



Neutral Citation Number: [2021] EWHC 2199 (Admin)

Case No: CO/2062/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2021

Before :

MR JUSTICE GRIFFITHS

Between :

THE QUEEN
on the application of THOMAS LANGTON

Claimant

- and -

SECRETARY OF STATE FOR ENVIRONMENT
FOOD AND RURAL AFFAIRS

Defendant

- and-

NATURAL ENGLAND

Interested
Party

Richard Turney and Ben Fullbrook (instructed by **Richard Buxton Solicitors**) for the
Claimant

Hanif Mussa and Tom Coates (instructed by **Government Legal Department**) for the
Defendant

Hearing date: 22 July 2021

Approved Judgment

The Honourable Mr Justice Griffiths :

1. This is an application for judicial review of the Secretary of State’s policy document “Next steps for the strategy for achieving bovine tuberculosis free status for England – The government’s response to the strategy review, 2018” (“Next Steps”), dated March 2020.
2. The relief claimed is the quashing of “Next Steps” and other relief, including restraining the continuation of badger culling in England.
3. It is important that I make it clear that this case is not about the rights and wrongs of badger culling, which is a controversial question about which many people have strong views. That is ultimately a policy question; for the public and professionals to debate, and for policy makers and politicians to decide. The role of the court is to scrutinise decisions and policy making within the limits of judicial review, on limited grounds such as irrationality or lack of due process. The fundamental decisions on the underlying controversies are not made by this court; nor should they be.
4. I should also mention that the single ground which I have to decide is much narrower than the full range even of legal objections which have been raised against the defendant’s badger culling policy. Not only is the single ground more limited than the original claim (which had multiple grounds): there has been earlier litigation in which the defendant has been challenged by the claimant on other grounds, all of which have been finally disposed of in that earlier litigation. Those are the cases known as Langton 1 and Langton 2 (so this case is, I suppose, Langton 3). For Langton 1, see the decision of the Court of Appeal in *R (Langton) v Secretary of State for Environment, Food and Rural Affairs and Natural England* [2019] EWCA Civ 1562, on appeal from Sir Ross Cranston [2018] EWHC 2190 (Admin). For Langton 2, see the decision of Sir Ross Cranston in *R (Langton) v Secretary of State for Environment, Food and Rural Affairs and Natural England* [2019] EWHC 597 (Admin).

The Ground of the application

5. When this application was originally brought, permission was refused on every ground by William Davis J (on the papers) and by Cavanagh J (after an oral renewal hearing). On appeal to the Court of Appeal, Bean LJ upheld the refusal of permission on every ground except one. That sole ground is, therefore, the one I have to decide. Bean LJ identified this ground as Ground 3(a) and gave the reasons for allowing it to be argued as follows:

“Ground 3(a) The argument that the Defendant, in publishing the Next Steps 2020 document, was bound but failed to have regard to the purpose of conserving biodiversity as required by section 40(1) of the 2006 Act, has only been dealt with very briefly in the two decisions refusing permission. I am just persuaded that permission should be granted for a substantive judicial review hearing on this issue in the Administrative Court.”

6. Ground 3(a) is expressed in the Statement of Facts and Grounds (which the claimant has decided not to amend) as follows:

“Ground 3: ecological impacts...

(a) Failure to consider ecological impacts altogether

67. There is no dispute that badger culling can have wider ecological effects. This is recognised by Natural England in their assessment of cull licence applications (see, for example, §28 of the judgment of the Court of Appeal in *Langton 1*), and in the Godfray Review (see above). In adopting Next Steps:

a. No consideration whatsoever was given to the ecological consequences of continuing culling;

b. That was a material consideration because:

i. The Defendant was bound to exercise his functions having regard “*so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity*” (s 40 Natural Environment and Rural Communities Act 2006) and such regard could not be had if the impacts were not considered at all;

ii. The adverse ecological consequences of culling had been expressly raised by the Godfray Review.

68. For those reasons, Next Steps was unlawful.”

The duty upon which the application is based – section 40 of the Natural Environment and Rural Communities Act 2006

7. I have quoted Ground 3(a) and, in particular, the averment (in para 67.b.i. of the quotation at para 6 above) that the Secretary of State failed to comply with section 40 of the Natural Environment and Rural Communities Act 2006 (“NERCA”). The whole of this application turns on whether the Secretary of State did or did not comply with this section.

8. Section 40 of NERCA provides, so far as material, as follows:-

“40 Duty to conserve biodiversity

(A1) This section applies where—

(...)

(b) any (...) public authority is exercising its functions in relation to England.

(1) The public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

(2) In complying with subsection (1), a Minister of the Crown or government department must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.

(3) Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.”

9. It is accepted that the Secretary of State is a “public authority” within the meaning of section 40 and, therefore, that section 40 applies to him.
10. The claimant also relies on section 41, which provides:-

“41 Biodiversity lists and action (England)

(1) The Secretary of State must, as respects England, publish a list of the living organisms and types of habitat which in the Secretary of State's opinion are of principal importance for the purpose of conserving biodiversity.

(2) Before publishing any list the Secretary of State must consult Natural England as to the living organisms or types of habitat to be included in the list.

(3) Without prejudice to section 40(1) and (2), the Secretary of State must–

(a) take such steps as appear to the Secretary of State to be reasonably practicable to further the conservation of the living organisms and types of habitat included in any list published under this section, or

(b) promote the taking by others of such steps.”

