



Neutral Citation Number: [2020] EWHC 1192 (Admin)

Case No: CO/4817/2019

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

Birmingham Civil Justice Centre  
33 Bull Street, Birmingham  
B4 6DS

Date: 13/05/2020

**Before:**

**THE HONOURABLE MRS JUSTICE ANDREWS DBE**

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**Between:**

**THE QUEEN (on the application of**  
**(1) THE NATIONAL FARMERS UNION**  
**(2) T&G STONE LIMITED**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR ENVIRONMENT,**  
**FOOD AND RURAL AFFAIRS**

**Defendant**

**-and-**

**NATURAL ENGLAND**

**Interested**  
**Party**

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**Maya Lester QC and Malcolm Birdling (instructed by Bowcock Cuerden LLP) for the**  
**Claimant**

**Sir James Eadie QC and Nicholas Chapman (instructed by the Government Legal**  
**Department) for the Defendant**

**The Interested Party did not appear and was not represented**

Hearing dates: 1 and 2 April 2020  
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**Approved Judgment**

**Mrs Justice Andrews:**

**INTRODUCTION**

1. This case concerns a topic which engenders very strong feelings on both sides of the debate: the culling of badgers to prevent the spread of bovine tuberculosis (“bTB”). However, it is not about the merits or otherwise of culling versus vaccination. The narrow issue for the Court to determine is whether it was lawful for the Defendant (“the Secretary of State”) to decide to issue a direction to Natural England (“NE”) on 6 September 2019 requiring it not to grant any badger culling licences in Derbyshire before 1 May 2020 (“the Direction”). The Direction was issued under s.16 of the Natural Environment and Rural Communities Act 2006 (“the 2006 Act”). NE was obliged to, and did, comply with it. It was the only such direction issued in 2019, and singled out Derbyshire; cull licences were granted in respect of all other applications that had been approved by NE.
2. Badgers are iconic animals, and a protected species. They may be captured and killed only in limited circumstances, as set out in the Protection of Badgers Act 1992 (“the 1992 Act”). However, badgers are also one of the vectors for transmission of bTB to cattle. The disease is a serious animal health problem and requires infected cattle to be destroyed. Scientific evidence indicates that culling badgers can be effective in reducing the disease; but culling is a highly emotive issue involving difficult political and ethical value judgments.
3. S.10(2)(a) of the 1992 Act makes provision for the issue of licences to cull badgers for the purpose of preventing the spread of disease. Whilst such licences may be granted by the Secretary of State, by ss.78(1) and 83 of the 2006 Act the Secretary of State may by agreement authorise NE to perform that function. The Secretary of State entered into such an agreement with NE with effect from 1 October 2006.
4. Licensed culling is limited to an annual six-week cull period, which cannot take place before June and generally does not take place before September. In line with the scientific evidence, any such licence would be granted for a minimum of 4 years, because it has been shown that culling does not provide a statistically significant overall benefit until the fourth annual cull has taken place. Indeed, epidemiological studies have suggested that stopping culling early could lead to an *increased* incidence of TB in cattle within the cull zone and the 2km around it.
5. At the time when the Direction was issued, NE had been on the point of granting a licence to the Second Claimant (“the Company”) which would have covered a specific cull zone, mainly falling within the boundaries of the county of Derbyshire, although it also encompassed some land in the adjacent county of Staffordshire. The cull zone is referred to in the documents as “the Lunar area” and that is how I shall refer to it in this judgment. It would have been the first culling licence granted in respect of Derbyshire. The Company had been incorporated by a group of farmers for the specific purpose of applying for such a licence. As the Secretary of State acknowledged, it had spent a great deal of time, effort and cost in making the application. The First Claimant (“the NFU”) which has considerable experience of supporting farmer-led groups applying for culling licences, had supported the Company throughout the application process.

6. The Company had satisfied NE that it met all the requirements set out in the statutory guidance given by the Secretary of State to NE, entitled “*Guidance to Natural England: 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*”, the most recent version of which was published in May 2018 (“the Guidance”). It had demonstrated that it was able to deliver an effective and humane cull in compliance with those requirements, and that it had arrangements in place to achieve this. The Direction was given with no forewarning to the Company and very little forewarning to the NFU.
7. In the covering letter from the Secretary of State (then the Rt Hon Theresa Villiers MP) to NE, reference is made to the fact that Derbyshire is in the TB Edge Area where the Government has been encouraging badger vaccination, including through the Badger Edge Vaccination Scheme (BEVS), as part of the bTB eradication strategy. The letter referred to the BEVS project in Derbyshire delivered by Derbyshire Wildlife Trust (“DWT”) and to the number of smaller privately-funded badger vaccination projects within that county, and to the fact that Derbyshire had more licensed badger vaccination sites than any other county in England. The Secretary of State then referred to Sir Charles Godfray’s independent review of the bTB eradication strategy (described in more detail later in this judgment) and said this:

*“the Government has on balance decided that NE should not issue the Derbyshire badger culling licence pending its response to the Godfray review and further consideration of how vaccination and culling can be best used in combination in areas like Derbyshire.”*
8. The reason given in the Direction itself was that:

