcome is certain. Its purpose is to seek to achieve a particular end, the prevention of the spread of disease. The dichotomy raised by the appellant between scientific certainly and scientific opinion is a false one.

70. The issue is whether the Secretary of State could rationally rely on the information available to him in reaching a decision to give the Guidance. In our judgment he could. The Secretary of State relied upon the available evidence relating to intensive culling and its effect, and upon the scientific judgments of the Animal and Plant Health Agency, Defra and informed independent experts. The second limb of this ground of appeal fails to reflect the nature and extent of the material before the Secretary of State. There was relevant evidence and informed scientific opinion before the Secretary of State. He was entitled to and did act upon the same. For the reasons given this ground of appeal is not made out.

Badgers Trust v Welsh Ministers [2010] EWCA Civ 807

71. The relevant provision is markedly different from section 10(2)(a) of the 1992 Act. Under section 21(2) of the Animal Health Act 1981 conditions precedent must be met before the power to make an order arises. They reflect the more restrictive nature of the power.

72. The statement made by Smith LJ at [77], upon which the appellant relies, relates to the test under section 21. However, it does recognise that permissible extrapolation from existing scientific evidence would provide a sufficient basis for an order even under the more restrictive section 21 test. In this case, and for the reasons given, we conclude that the Guidance is not based upon any impermissible or irrational inference.

Ground 3(d)

73. This ground of appeal has been overtaken by events. New assessments have been made by Natural England. They are included in the relevant part of the HRA template to accord with the judgment of the CJEU in *People Over Wind*. The licences are area-specific and fact-sensitive. In our judgment no ruling of this court would assist in their implementation, a ruling would have no practical utility. We note that Natural England has not changed its ecological assessment

of the actual risks posed by disturbance from licensed activity, rather it has responded to the legal ruling.

74. We have considered the *Zoolife* case and are unable to find that there are exceptional circumstances such as to warrant the determination by this court of ground 3(d) of the appeal. There is no evidence of a large number of similar cases before the court. This is unsurprising as Natural England is the only licensing authority and it no longer follows the approach which is the subject of this ground of appeal. These are fact-sensitive cases, they depend on the facts of the relevant measure. Accordingly, we find that no determination on ground 3(d) is required by this court because it has become academic.

Conclusion

75. In the result, there is no merit in the grounds of appeal and the appeal will be dismissed.