Scope of the application

11. There is a dispute about the scope of Ground 3(a) which I must decide at the outset. The defendant says that it only covers supplementary badger culling. The claimant says that his case extends to all badger culling.
12. In support of his broader interpretation, the claimant relies on the original Claim Form's statement of the “Details of the decision to be judicially reviewed”, which are given as the defendant's decision to publish Next Steps. The claimant makes the point that Next Steps reviews policy on all culling, and not just supplementary culling. The claimant argues that a fair reading of the Statement of Facts and Grounds accompanying the Claim Form shows that references to supplementary badger culling (notably, in paras 4-5, 43-45 and 67-68) do not limit the grounds of claim to supplementary culling.
13. After careful consideration of the Statement of Grounds, it seems to me clear that Ground 3(a) is directed at supplementary culling and not culling more generally. My reasons are as follows.

14. Para 2 of the Statement of Facts and Grounds focusses the claim, right from the start, on supplementary culling, stating (with emphasis added):

“Badgers are a protected species under the Protection of Badgers Act 1992 (“PBA”). The Defendant has, since 2011, supported the use of badger culling as a means of controlling bovine tuberculosis (bTB) in cattle herds. That policy is controversial. **Since 2017, the Defendant has also supported the licensing of “supplementary culling”. This form of badger culling is particularly controversial.** After the completion of four-year “intensive” badger culls, designed to reduce the badger population as a contended means of reducing the spread of disease, supplementary culling permits the ongoing seasonal killing of badgers in the cull areas.”

15. This emphasis is continued. Para 3 refers to Langton 1 as dismissing the claimant’s challenge “to the 2017 supplementary culling policy”. Para 4 refers to the Godfray Review (to which Next Steps responded) as being ordered “Since the adoption of the 2017 supplementary culling policy”. It then unambiguously focusses on that part of Next Steps which concerned supplementary culling, saying (again at para 4, with emphasis added):

“In March 2020, the Defendant responded to that review, announcing his “Next Steps”. **Those steps include the continuation of supplementary culling. It is that policy which is the subject of this claim.**”

16. Para 5 then continues: “In summary, the Claimant submits that this policy is unlawful on the following grounds...” The context provided by paras 3 and 4 demonstrates that “this policy” is the policy referred to in the last two sentences of para 4, namely “the continuation of supplementary culling”.
17. Ground 3(a) is then articulated in para 5 as the defendant’s alleged failure “to consider the ecological aspects of the policy” – this being, on my reading, “the continuation of supplementary culling”.
18. When the Statement of Facts and Grounds comes to address Next Steps, at paras 42-45 it continues to focus on the supplementary culling aspect.
19. The Statement of Facts and Grounds having, from the outset, for the purposes of the whole claim for judicial review, narrowed the challenge down to supplementary culling in this way, I am not persuaded that the looser language of Ground 3(a) in paras 67-68 (which I have quoted in para 6 above) was intended to or can be read as enlarging it beyond that.

Factual background

20. The background to Next Steps is in part set out in the Secretary of State’s Foreword to Next Steps which states:

“Bovine TB (bTB) is one of the most difficult and intractable animal health challenges that England faces today. Around 30,000 cattle have to be slaughtered annually due to infection. Our cattle breeders suffer the loss of prize-winning animals and valued herds and this loss creates considerable trauma in the farming industry.

BTB is a very difficult disease to eradicate for a number of reasons. It is a slow moving, insidious disease which is difficult to detect. The diagnostic tests that exist are not perfect; the disease can survive in the environment for several months. BTB is harboured in wildlife with badgers being a known vector. The BCG vaccine provides only limited protection and does not cure infected badgers. There is no example of a country that has successfully eradicated bTB without also addressing the presence of the disease in wildlife.

(...) since the late 1980s, bTB has spread and the 2001 Foot and Mouth Disease outbreak led to a suspension in testing and then widespread restocking of farms. This meant that in the first five years of this millennium, the disease once again spread rapidly and became our number one animal health challenge.”

The Randomised Badger Culling Trials 1998-2005

21. Between 1998 and 2005, Randomised Badger Culling Trials (“RBCT”) were conducted which formed the basis of subsequent expert and policy discussion about whether badger culling should be introduced as a means of controlling bTB.

The 2007 DEFRA Report

22. The results of these trials were considered in a 2007 report (“the 2007 DEFRA Report”) commissioned by the defendant entitled “The Ecological Consequences of Removing Badgers from the Ecosystem”. The 2007 DEFRA Report was prepared for the defendant by the Central Science Laboratory.
23. The 2007 DEFRA Report explained the nature of the work as follows:

“The aim of the RBCT was to measure and compare the incidence of cattle infections in a series of 100km² study areas, each with one of three experimental ‘treatments’: no badger culling; reactive badger culling around infected farms; proactive removal of a substantial proportion of resident badgers. These treatments were arranged in ten experimental triplets, situated in TB hotspots in southern England, with the experiment planned to run for several years. It is known that the removal of native predators affects the dynamics of the food webs of which they are a part. It seemed highly likely that the sustained population reduction of an abundant carnivore such as the badger over large areas of land could have the potential to affect the dynamics of the ecosystem. It was deemed important to monitor this.

Additionally, the RBCT provided a rare scientific opportunity to study ecosystem response to a predator removal operation, using a replicated and randomised experimental design on a large scale. Defra contracted the Central Science Laboratory (CSL) to carry out an assessment of the ecological consequences of badger removal during the RBCT. The aim of the contract was to monitor the populations of species that may be affected by badger removal, and where possible determine the underlying ecological processes driving any observed population responses.”

24. The main results noted in the 2007 DEFRA Report were:

- i) An increase in fox populations in proactive cull areas compared to the areas where there was no culling. It took place “mainly over the first three years”, after which the fox population “stabilised at a higher level”. The evidence suggested that this was not related to food availability. Rather, it was probably due to “a reduction in competition for space, in particular breeding den availability, caused by badger removal.”
- ii) A strong increase in hedgehog populations in proactive cull areas, which more than doubled where such populations were already significantly present. This was explained as being due to the reduction in badger predation on hedgehogs in the proactive cull areas.
- iii) Some evidence that skylark and, especially, meadow pipit populations did not fall in areas of proactive badger culling but did fall in areas where there was no badger culling. Badger culling therefore appeared, potentially, to protect these species. The evidence was stronger for meadow pipits than for skylarks. However, none of the evidence was conclusive, and factors unrelated to badger culling were identified which might have been responsible.
- iv) Evidence of reduced hare populations in proactive badger culling areas, which continued for the whole duration of the RBCT. This was tentatively linked with the reduction in badger population, but the effect was so weak as not to be statistically significant.