*“The Secretary of State intends to consider further the relationship between the operation of culling and vaccination for the purpose of preventing or controlling the spread of bovine TB in areas such as Derbyshire located in the Edge Area (that area immediately adjacent to the High Risk Area that is not part of the Low Risk Area).”*
9. The Claimants challenge the Secretary of State’s decision on three main grounds: (1) unlawful departure from policy; (2) frustration of a legitimate expectation; and (3) *Wednesbury* unreasonableness (encompassing both irrationality and alleged failure to take into account relevant considerations/giving weight to irrelevant considerations). Before considering the merits, it is right that I should pay tribute to both legal teams, and in particular to Counsel, for the thoroughness of their preparation and the excellence of their presentations. They coped magnificently with the challenges posed by the need to conduct the hearing remotely by video link due to the restrictions imposed in response to the COVID-19 pandemic.
10. I can well understand the disappointment, frustration and bewilderment felt by the Company and those individuals behind it who had worked so hard to achieve what was necessary to obtain a licence, and who had every reason to anticipate a licence being issued in September 2019, only to be told at the very last minute that the Secretary of State had issued the Direction to NE for reasons that were not canvassed with them in the course of the application process. However, I am not persuaded that the decision to issue the Direction was unlawful.

## **POLITICAL AND STATUTORY FRAMEWORK**

11. S.78 of the 2006 Act provides as follows:

(1) *The Secretary of State may enter into an agreement with [NE] authorising that body to perform a [Department for Environment Food and Rural Affairs (“Defra”)] function*

(a) *either in relation to the whole of England or in relation to specified areas in England,*

(b) *subject to paragraph (a), either generally or in specified cases.*

*“Specified” means specified in the agreement.*

(2) *An agreement under this section –*

(a) *may be cancelled by the Secretary of State at any time, and*

(b) *does not prevent the Secretary of State from performing a function to which the agreement relates.*

(3) *This section is subject to sections 81 and 82 (reserved functions and maximum duration of agreement).*

12. S.15(2) of the 2006 Act empowers the Secretary of State to give NE guidance as to the exercise of its delegated licensing functions. S.15(4) provides that the Secretary of State must publish such guidance as soon as is reasonably practicable. S.15(5) makes it clear that the power to give guidance includes the power to vary or revoke it. S.15(6) provides that in discharging its functions, NE must have regard to such guidance.

13. S.16(1) of the 2006 Act provides that the Secretary of State may give NE general or specific directions as to the exercise of its functions. The Secretary of State must publish any such directions as soon as reasonably practicable after they are given (s.16(3)). NE must comply with any directions given under that section (s.16(5)).

14. In 2011, following a public consultation, the Coalition Government published a Paper entitled “*the Government’s policy on bovine TB and badger control in England*”. The Paper identified bTB as the most pressing animal health problem in England. It noted that the prevalence of the disease was on the increase and that it had caused nearly 25,000 cattle to be slaughtered in 2010. It set out a list of reasons for intervention to tackle bTB, which included protecting the health of the public, maintaining public confidence in the safety of products entering the food chain, and protecting and promoting the health and welfare of animals. It then explained the reasons why it was considered necessary to introduce, as part of a package of measures, what was described as “*a carefully managed and science-led policy of badger control in areas with high incidence of TB in cattle*” (para 1.5).

15. Having explained why the Government had concluded that maintaining the current approach (which did not include culling) was insufficient to address the spread of bTB, the Policy Paper addressed the pros and cons of various control options,

including badger vaccination and badger culling. It stated in para 3.29 that, on the basis of current veterinary and scientific advice, culling in high cattle TB incidence areas, carried out in line with strict evidence-based licence criteria (explained in section 5 of the Paper) would reduce the number of infected badgers, and thus the weight of TB infection in badger populations in the treatment area, more quickly than vaccination, and therefore would have a greater and more immediate beneficial impact on the spread of TB to cattle and the incidence of infection in cattle.

16. The Paper proposed that controlled culling by shooting would be piloted in two areas initially and monitored closely over the first year (with input from a panel of independent experts). There would also be arrangements to monitor the impacts of the policy and compliance with licence arrangements. Para 6.9 stated that:

*“The Government does not want to see culling continuing for any longer than necessary. Four years after the first culling licence has been granted, the Government will review the policy and advise NE whether further culling licences should be granted. NE should continue with normal licensing operations until it receives this advice. (Existing licences will remain valid for the term for which they were originally granted).”*

17. In the concluding section of the Paper, having reiterated that it did not want to see culling continue for any longer than necessary, the Government stated that it had concluded that culling was a proportionate response to the problem of TB in cattle (para 7.3). The Government’s policy was described as:

*“to enable farmers and landowners to cull and/or vaccinate badgers under licences granted under the Protection of Badgers Act 1992 and the Wildlife and Countryside Act 1981”* (para 7.4).

The Paper made it clear that the policy would only be rolled out more widely if the evaluation of the pilot schemes confirmed that culling using controlled shooting could be carried out effectively, safely, and humanely.