25. The 2007 DEFRA Report summarised its main conclusions as follows:

“Badger culling as carried out in the RBCT appears to have consequences for other species. This is consistent with a range of studies from around the world where predators and carnivores have been shown to have an important role in ecosystem functioning. This should be taken into account in any consideration of culling as an option for the management of TB in cattle.

Foxes, hares and hedgehogs are important species for different reasons. Foxes are important predators in the ecosystem, and are of management relevance in the context of disease (rabies) control and livestock predation. Increasing populations in

response to badger culling is likely to be of interest to a range of parties, and should therefore be a material consideration.

Hedgehog populations are limited by badger predation, as indicated by previous research. However despite high badger densities, they continue to exist in reasonable numbers in refugia provided by amenity areas...

Hares have become a species of conservation concern, with population declines over several decades associated with habitat loss and changing farmland management practices... There is some evidence from this study that indicates that widespread badger culling could have negative effects on hare populations.”

26. It suggested options for future research. However, the RBCT was on a scale not replicated before or since, and it remains to this day the main source of data available to the defendant on the possible ecological consequences of badger culling.

The 2010 NE Advice

27. Badgers are a protected species and cannot be culled without a licence from Natural England. Whether or not badger culling takes place is, therefore, a question of government policy, because it is entirely controlled by whether or not such licences are granted and, if they are, where and on what terms. Natural England is subject to direction from the government.
28. In the immediate aftermath of the RBCT and the 2007 Defra Report, the government of the day did not adopt a policy of badger culling. It did, however, work on policy for the eradication of bTB.
29. In December 2010, Natural England gave the defendant formal advice

“...as to the circumstances in which licences should be granted

- to kill badgers... and...
- to use prohibited methods to take or kill badgers...

to prevent the spread of the disease bovine tuberculosis (TB) in cattle in England”.

The advice (“the 2010 NE Advice”) was entitled: “Licensing the control of badgers (*Meles meles*) to prevent the spread of bovine tuberculosis in cattle”.

30. The ecological impact was addressed under the heading “Protected species and habitats” in paras 22-23, which suggested that there was not much cause for concern, although caution was advised, in the following terms:

“22. The badger is a common and widespread native British species and is not at present a species of conservation concern. Any policy of licensed control should be so designed and conducted that it does not lead to the species becoming a

conservation concern. This includes taking such measures as are necessary to avoid the local disappearance of, or serious disturbance to, badger populations (Bern Convention and licensing principle v). The Convention does not define ‘local’, nor is there clear evidence upon which to make a judgement of what might constitute ‘local’ in respect to English badger populations. Nevertheless, for the purposes complying with the Convention, and of being proportionate in our requirements of individual applicants, we advise that measures are taken to ensure that the badger population within each 150km² area is not completely eradicated.

23. While there are no immediately apparent reasons to suspect that the lethal control of badgers will have a detrimental impact on other protected species or protected habitats, the policy should include appropriate safeguards to prevent incidental harm occurring (licensing principle v). This requirement can be met by following existing licensing policy, which is to consider impacts on protected species and habitats on a case by case basis.”

31. The suggestion that “there are no immediately apparent reasons to suspect that the lethal control of badgers will have a detrimental impact on other protected species or protected habitats” is particularly relevant to this case.

The 2011 FERA Report

32. In January 2011, the Food and Environment Research Agency (“FERA”) produced a report, entitled “Evaluation of the Potential Consequences for Wildlife of a Badger Control Policy in England” (“the 2011 FERA Report”). Paragraphs 1 and 6 of the Executive Summary explained as follows:

“1. Policy proposals for controlling TB in cattle include a range of options for badger management by culling and/or vaccination. We have conducted an outline assessment of the ecological considerations that would be required for the competent authority, which in this case is Natural England (NE) who will be responsible for issuing licences, to evaluate potential licence applications under this policy. These are in addition to the various considerations pertaining to the culling and/or vaccination of badgers themselves.

(...)

6. It is not desirable or possible at this stage to conduct a formal Ecological Impact Assessment (EcIA) given that no licence applications have yet been made. However it may be appropriate for potential applicants and NE to conduct such an EcIA before the determination of an individual licensing decision. It will be incumbent upon applicants and the relevant authorities to evaluate the appropriate course of avoidance or mitigation of

impacts of the actions, and ensure the obligations arising from the various legislative provisions are addressed.”

33. The 2011 FERA Report is very clear that its remit was “to provide a document that details the potential ecological impacts that might result from culling badgers and/or vaccinating badgers in combination with culling”. It therefore directly assisted the defendant in discharging his duty under section 40 to “have regard to the purpose of conserving biodiversity” when formulating his policy on badger culling and badger vaccination as part of the campaign to eradicate bovine Tuberculosis.
34. However, the 2011 FERA Report noted that “Without specific details of proposals in hand, it is not possible to assess explicitly the likelihood or significance of impacts on protected species or habitats at European, UK, national or regional levels”.
35. It therefore sought “to characterise the possible impacts for the consideration of Defra and NE.” It then left these aspects to Natural England, saying:

“It is intended that, on the basis of the information provided within this document, NE will be able to determine whether further steps are necessary, which potential effects may need to be considered and under what circumstances an EcIA or similar assessment may be requested.”
36. In its consideration of legislation and relevant policy, it referred to the NERCA duty “to ensure due regard to the conservation of biodiversity”. It noted the defendant’s publication (pursuant to his duty under NERCA) to publish “a list of habitats and species which are of principal importance for the conservation of biodiversity in England”, which he had done, under section 41 of NERCA. The listed habitats and species “have been identified as requiring action under the UK Biodiversity Action Plan (UKBAP)”. It then said, in relation to the proposed badger control policy which was the whole subject matter of the report:

“Under the proposed policy NE may require the submission of a form of evidence from the applicant which demonstrates that no significant impacts from a culling operation will take place or have been suitably mitigated against, reducing the impacts to a negligible level. This can be, but does not need to be an EcIA [Ecological Impact Assessment], and may be required in order for NE to discharge its duties under the NERC Act.”
37. This was, therefore, suggesting that this aspect was to be addressed at the Natural England level.
38. The 2011 FERA Report then attempted a detailed review (over pp 11-18 of the Supplemental Bundle) of potential impacts of badger control on the ecosystem. It divided those potential impacts into two broad categories. The first was “direct physical impacts on habitats or species, caused by activities such as driving vehicles [and] digging traps”. This case is not concerned with those, because no-one suggests that they would affect biodiversity. The second was “indirect ecological impacts, caused by the reduction in badger density and the changes in biological processes such as predation and competition”. These were dealt with at pp 15-18. The 2011 FERA Report relied

heavily on the Randomised Badger Culling Trial (p 15), which it described as “a rare opportunity to study the effects of removing a top predator on the remainder of the ecosystem under experimental conditions”. However, there is no question in this case of removing badgers from any area. The policy, and the proposal, is that culling should be used to reduce without eliminating badger populations.

39. The section on indirect impacts is the most detailed consideration of “the existing ecological evidence regarding the known effects of badger removal on the abundance of other species” in my papers. But it is no less tentative and inconclusive than the 2007 DEFRA Report, which was based on the Randomised Badger Culling Trial. The 2011 FERA Report also seems to be heavily dependent on the RBCT, although some other sources are cited.
- i) The 2011 FERA Report says that badger removal “may” have knock-on effects beyond reductions in direct predation; that there is “the potential to have an impact on bird populations” but “their potential impact on bird populations is not clear”.
 - ii) In relation to lagomorphs (rabbits and hares), it says “there is no evidence that badger predation limits or regulates lagomorph populations”, although “given the potential importance of fox predation” and “the increase in fox density seen in response to badger culling in the RBCT”, badger removal “could potentially” have an impact on lagomorph populations.
 - iii) It notes the importance of the fox as a predator in the areas likely to be subject to badger culling, and concludes “any such population response could have significant knock-on consequences”.
 - iv) Based on the increase in some hedgehog populations picked up by the RBCT, it says that “the removal of badgers from an ecosystem could result in a significant increase in hedgehog abundance” which might have “potential impacts” on “other species groups such as ground nesting birds”.
40. On 4 April 2011, the Department for Food, the Environment and Rural Affairs (“DEFRA”) facilitated a meeting of scientific experts to discuss the matter. It concluded “The RBCT provides the best scientific evidence available from which to predict the effects of a future culling policy...”

Guidance to Natural England

41. Section 15 of NERCA empowers (and in some cases requires) the defendant to issue guidance to Natural England on the exercise of its functions. Before issuing such guidance, he has to consult Natural England itself, and also the Environment Agency and such other persons as he may think appropriate (section 15(3)). Such guidance must be published, and Natural England “must” have regard to it (section 15(6)).
42. The defendant gave guidance to Natural England on “Licences to kill or take badgers for the purpose of preventing the spread of bovine TB under section 10(2)(a) of the Protection of Badgers Act 1992” accordingly, and this has gone through a number of editions. The first of these was published in December 2011 (“the 2011 Guidance”), followed by later editions in December 2015 (“the 2015 Guidance), July 2017 (“the

2017 Guidance”), May 2018 (“the 2018 Guidance”), and (following a public consultation) May 2021 (“the 2021 Guidance”).

43. The application before me is exclusively directed to “Next Steps”, and does not challenge the lawfulness of any of this Guidance.

The 2011 Policy

44. In December 2011, the Department for Environment, Food and Rural Affairs published “The Government’s policy on Bovine TB and badger control in England” (“the 2011 Policy”).

45. The 2011 Policy began by explaining why the government considered it important to tackle tuberculosis.

“1.1. Bovine TB is the most pressing animal health problem in England. The annual number (and incidence) of herds infected with TB in England has been on a slowly rising trend for some 25 years. The area affected by bovine TB has spread from a few isolated pockets in the late 1980s to cover large areas of the West and South West of England and Wales. During 2010, 10.8% of herds in England were under movement restrictions due to a TB incident at some point during the year, while in the West and South West this figure was 22.7%. In 2010 in England there were 8.2 new TB breakdowns for every 100 tests carried out in unrestricted herds and nearly 25,000 cattle were slaughtered for bovine TB control purposes.

1.2. It is estimated that the average cost of a confirmed TB breakdown in cattle is around £30,000. About £20,000 of this falls to Government, mainly in compensation for animals compulsorily slaughtered and costs of testing. This leaves about £10,000 in costs to farmers from losses of animals, farm costs of testing, and disruption to business through movement restrictions. The cost to the taxpayer is set to top £1 billion over the next ten years.”

46. It committed to “a comprehensive and balanced package of measures” with “eradication as the ultimate, long-term goal” (para 1.4). It said that “cattle-based control measures alone are not working” (para 1.4). It concluded (at paras 1.5-1.6):-

“1.5. The Government has therefore committed to introduce, as part of a package of measures, a carefully managed and science-led policy of badger control in areas with high incidence of TB in cattle. Following a public consultation in 2010 and a consultation of key stakeholders on draft Guidance to Natural England between July - September 2011, the Government has now decided to proceed with a policy of enabling farmers and landowners to cull and/or vaccinate badgers, under licence, in areas of high incidence of TB in cattle.