18. The first set of statutory guidance to NE under s.15 of the 2006 Act was published simultaneously with that Paper. The first badger cull pilots were licensed in 2012 and culling in those areas took place in 2013. As the Paper envisaged, after the first year there was an evaluation process. The independent expert panel that assessed the pilot schemes made various recommendations, and a further consultation took place in 2013.
19. In April 2014, the Government published a long-term (25 year) strategy for the eradication of bTB (“the Strategy”) which remained in force at all material times thereafter. This was the “strategy” to which the Secretary of State referred in her letter to NE accompanying the Direction. In his foreword, the then Secretary of State said that he had decided to continue the policy of badger culling in endemic areas, learning lessons from the pilots in 2013. The stated aim of the Strategy was to eradicate bTB by 2038, achieving officially bTB free status for England incrementally, whilst maintaining an economically sustainable livestock industry.
20. The Strategy repeatedly acknowledged that there was no single solution, and that an integrated approach would require the use of a range of disease surveillance and

control interventions, including statutory and non-statutory controls. It identified 3 key actions:

- a) establishing three bTB management regions or zones, namely the High Risk Area, the Low Risk Area, and the Edge Area (described as a buffer zone between the other areas where the incidence of the disease is lower than in the High Risk Area but higher than in the Low Risk Area);
- b) applying a range of measures to control the disease within each of these zones that is practical and proportionate to the disease risk, while maintaining an economically sustainable livestock industry; and
- c) ensuring that there is shared governance of the delivery process between the main beneficiaries, including the food and farming industry, and the taxpayer.

21. The Government's stated intention was to adopt a risk-based approach to disease control which would differ in each of the three defined Areas. In the High Risk Area, management of badger to cattle infection would include vaccination and culling. In the Edge Area, as well as the restrictions on cattle movements and other control measures deployed in the Low Risk Area, there would be a focus on surveillance to identify the role of wildlife vectors (such as badgers). Management of these wildlife vectors would include vaccination and possibly culling where the evidence supported its deployment. At the time when the Strategy was published, the three Areas straddled county boundaries. In consequence, some parts of Derbyshire were within the High Risk Area, whilst the remainder fell within the Edge Area.
22. The press release accompanying the announcement of the Strategy on 3 April 2014 indicated that a series of changes would be made to improve the effectiveness, humaneness and safety of culling, and that the changes would be monitored to assess their impact before further decisions were taken on more badger cull licences the following year. These changes would include more extensive training for contractors carrying out the cull, better planning by the licensed companies to ensure that culling was spread evenly across all land available, and better data collection to assess progress.
23. At the same time, the Government announced that grant funding would be made available for private badger vaccination projects in the Edge Area, aiming to increase TB immunity in uninfected badgers and thereby reduce the spread of the disease. Pursuant to that aspect of the Strategy, the BEVS was launched in September 2014 to support badger vaccination projects in the Edge Area. The take-up of vaccination by the farming industry since then has been very limited. Delivery of badger vaccination has been predominantly undertaken by third sector organisations and volunteers, many of whom are also active and vociferous campaigners against badger culling.
24. In 2015, DWT, which has had a vaccination licence since 2014, was awarded a BEVS grant for a badger vaccination area of approximately 95 km<sup>2</sup>. in the part of Derbyshire which was then designated as falling within the Edge Area. There was disruption to the vaccination programme between 2015 and 2017 due to a worldwide shortage of the BCG vaccine, but once supplies became available again, a new BEVS was

launched in November 2017. DWT's grant was renewed in 2018. At the time of the decision under challenge, theirs was the longest running BEVS project in England.

25. In August 2016, there was a further consultation exercise on proposals to enhance the TB control framework through more sensitive testing of cattle from TB breakdown herds, and for making faster progress on the road to achieving official bTB freedom for counties in the Edge Area. The latter proposal involved redefining the Edge Area boundaries by incorporating as whole counties those which currently straddled the High Risk and Edge Areas. Those proposals were implemented, and in January 2018, the entire county of Derbyshire and four other counties were re-categorised as falling wholly within the Edge Area. These included Cheshire (where, at the time of the 2016 consultation, there had already been expressions of interest in the grant of a badger control licence for culling).
26. The Derbyshire part of the Lunar area which would have been covered by the licence applied for by the Company falls within the part of the county which was formerly in the High Risk area. It is not adjacent to the area of the county in which DWT is operating its vaccination programme, and badgers within that area would be unlikely to roam far enough to fall within the boundary of the cull zone. Besides the distance between the two areas, there were physical obstacles, such as highways.
27. In February 2018, the then Secretary of State, the Rt Hon. Michael Gove MP, announced an independent review of the Strategy, to be chaired by Sir Charles Godfray, a population biologist and Fellow of the Royal Society. After referring to the results of early analysis suggesting that the two pilot cull zones were seeing the anticipated impact in terms of reduced incidence of the disease, Mr Gove said:  
  
*"However, we do need to consider what further steps or actions should follow the conclusion of each four-year cull. After all, none of us wants to be culling badgers forever. The review will therefore also consider such issues."*
28. The Godfray review's terms of reference were: *"to reflect on progress being made with implementation of the bTB Strategy and to 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."*
29. The Godfray Report was published in October 2018. Chapter 1 provided a summary of its findings and conclusions, which included the following:

*The deeply held beliefs of people who cannot countenance culling badgers deserve respect, as do the beliefs of people who argue that sacrificing badgers is justified to reduce the burden of this disease on livestock and farmers. The decision whether or not to cull badgers must be informed by evidence which provides important information on likely outcomes. However, final decisions have to take into account the irreconcilable views of different stakeholders and so inevitably require judgements to be made by ministers (para 3).*

*Our interpretation of the evidence is that the presence of infected badgers does pose a threat to local cattle herds. This interpretation reflects the broad consensus amongst epidemiologists who have studied the disease. Reducing this threat, by culling or non-*

*lethal intervention, will thus help lower the incidence of the disease in cattle. If a decision is made not to cull, and if non-lethal interventions prove less effective, then progress towards eliminating the disease will be slower and complete elimination may be even more difficult (para 4).*

*Experience from the Randomised Badger Culling Trials suggests that the benefits of widespread culling repeated annually for four years persist for some years after lethal control stops, and hence we see periodic culling as a more promising strategy than continuous culling beyond four years (para 29).*

*Moving from lethal to non-lethal control of the disease in badgers is highly desirable. Though research into other options should continue, we believe that the injectable BCG vaccine is the only viable option currently available. At the moment there is limited information about the relative effectiveness of vaccination and culling on incidence of the disease in cattle, though the results from small-scale vaccine projects in England and large-scale deployment of vaccination in the [Republic of Ireland] will help address this. We believe it is very important to maintain flexibility in policy over control of the risk of transmission from badgers to be able to respond to the changing evidence base (Para 30).*

*If uncertainty about the relative effectiveness of vaccination and culling is not resolved by analysis of the outcomes of existing interventions (in England and elsewhere) then we believe Government should address this need. Culling is currently being carried out, or being planned, in 32 areas, chiefly in the west of England. On the assumption that this goes ahead and that periodic culling rather than continuous culling is adopted (§29) we suggest that after 4 years of culling Government should consider a programme in which badgers are vaccinated in half of the areas and, after a two-year pause, intensive culling resumes in the other half. The outcome should be monitored and adaptively managed so should it become clear that vaccination is providing comparable benefits to culling then all areas should adopt it, with the opposite happening if vaccination fails to provide protection (para 31).*

30. The latest edition of the Guidance to NE was published in May 2018, whilst the Godfray review was still being undertaken. The Guidance states that it represents the Secretary of State's considered views based on current scientific evidence about what is required for any cull of badgers for bTB control purposes to be effective, safe and humane. It was issued after consultation with NE, the Environment Agency and the public.
31. In paragraph 6 the Guidance states that the Government's policy is to enable the licenced culling or vaccination of badgers for the purpose of controlling the spread of TB as part of the Strategy for achieving Officially Bovine Tuberculosis Free status for England. It goes on to explain that there are 3 types of culling licence, and that which is appropriate will depend on the phase of the proposed culling operations and the TB risk area in England concerned. A badger disease control licence is required where culling is to take place for the first time in the High Risk or Edge Area. That was the relevant type of licence for which the Company applied.
32. The Guidance goes on to set out the criteria which must be met by applications for each of the 3 different types of licence. Para 26 sets out recommended "best practice" where the use of vaccination in combination with any type of culling licence is



proposed in the Edge Area. This includes a recommendation that where culling and vaccination are taking place on adjacent land, applicants should take reasonable steps to negotiate an agreed approach to badger control operations along the relevant boundary with that landowner/occupier.

33. Para 27 of the Guidance states that before granting a culling licence, NE should be satisfied that the application meets the licence criteria and the policy requirements. NE, on behalf of the Secretary of State, will determine applications for culling and vaccination licences on a case-by-case basis. Para 31 states that a maximum of 10 new badger disease control areas may be licensed each year unless there are compelling reasons to increase or decrease that number. Applications will be prioritised according to the extent to which they best meet the primary aim of the policy (i.e. to eradicate TB). Para 35 states that NE should give the public an opportunity to comment on any licence applications that are made.
34. NE issued its own “external guidance” to applicants for a badger disease control licence in 2019, which explained the process for making an application for such a licence and the relevant timelines from application to grant. Applicants hoping to be granted a licence in all prospective areas were required to follow the same rigid deadlines. If the requisite information was not provided by a deadline, then the licence application would not be permitted to progress to the next stage and would be treated as withdrawn.
35. As NE may not issue more than 10 licences in a year without special reasons, applicants were told in this guidance that the top 10 areas would be identified by April 2019 and only those 10 would then go forward to the next stages of the application process. In June 2019, the applicants had to provide NE and Defra with their operational readiness assessment (essentially a dossier of the area’s preparedness and planning for badger culling), together with supporting evidence to demonstrate that they could deliver a cull safely, effectively and humanely.
36. The applicants who remained in the running were then required to attend a “challenge session” with NE and Defra officials in or around late July 2019 to discuss their operational readiness assessment and answer any questions raised about it. In the experience of the NFU representative who provided evidence in this claim, until this case it was unheard of for an applicant to pass the challenge session and then be refused a licence. At the point of completing the challenge session, the prospective badger cull area will already have been fully operationally prepared, and any potential problems should have been resolved.
37. It was envisaged in NE’s guidance to applicants that in August 2019, the applicant would run final briefings for all their contractors and distribute relevant equipment and supplies to them. In late August, NE would issue the licence and authorisation letter a few days before culling was due to start – *“providing your application satisfies the required criteria.”*
38. The Government’s response to the Godfray review was not published until March 2020, six months after the impugned decision was taken and the Direction issued. The response signals a policy shift towards a disease control programme focused principally on vaccination, and indicates an intention to end most culling by the mid to late 2020s. It states in its conclusion that:

*“the government is clear that widespread badger culling cannot continue forever and that there needs to be a gradual transition to badger vaccination, while retaining the option for culling in specific circumstances when and where it is necessary. We have reached a point in the bTB strategy where it is right to move on from widespread culling being the focus”.*

39. The response makes it clear that during the transition period the Government will continue to license new cull areas where appropriate; however, a more restrictive approach will be taken to culling in the Edge Area, which will not be permitted unless the epidemiological evidence points to a problem in badgers. There will be a consultation on a revision of the statutory Guidance to NE, with a view to publishing a new version of it by around August 2020.