1.6. This document explains the reasons why it is necessary to tackle the reservoir of TB infection in badgers; the other options that have been considered; the benefits that we could expect culling to achieve and the rationale for the licence conditions that will be imposed to ensure these benefits are realised.”

47. The 2011 Policy specifically considered ecological impacts (paras 4.22-4.23). It recognised that both culling and vaccinating “could have a range of potential impacts on the ecosystem”. However, it said that these were uncertain, and were expected to be minimal.

“We cannot identify the exact ecological impacts as they would be specific to the locations of licence areas and these would not be known until licence applications were made... While it cannot be conclusively ruled out that there will be any significant ecological impacts (as we cannot determine exact sites where badger control will take place until applications for licences are made) we believe the effects will be minimal.”

48. It therefore continued the theme, already present in para 23 of the 2010 NE Advice and para 6 of the 2011 FERA Report, that ecological impact ought to be examined in the context of licence applications to Natural England, because of an absence of information upon which it might usefully be assessed more generally.
49. The 2011 Policy also noted that a licence application might be received “for an area that includes a European Site, or is close enough to a site that impacts on its habitats or species are possible” (para 4.23). A European Site is a site designated under the Habitats Directive or the Wild Birds Directive, so as to fall within the Conservation of Habitats and Species Regulations 2017. A result of Langton 1 is that appropriate assessment is being carried out for badger culling in European Sites. Some of the Sites of Special Scientific Interest designated under section 28 of the Wildlife and Countryside Act 1981 are not European Sites. A result of Langton 2 is that appropriate assessment is being carried out for badger culling in Sites of Special Scientific Interest, whether or not they are also European Sites.
50. One other point which is worth noting from the 2011 Policy is its observation that badgers, while a protected species, “are not endangered in England” (para 7.3). This is conceded by the claimant. The application for judicial review is not brought on the basis of the effect of culling, or supplementary culling, on badgers themselves. It is based on the effect, or potential effect, on biodiversity more generally.

The 2014 Strategy

51. In 2012, Natural England granted licences to cull badgers in two initial areas in Gloucestershire and Somerset. Intensive culling began in those two areas in 2013 and continued for two consecutive years.
52. In April 2014, the defendant published “The Strategy for achieving Officially Bovine Tuberculosis Free status for England”. The defendant wrote in his Foreword that “The Strategy simply will not work without addressing the reservoir of TB infection in badgers.” He said that vaccination alone would not be sufficient. He said “I have

decided to continue the policy of badger culling in endemic areas learning lessons from the pilots in 2013”.

53. The 2014 Strategy aimed to tackle “the reservoir of bTB in wildlife whilst maintaining biodiversity” (p 10; see also p 30). It quoted a 2014 study on the ecological impacts of badger culling (p 79), which referred back to the data from the RBCT in this respect.
54. The thrust of the 2014 Strategy was to establish three bTB management regions or zones in England: a High Risk Area, a Low Risk Area and a buffer zone (Edge Area) in between. A range of measures was set out, with badger culling one of the measures to be allowed in some areas. It said that “carefully managed badger culling” to achieve “a substantial reduction of the badger population” over “a sufficiently large geographic area” leads to an overall net reduction in cattle herd bTB based on the data, while recognising that “Small-scale or short-term culling” might be counterproductive, because of a phenomenon known as “perturbation”. The 2014 Strategy concluded with the following commitment:

“The Strategy will be carefully monitored and fully evaluated and the approach and forward use of the tools will be adapted based on experience in the field and as new tools become available. The Strategy will be regularly reviewed and refreshed accordingly.”

Supplementary culling

55. Neither the RBCT, the 2011 Policy, or the 2014 Strategy included supplementary culling. However, between May 2015 and December 2016 the Government considered how it should develop its strategy in areas where an intensive cull had been completed. The defendant accepted a recommendation that he should license supplementary culling;

“...namely, continuing culling with a view to maintaining the badger population at the same level as following the intensive culling period thereby maintaining the disease control benefits expected to be achieved by a successful intensive cull.” (evidence of Dr Brown, who is head of the defendant’s bovine tuberculosis control policy programme).

56. As a result, the defendant issued guidance to Natural England which was specific to supplementary culling (“the 2017 Guidance”). This was the subject of Langton 1, but the 2017 Guidance was upheld in Langton 1 by the Administrative Court and by the Court of Appeal.

Natural England’s approach to applications for badger culling licences

57. The 2017 Guidance stipulated that, when granting licences to cull badgers, Natural England should ensure that the supplementary culling would “not be detrimental to the survival of the population concerned” (para 11). It also directed Natural England (in para 12) as follows:

“Natural England should take into account conservation considerations for designated sites, for example Sites of Special Scientific Interest (SSSIs), Special Areas of Conservation (SACs), and Special Protection Areas (SPAs). Under the Conservation of Habitats and Species Regulations 2010, (SI 2010/490), an “appropriate assessment” must be carried out before granting a licence which might have a significant effect on a European protected site (principally SACs & SPAs).”

58. In a footnote, it added:

“Where the assessment concludes that the grant of a licence might result in an adverse effect on the integrity of a European protected site, the licence must not be granted unless there are no alternative solutions and the rationale for the policy can be relied upon as an imperative reason of overriding public interest (pursuant to regulation 62(2) of those Regulations). Where the European protected site hosts habitat which for the purposes of the Habitats Directive is a priority habitat or a species which is a priority species, any such overriding public interest cannot be relied upon except pursuant to advice from the European Commission that it may be.”