### **EVENTS LEADING TO THE DECISION UNDER CHALLENGE**

40. The Company was formed in March 2018. In the same month NE published a consultation which gave the public the opportunity to comment on the proposed licences to cull badgers in various locations, including the Lunar area. At that stage, the Company was not made aware of any particularly vocal public opposition. The Company’s application was made in accordance with the prescribed timetable, and on 13 December 2018 NE confirmed that Derbyshire had been ranked within the top 10 areas interested in applying for a licence in 2019. In the event, in around July 2019 NE concluded that there were compelling reasons to licence a cull in an eleventh area, Cheshire, which also fell within the Edge Area. That decision was reached in conjunction with the Secretary of State and the Minister of State (“the Minister”) and taken long before there were any concerns expressed about Derbyshire.
41. In May 2019, NE confirmed to the Company that the TB management agreements signed by farmers were sufficient to meet their land access requirements. Over the next two months, NE carried out visits to assess the adequacy of on-farm biosecurity measures. In June 2019, the Company provided NE with evidence of sufficient funds to meet the operational costs for all 4 years of the licence, and submitted its operational readiness assessment. The directors informed NE and Defra that they proposed to commence culling operations on 9 September 2019.
42. The Company’s representatives then attended a practice challenge session run by the NE advisor in July, which appeared to go well. During that session, the issue of vaccinated badgers within the cull zone was raised for the first time. The Company’s representatives were asked how they would cope with any areas of land within the cull zone where badgers had been vaccinated. They said that they would place any baited traps away from such areas, and that they would not cull badgers on any land that was not signed up for the cull, but if any vaccinated badgers did move into land that was signed up, they would be culled. The NE representative appeared satisfied with that response.
43. The actual challenge session took place on 1 August 2019. Many questions were asked and answered. The representatives of Defra and NE appeared really pleased with how the session had gone, and the leader of NE’s operations team said to one of the Company’s directors that it was the best challenge session she had ever been to. The Company’s directors understood that they were free to go away and make their final preparations for operations to begin, which is what they did. They were

expecting to get the licence on 5 September. No one told them that this was conditional upon anything further. So far as the Company was concerned, it had met all the criteria, and its directors understood that they would get their licence.

44. On 14 August 2019 there was a licensing decision meeting between NE and Defra. No concerns were raised about the Lunar area, although there was an acknowledged need to be aware of DWT's vaccination work in the county and their likely criticism of culling vaccinated badgers. The national operations director at NE was recorded in the minutes as being content with the recommendation to authorise the licence for the Lunar area.
45. Two days later the Minister, George Eustice MP, was contacted by an MP whose constituency was in Derbyshire, who had been lobbied by anti-cull campaigners and was asking for information. Against a background of growing media interest, and increasingly vociferous campaigning by those opposed to culling, the Minister sought information from civil servants in Defra so that he could respond to the MP. They provided him with an advice note on the issue of culling and vaccination in Derbyshire, incorporating input from the Chief Veterinary Officer, ("CVO") together with a map indicating the proposed cull zone and known vaccination areas. The location of the cull zone was deliberately kept confidential for reasons of security. At that stage, the CVO positively endorsed proactive badger culling in the Lunar area as "the best available option".
46. The note confirmed, and the map illustrated, that most of the vaccination in Derbyshire was not in the Lunar area. Although there were around four or five small pockets of vaccinated land falling within the Lunar area (one of which is on the Staffordshire side of the county boundary) and two others just outside the boundary of the Lunar area, it was pointed out that other areas where licences had already been granted included similar pockets of vaccinated land. The note explained that because there were some areas outside the cull boundary that were within the distance that badgers could roam, the possibility of vaccinated badgers being culled could not be completely ruled out.
47. Subsequently the Prime Minister took a personal interest in the matter and spoke to the Minister about the culling policy generally, and the situation in Derbyshire in particular. Whilst making it clear that the ultimate decision was for the Minister, the Prime Minister asked him to give careful consideration to the issues raised. The Minister met with Defra officials to discuss the position in Derbyshire and to obtain further advice. Following those discussions, he sent a personal letter to the Prime Minister expressing the view that it would be wrong to halt the issuing of any of the current licences, but that once culls had completed their 4 year cycle, the Government should be looking at alternatives such as vaccination to give an exit strategy from the badger control phase of the 25 year Strategy. He suggested that any change in policy could be considered and communicated to the public as part of the Government's response to the Godfray review, on which work was already underway.
48. On 23 August 2019 NE advised Defra officials that NE would proceed to issue badger culling licences and authorisations in the absence of a direction not to do so.
49. Whilst awaiting the Prime Minister's response, the Minister and his advisers continued to consider the position in Derbyshire with a view to taking a decision on

whether the proposed cull should be allowed to take place. The Minister was told that the Lunar area covered the worst affected part of Derbyshire, where bTB levels were as high as those in parts of the High Risk Area, and that the area had 967 herds and the second-highest rate of bTB per 100km<sup>2</sup> of all the 11 areas under consideration for licensing that year. DWT had expressed concern over culling taking place adjacent to their vaccination areas, but they had not been told where the cull was likely to take place because of legitimate concerns over security. All the DWT vaccination schemes were outside the proposed cull area. The Minister was reminded that the Guidance to NE on culling explicitly provides for culling and vaccination to take place in adjacent areas as part of a combined strategy and suggests best practice on how to combine the two.