59. Natural England (which is an interested party in this case) has given evidence to me from Dr Matthew Heydon, who is the Principal Specialist for Species Protection and Wildlife Management at Natural England’s Chief Scientist’s Directorate. He explained that, in approaching the licensing of badger culls, which is a derogation from the statutory prohibition of badger killing, Natural England adopts the same approach that it adopts to all species licensing. It grants licences only as a last resort, preferring, where possible, to encourage avoidance and tolerance of harms from protected species (Step 1) and, when that is not realistic, encouraging permitted methods to manage the wildlife (Step 2). Natural England only considers possibly licensing lethal action (Step 3) if neither of these options is available.
60. At that point (Step 3), Natural England applies the five key principles derived from domestic legislation and international conventions, which include (as number five) “The licensed action will not have an adverse effect on the conservation status of any species or habitat”. This is specifically applied to Natural England’s licensing of badger culls as well. Dr Heydon’s unchallenged evidence is that it is applied, so as to avoid any adverse effect, not only on the conservation status of badgers, but of “any species or habitat”.
61. Dr Heydon’s evidence is that the evaluation of the Randomised Badger Culling Trial in the 2011 FERA Report “provided insufficient grounds to justify refusing licences on account of wider ecological effects on either protected or unprotected species and habitats”, in the considered opinion of Natural England.
62. This view has been communicated by Natural England to the defendant in its statutory advice, which (in 2010, at para 23) said:

“23. While there are no immediately apparent reasons to suspect that the lethal control of badgers will have a detrimental impact on other protected species or protected habitats, the policy should include appropriate safeguards to prevent incidental harm occurring (licensing principle v). This requirement can be met by following existing licensing policy, which is to consider impacts on protected species and habitats on a case by case basis.”

63. Natural England itself is therefore advising the defendant both that “there are no immediately apparent reasons” to suspect detrimental impact on other protected species or habitats, and that the risks, such as they may be, are best addressed at Natural England’s level, by allowing it to “consider impacts on protected species and habitats” on a case by case basis as licences are applied for.

64. The claimant criticises the defendant, and Natural England, for focussing particularly on the ecological impact of licensed badger culling when it is to occur in a protected site (a European site or a Site of Special Scientific Interest). However, the material I have just cited is not limited to those sites. Moreover, Dr Heydon says, in terms, that:

“The conditions that Natural England imposes on licences to safeguard species and habitats associated with protected sites are not necessary outside protected sites in order to comply with the purpose of conserving biodiversity. The conditions are ultra-precautionary in nature, in the sense that it is unlikely that there would be any adverse effect on the integrity of the species associated with the site even if such conditions were not imposed (and Natural England’s assessments state as much).”

The 2018 NE Guidance

65. Natural England has a specific statutory obligation to protect biodiversity as one of its purposes (section 2(2)(a) of the Natural Environment and Rural Communities Act 2006). It is also, like the defendant, subject to section 40 of NERCA.

66. In August 2018, Natural England issued draft “Guidance on Evaluating the Ecological Consequences of Badger Culling on European Sites” (“the 2018 NE Guidance”). Although this has now been superseded by the 2021 Guidance, I was particularly referred to this version because it was in force at the time that Next Steps was published.

67. The 2018 NE Guidance confirmed that “the primary source of information on the ecological effects of badger culling” was still the Randomised Badger Culling Trial (RBCT), and the 2011 FERA Report which summarised that research and other relevant publications (para 4). The 2018 NE Guidance also took into account “more recent published research” as well as Natural England’s own “expert knowledge and practical experience” (para 5).

68. The claimant’s main objection to this Guidance is its concentration on European Sites. I have already addressed that point (in para 64 above).

69. The 2018 NE Guidance considers ecological impact, including potential for impact on biodiversity, at some length (paras 50-106). However, being based on the earlier material which I have already cited, it does not add to that materially, and its conclusions are just as tentative and precautionary. Based on that material, no actual, specific, substantial, damage to biodiversity has ever been observed as a result of badger culling practised as it has been in England, let alone as a result of supplementary badger culling.
70. The overwhelming impression left by the 2018 NE Guidance is that there is no cause for concern. That is consistent with the other publications and evidence which I have summarised. It does not mean that there can be complacency. That is why this aspect is kept under review by Natural England (which is an expert body close to the defendant) and why Natural England adopts what Dr Heydon's evidence calls an "ultra-precautionary" approach when granting licences.

The Godfray Review

71. The defendant commissioned an independent review of the 2014 Strategy, chaired by Professor Sir Charles Godfray. It was in response to the Godfray Review that Next Steps was produced.
72. The Godfray Review was published in October 2018, entitled "Bovine TB Strategy Review". The authors were Professor Sir Charles Godfray FRS (Chair), Professor Christi Donnelly FRS, Professor Glyn Hewinson, Professor Michael Winter CBE and Professor James Wood.
73. The purpose of the Godfray Review, set out in the Terms of Reference at Annex 3, was:

"To reflect on progress being made with implementation of the bTB Strategy and consider how to take the Strategy to the next phase. Advise on what further actions might be prioritised now to ensure we maintain progress towards our target of achieving Officially Free status for England by 2038."
74. The Godfray Review was clear that there was more to be done.

"Today, bovine TB incidences in England, definitely in cattle and possibly in badgers, are at best roughly stable. This cannot be allowed to continue. There are no easy answers to reducing disease levels and what is required is new drive and a concerted and concentrated effort by all sectors involved."
75. It identified the need for more research, "such as in novel diagnostics, vaccines, genetic resistance and around farmer behaviour" (para 41). Further research on impacts on biodiversity is not highlighted here. In the body of the report, however, it is said (at para 6.70):-

"Ecological studies of the consequences of reducing badger densities (by culling or fertility control) on other species (for example foxes⁸¹) should be undertaken given the key roles played by badgers in their local ecosystems."

76. There are difficulties with getting research on that which is any better than the data already provided by the unique scale of the Randomised Badger Culling Trials summarised in the 2011 FERA Report. These difficulties are examined and explained in the second witness statement of the defendant's senior civil servant Dr Eleanor Brown MSc MA VetMB MRCVS (paras 5-14), which demonstrates, to my mind convincingly, why further research suggested by the claimant's expert Mr Dominic Woodfield CEng MCIEEM is not necessary and would probably not even be useful.
77. The claimant particularly relies on para 6.33 of the Godfray Review, which says:
- “Reducing badger numbers will have consequences for other species in the local area. Culling in the RBCT (which was limited to 100 km² areas) was associated with increased numbers of foxes and hedgehogs. Badgers are omnivores (with a particular preference for earthworms) and inhabit highly modified farmland ecosystems. Reducing their densities will have complex direct and indirect ecological effects with some species increasing and others decreasing in abundance.”
78. This immediately follows a recognition that “It is unclear the degree to which region-wide badger culling would affect the viability of the species in these areas and what the large-scale ecological effects would be.” (para 6.32).
79. The Godfray Review does not identify any research which I have not already considered and summarised. It does not, therefore, suggest that any of the options for future control of bovine tuberculosis, including badger culling and supplementary badger culling, which it examines, and upon which it makes recommendations, should be avoided because of the possibility of damage to biodiversity.
80. The Godfray Review identifies the following “Options for the future”:
- i) Continuing with current policy.
 - ii) Stopping culling (without the introduction of other wildlife control measures).
 - iii) Stopping culling and replacing by vaccination.
 - iv) Stopping culling and replacing by fertility control.
 - v) Periodic intensive culling.
 - vi) Using culling to reduce badger densities and then replacing with vaccination (and/or possibility fertility control).
81. The Godfray Review emphasises that “final decisions have to take into account the irreconcilable views of different stakeholders and so inevitably require judgments to be made by ministers” (para 3). However, when running through the options, the Godfray Review says that “Stopping culling (without the introduction of other measures) would mean that an important source of transmission to cattle would not be addressed” (para 6.39). It points out that vaccination works only over time (para 6.42) and further work on vaccines is required (paras 6.44-6.46; also para 6.58 “we cannot say today whether

it is feasible”). It notes that reliable fertility control for badgers is not currently available (para 6.48).

82. That leaves the options of “Periodic intensive culling” and “Using culling to reduce badger densities and then replacing with vaccination and/or fertility control”. The Godfray Review expresses a clear preference for “periodic intensive culling as a more promising strategy than continuous culling beyond four years” (para 6.60).

Next Steps

83. Next Steps was published by the defendant in March 2020 as “The government’s response to the strategy review, 2018”, i.e. the Godfray Review. Its full title is “Next steps for the strategy for achieving bovine tuberculosis free status for England”.
84. The defendant says in his Foreword that Next Steps is part of the government’s “25-year strategy to eradicate bTB published in 2014”. The “cornerstone” of that strategy is “regular testing and removal of infected cattle from herds”. But licensed culling of badgers in the High Risk Areas is also part of it and “This policy, while difficult and inevitably contentious, is starting to yield results”. However, “no one wants to be culling badgers forever”. In response to the Godfray Review, the government will “begin an exit strategy from the intensive culling of badgers” and “as soon as possible”, “pilot badger vaccination”.
85. On culling, the defendant says:

“While the government must retain the ability to introduce new cull zones where the disease is rife, our aim will be to allow future badger culls only where the epidemiological evidence points to a significant reservoir of the disease in badgers. We envisage that any remaining areas would join the current cull programme in the next few years and that the badger cull phase of the strategy would then wind down by the mid to late 2020s, although we would need to retain the ability to cull in a targeted way where the epidemiological evidence requires it.

In the Edge Area, where some vaccination projects have been supported, our aim will be to ensure that badger culling is only authorised in areas where the epidemiological evidence points to a problem in badgers. We will continue to support badger vaccination projects in areas where the prevalence of disease is low. We will also investigate the potential for projects where adjacent vaccination and culling could complement each other in controlling disease. Changes to our guidance to Natural England on licensing badger control will be subject to consultation.”

86. Within the body of Next Steps, one of the “Key Messages” is that:

“The government envisages that the current intensive culling policy would begin to be phased out in the next few years, gradually replaced by government-supported badger vaccination

and surveillance. Culling would remain an option where epidemiological assessment indicates that it is needed.”

87. Longer term, the government’s ambition is said to be “Allow SBC [i.e. Supplementary Badger Culling] to continue during a transition period until we are able to effectively deploy badger vaccination across as many post-intensive cull areas as possible. This will avoid having periods of no badger control and so preserve the benefits from intensive culling.” (para 72).
88. Next Steps does not mention biodiversity and it does not mention the ecological impact of culling on biodiversity, either in the past or in the future.

Submissions

89. The claimant seeks an order quashing Next Steps and further relief to stop culling pending review of the government’s policy. He makes the following submissions:
- i) The defendant is bound by section 40 of NERCA and, when issuing Next Steps, was “exercising his functions”, but there is no evidence, either in Next Steps itself or elsewhere in the papers, that he had “regard... to the purpose of conserving biodiversity” when formulating Next Steps, as required by section 40.
 - ii) The section 40 duty cannot be delegated and it is not enough to point to other bodies (such as Natural England) which were having regard to biodiversity.
 - iii) Section 40 applies whenever the defendant is exercising his functions and so the consideration of biodiversity in, for example, the 2011 FERA Report cannot replace the duty as it applied, specifically, when Next Steps was issued.
 - iv) Next Steps decided, amongst other things, that new badger culling licences should be granted. It is “self-evident that a policy of support for badger culling has ecological effects” (para 49 of claimant’s skeleton argument). The duty is to “have regard” to the purpose of biodiversity and, since the defendant did not do that, Next Steps is flawed and cannot stand.
 - v) It is not possible to say what effect on the defendant’s thinking a specific regard to biodiversity might have had.
90. The defendant makes the following submissions:-
- i) The defendant had, at the time of first permitting badger culling, formed the view that the ecological impacts of proposed culling could only accurately and reliably be assessed through the licensing process.
 - ii) Next Steps is a high-level document responding to the Godfray Review. The Godfray Review did not require further ecological impact assessment to be conducted and did not present any new evidence on adverse ecological effects of culling.
 - iii) Next Steps proposed to phase out badger culling after a period aiming initially to preserve the status quo on badger culling and badger populations.