50. The Prime Minister initially indicated a reluctant acceptance that all the September culls should go ahead as planned, but then spoke again to the Minister and reiterated his specific concerns about Derbyshire. Following that conversation, the Minister decided to rethink the situation, with a view to ascertaining if there was any way to mitigate the risk of culling vaccinated badgers in the Lunar area. He commissioned policy officials to draw up the various options, including what mitigation measures could be put in place if the cull in Derbyshire were to be licensed. NE had the power to impose conditions on any licence under s.10(2) of the 1992 Act. NE indicated that they considered 200m buffer zones around vaccination sites to be pragmatic. This appears to have been on the basis that there was empirical evidence from the initial cull trials that this was a badger's typical ranging distance.
51. On 29 August 2019, the Minister and the Secretary of State confirmed that they were content for the other 10 cull areas (including Cheshire) to be licensed.
52. Defra officials worked hard over the August Bank Holiday weekend to produce the available options for the Lunar area. They came up with three. Option 1 was to continue with the cull without any mitigation to reflect the presence of vaccination sites, which they said would risk negative public commentary and possibly antagonising future relationships with wider wildlife groups if the Minister wanted to announce renewed support for vaccination. Option 2 was not to allow the cull to happen in 2019. This was not recommended, on the basis that there was no disease control rationale for it. Option 3 was to allow the cull to take place, but with a buffer zone of 200m around vaccinated areas. This was put forward as the preferred option.
53. Further advice was obtained from the CVO, who said that for vaccination to be effective it would take a long time and cost a huge amount of resource. There were likely to be areas where they would still want to cull but had not yet done so, but to her mind these were the second most urgent areas to find a solution for, the most urgent areas being those which were 1 to 4 years into culling already. From the disease control perspective, a phased approach would be best, the objective being not to worsen disease anywhere but to accept that progression to control/eradication will be slower. As part of that phased approach, she suggested that culling should only be licensed in the High Risk Area, and that the current High Risk Area and Edge Area in terms of prevalence should be reviewed. She acknowledged that this represented a departure from the views she had expressed previously.

54. The Chief Scientific Adviser expressed the view that culling was necessary in order to achieve bTB free status, and that it was not known whether vaccination alone could eliminate bTB in cattle.
55. There followed a series of meetings and discussions in which the Minister and those advising him explored the feasibility of introducing buffer zones to mitigate the risk that vaccinated badgers would be culled, and considered what would be the largest buffer zone that could be introduced without compromising the feasibility of the cull. At around this time, the Minister also had a discussion with the Minister of State for Environment and International Development. That Minister indicated that he would support the Godfray review's recommendations of a shift in the balance towards vaccination.
56. Although NE had suggested a buffer zone of 200m, the Minister was keen on a wider buffer zone of between 500m and 1 km, if that would not interfere with the efficacy of the cull. He asked Defra officials to explore whether those options were possible, and to consult with the NFU to see whether they or the Company would offer to implement the buffer zones. It was envisaged at that stage that the NFU might be willing to act as an intermediary between Defra and the Company.
57. By the evening of 2 September, the Minister had indicated to the Prime Minister that he was minded to allow the cull in Derbyshire to go ahead, subject to taking steps to mitigate the risk that vaccinated badgers would be killed by introducing buffer zones around the licensed vaccination sites within the Lunar area and between any vaccination areas and the boundaries of the Lunar area. In his letter, the Minister stated that "*the very clear expert veterinary and scientific advice is that the cull should proceed in Derbyshire on disease control grounds*". His two main reasons for going ahead, subject to those mitigating steps, were that Derbyshire had the second highest rate of TB and the highest number of TB herd breakdowns overall, and that the DWT vaccination area was outside the proposed cull zone. There was no response to that communication.
58. On the morning of 3 September 2019, the Director of Animal and Plant Health and Welfare at Defra telephoned a senior NFU official and informed him that there were serious concerns about the proposed Lunar cull. This was the first intimation of any such concerns to anyone on the Claimants' side. He explained that the concerns were that vaccinated badgers should be protected, and that it had been suggested that buffer zones may meet those concerns. He asked whether such zones could be put in place, and what the practicalities might be, including by reference to the size of the buffer zones. Later that day, Defra supplied the NFU with maps indicating the handful of small areas within the Lunar area and on the edges of it where badger vaccination had been licensed.
59. After they had taken time to consider the idea of buffer zones and discussed the matter internally, including canvassing the views of their President, the NFU made it clear to Defra on 4 September that they did not support the idea of introducing buffer zones at such a late stage in the process. They told Defra officials that they felt that such measures would compromise the disease control basis for the proposed cull. They also indicated that they thought any decision to impose buffer zones would be received very poorly by the Company and the wider farming community. They

ultimately took the position that no halfway house was possible, and that culling should be licensed for the whole Lunar area or not at all.