- iv) The section 40 duty was not engaged by Next Steps. If it was, it was sufficiently discharged.
- v) Even if the defendant had given more explicit attention to section 40 of NERCA and the purpose of conserving biodiversity, it is “highly likely” that the outcome would not have been substantially different. The defendant would still have indicated an ambition to phase out supplementary culling over a transitional period. Therefore, section 31(2A)(a) of the Senior Courts Act 1981 applies.

Discussion and decision

91. There is no evidence that the defendant himself (this being a non-delegable duty, when it applies) explicitly had regard “to the purpose of conserving biodiversity” when he issued Next Steps.
92. However, section 40 required him to have regard to this purpose only “so far as is consistent with the proper exercise of [his] functions”. Biodiversity had been considered at multiple points before Next Steps, and the evidence was inconclusive. The claimant does not say that the defendant was bound by law to commission additional research at that point. Getting clearer research results was in any event very difficult for practical and methodological reasons (for the reasons discussed by Dr Brown).
93. There was nothing in the Godfray Review, or any other material immediately preceding “Next Steps”, which suggested that there were fresh implications for the purpose of conserving biodiversity which had to be considered at that point. Nothing had changed. The information was the same. The situation on the ground (so far as the evidence showed, or could show) was the same. There was no prospect of obtaining new or meaningful research results in the immediate future. I am not persuaded that the defendant had explicitly “to have regard... to the purpose of conserving biodiversity” at this particular point. To do so was not “consistent with the proper exercise of [his] functions”. If section 40 was meant to require him to have regard to this aspect whenever he did anything at all, the qualification “so far as is consistent with the proper exercise of [his] functions” would not be there. To every thing there is a season, and a time for every purpose.
94. Section 40 of NERCA imposes a duty on every public authority, and not just the defendant. It imposes the duty on Natural England (for example) as well. Therefore, it is not necessary for the whole burden of having regard to the purpose of conserving biodiversity (under section 40) to be thrown on to the Secretary of State. This is relevant to whether, when he is exercising any particular function or functions, it is “consistent with the proper exercise of those functions” that he should “have regard... to the purpose of conserving biodiversity” as required by section 40. It goes to the extent of the duty, and does not fall into the error of saying that the duty can be delegated by the defendant.
95. There are two, to my mind compelling, reasons for concluding that “Next Steps” did not engage the defendant’s section 40 duty. The first is that the duty had been discharged previously, when the implications of the statutory purpose of conserving biodiversity had been expressly examined. There was nothing new to go on at this point. There was nothing upon which a section 40 duty could bite. There was no new material,

whether in the Godfray Review or elsewhere, to have regard to, which might engage a section 40 obligation.

96. The second is the nature of Next Steps itself. Next Steps did not effect any change so far as badger culling or supplementary badger culling was concerned, except to suggest that it should be ended in the foreseeable future. It is sophistry to say that, because it was not stopping badger culling immediately, Next Steps was proactively deciding that badger culling should take place with the result that a conscious review of the implications for biodiversity was required by section 40. Next Steps was essentially proposing more of the same, and then a move away from badger culling altogether. This did not make Next Steps the time for a specific consideration of the effect of badger culling on the conservation of biodiversity. Indeed, the relief claimed by the claimant, which is a sudden stop to all badger culling pending a section 40 consideration by the defendant, would be more likely to change the existing state of biodiversity than the policy of time-limited continuation, followed by phasing out after a few years, in Next Steps.
97. I would find these points to be decisive in relation to all the badger-culling implications of Next Steps. However, they are at their most powerful in relation to supplementary badger culling, which aims only to keep the badger population stable at its current post-cull levels, rather than reducing it any further.
98. If, however, I am wrong about that, and the section 40 duty was engaged, then it is correct to say that the defendant failed to discharge it, in that he did not himself, so far as the evidence shows, have specific regard to the purpose of conserving biodiversity when he issued Next Steps. Given the intense focus on that question which this application has applied, it is reasonable to suppose that if he was in a position to say that he did have such regard, he would either say so himself, or produce some sort of evidence, such as a minute or a briefing document, to prove it.
99. However, given the history, and the complete absence from any of the materials I have outlined of any evidence that any change to culling policy was required in order to conserve biodiversity, it is inevitable that, if the defendant had explicitly applied his mind to a section 40 “regard... to the purpose of conserving biodiversity”, the outcome would have been the same. The existing policy of badger culling, including supplementary badger culling, had been developed and implemented with the benefit of all the evidence available about ecological impact and biodiversity. There was no new evidence that might even potentially have caused Next Steps to take a different turn. There was no prospect of obtaining any such new evidence at that point, either.
100. I am therefore bound by section 31(2A) of the Senior Courts Act 1981 to refuse relief in any event, because it is “highly likely that the outcome... would not have been substantially different”. There is no exceptional public interest under section 31(2B) in requiring the defendant to go through the motions of a section 40 exercise when there is no reason to think that it will make any difference to the outcome.
101. For these reasons, the application for judicial review is dismissed.