60. Unfortunately, and for reasons which have not been satisfactorily explained, the Company was told nothing about the suggestion of buffer zones until after the impugned decision had been taken. It appears that at the end of the discussions with the NFU it was decided that the NFU would not tell the Company, but it was not made entirely clear to me why Defra officials did not do so. When the directors did find out, they indicated to Defra that they would have been amenable to that suggestion, but by then it was too late as the Direction had already been given to and acted upon by NE.
61. On 4 September 2019, the CVO provided updated advice to the Minister about the three options, including the possibility of licensing a smaller area (equivalent to 88% of the Lunar area) to accommodate the proposed buffer zones. She pointed out that whilst refusing to allow the cull to go ahead would not lose disease benefits already gained, not carrying out a cull in an area where there is a significant level of disease would impact on the time it took to eradicate bTB. She said that more importantly, it would enable the disease to spread to other uninfected wildlife and to uninfected cattle (as this area is in disease level terms comparable to the worst of the HRA). Overall, she stated that this would mean losing ground in the fight against the disease.
62. The CVO reiterated that the cull would be most effective when it covered as near as possible the whole of the area. She shared the Chief Scientific Adviser's view that the vaccination areas within the cull area were so small that their disease control benefit would be minimal, and over a long time. However, she said that the introduction of a 200m buffer zone around the areas of vaccination would be unlikely to have a significant [adverse] impact on the effectiveness of the cull as a disease control tool. It would maintain the progression in disease control *and* provide a significant degree of protection to the vaccinated badgers. Thus, she supported Option 3. She expressed no views about wider buffer zones.
63. In the late afternoon of 4 September, the Defra officials who had been advising the Minister were told that he took the view that "*the safest option is for the Secretary of State to give a direction to NE not to licence Lunar this year but to pause so that a better disease control strategy for the area can be developed for next year.*" The Minister said he was content for the remaining licences to be released by NE.
64. In the light of this indication, a submission was prepared for the Permanent Secretary to Defra which annexed the CVO's most recent advice. It stated that the Minister "*had decided to over-ride NE's decision to license a new badger cull in Derbyshire this year in response to political and wildlife NGO concerns about the impact on badger vaccination projects within the county*". It explained that:

*"Derbyshire is in a novel situation because, whilst some other cull areas have vaccination taking place within or in close proximity to them, none are BEVS projects and none are on the same scale as the project in Derbyshire, which is run by [DWT] with input from the National Trust, the NFU and local badger groups (groups we have worked hard to forge stronger relationships with over the past year). This is the first serious test of our policy of enabling culling and vaccination to co-exist in the Edge area, where Government is proactively supporting vaccination as a rational*

*disease control option. The Godfray review highlighted the need to shift away from culling in the longer term, therefore this area and situation presents an opportunity to consider how we can ensure vaccination and culling coexist in a way that maximises disease control benefits.”*

65. On 5 September, there was a meeting between the Minister and the Secretary of State to discuss the matter. No-one else was present, and no record was made of their discussions. The decision to issue the direction to NE not to license the Lunar cull was taken by the Secretary of State herself, on the advice that she received from the Minister.
66. The Director of Animal and Plant Health and Welfare has provided his account of what he was told by the Minister about the discussions at that meeting. He was told that the clear disease control justification for permitting culling and the fact that the Guidance supported the issue of a licence were weighed against the interest in avoiding culling vaccinated badgers. No mitigations were considered to be feasible that would both permit an effective cull and provide adequately certain assurance that vaccinated badgers would not be culled. The risk that this might happen was given “very substantial” weight. The Director was told that the other factors taken into consideration in reaching the decision were that:
- i) Derbyshire had an active and well-established vaccination programme and the largest BEVS funded vaccination project.
  - ii) There had been relatively weak take-up of vaccination among landowners and farmers, and the Government wished to build links with vaccination groups including those in Derbyshire.
  - iii) No cull had previously been licensed to take place in Derbyshire and any cull licensed in 2019 would continue for at least 4 years.
  - iv) The proposed cull was highly controversial and faced substantial public opposition. There was a risk that public opposition could spill over into more sustained protest and in turn constrain the Government’s future policy options.
  - v) The present administration wished to reconsider Government policy in relation to culling, including in relation to the interface between culling and vaccination, but it did not have sufficient time prior to the deadline for licensing culls in 2019 to reformulate that policy.
  - vi) Refusing to permit the proposed cull would inevitably cause upset and anxiety to the Company and others who supported the proposed cull and the policy of culling in general, and those who had invested time effort and money in the hope and believe that they would be granted a licence. It was anticipated that the Government could offer to reimburse the Company for its wasted financial expenditure.

## **THE AFTERMATH OF THE DECISION**

67. On 6 September 2019, the Secretary of State issued the Direction to NE and it was published by Defra on the same day. Four days later, Ministers gave approval to a cull

proceeding in the part of the Lunar area that fell in Staffordshire, and a licence was granted by NE to the Company to carry out that cull. On 20 September, Defra officials submitted their initial drafts of the Government's response to the Godfray review. In December 2019, an *ex gratia* payment was made to the Company to compensate it for the outlay in making the application. As already stated, the Government's response to the Godfray review was published in March 2020.

## **THE CLAIM FOR JUDICIAL REVIEW**

### **GROUND 1 AND 2 – UNLAWFUL DEPARTURE FROM POLICY/FRUSTRATION OF A LEGITIMATE EXPECTATION**

68. The Claimants contend that the Direction amounted to a Ministerial edict that NE must disapply the policy in the Guidance in relation to the Company's application, notwithstanding the published criteria being fulfilled and there being a pressing disease control reason to grant the Company a licence, on grounds not foreshadowed to the Claimants or to the public. It was submitted by Miss Lester QC that this amounted to an unlawful departure from the Secretary of State's published policy (Ground 1) and frustrated the Company's legitimate expectation (i) as to the matters which would be taken into account in the process which would be followed in the determination of its licence application and (ii) that if it satisfied those requirements it would obtain a licence (Ground 2). These grounds are so interlinked that it is convenient to consider them together.
69. The Claimants rely on the principles succinctly summarised by Lord Dyson in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [26]:
- "... A decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law 10<sup>th</sup> ed (2009) p.316. As it is put in De Smith's Judicial Review 6<sup>th</sup> Ed (2007) at para 12-039:*
- "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness." ..."*
70. Logically, the first matter for the court to consider is the nature and extent of any relevant policy. The Government's published policy at that time, reflected in the Strategy, and repeated in Para 6 of the Guidance, was to *"enable the licensed culling or vaccination of badgers for the purpose of controlling the spread of TB as part of the strategy for achieving officially bovine tuberculosis free status for England"* with a view to eradicating bTB. The policy therefore encompassed both licensed culling and vaccination as part of a long-term strategy to combat and ultimately eradicate the disease. Certain preconditions need to be met in order to satisfy the evidential basis for a cull. However, there is nothing in the Strategy to create a straitjacket in terms of how the policy is to be implemented – for example, by stating that a cull must be carried out in a particular area if the incidence of bTB is above a specified threshold. This possibly explains why the Claimants have focused on the Guidance.



71. The Guidance sets out the views of the Secretary of State, based on current scientific evidence, about what is required for *any* cull of badgers for the purposes of control of bTB to be effective, safe, and humane. That appears to me to be the ambit of any policy reflected in it – namely that licences to cull will only be granted to those who can meet those requirements. Paras 8 to 10 of the Guidance specify the criteria that any applicant for a Badger Control Licence must fulfil in order to demonstrate that they can deliver an effective safe and humane cull – and thus to be eligible for the grant of a licence. However, it does not follow that any person who fulfils those criteria is guaranteed to obtain a licence, or that they are entitled to a licence in the absence of a good reason to refuse it. In fact, there is nothing in the Guidance to mandate the grant of a licence in any particular area in any given year, even if that area falls within the top 10 in terms of priority.
72. When considering the Company’s application, NE adhered to the Guidance and to its own published timetable. If and to the extent that the Guidance represented policy regarding the criteria that must be fulfilled in order for someone to be eligible for a licence, there was no departure from it. Yet there is plainly a residual discretion to grant or refuse a licence to an applicant who fulfils all the criteria, as Miss Lester accepted.
73. The nature of the Guidance is therefore different from the published policy in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 which mandated that any unaccompanied child refugee meeting the specified eligibility criteria would be transferred to the UK under s.67 of the Immigration Act 2016. Although there was a stated quota, the evidence was that the limit on numbers was routinely ignored. The published criteria were exclusive. Once they were met, certain consequences had to follow. By contrast, fulfilment of the criteria in the Guidance does not mandate a particular result.
74. Moreover, the Guidance does not dictate how the residual discretion is to be exercised. The implementation section of the Guidance makes it clear that applications will be determined on a case by case basis, and the primary statute, the 1992 Act, makes it clear that licences may be made subject to conditions. Paras 31 and 35 identify specific factors that are relevant to the exercise of the discretion, namely, the extent to which the application best meets the primary aim of the policy (i.e. to eradicate bTB) and any public comment on the application. However, they are not identified as the only relevant factors. Whilst the Guidance expressly contemplates that culling may take place in an area adjacent to an area in which there is vaccination, the fact that it does so cannot be elevated to an expression of policy that the existence of vaccination projects within or adjacent to the proposed cull area is to be treated as an irrelevant consideration when considering whether to grant a licence to an applicant who meets the specified criteria.
75. Given that there is nothing in the Guidance that mandates NE to grant licences for any geographical area, it was open to NE to refuse to grant a licence for all or part of particular area; or to refuse to grant a licence even to someone who had demonstrated that they were able to carry out a safe, effective and humane cull as required by the Guidance. Like any other discretion, it would have to be exercised rationally, and consistently with the statutory obligation under s.10(9) of the 1992 Act not to unreasonably withhold a licence. That is not the same as it being the published policy of the Secretary of State that she (or NE) will grant a licence to any applicant in the

top 10 areas who meets the criteria in the Guidance, or will do so unless there is some good reason not to.

76. The Guidance was issued pursuant to s.15 of the 2006 Act. As such, it is directed to NE (not the Secretary of State) and NE must “have regard” to it when exercising its delegated functions – a less onerous obligation than an obligation to apply it. The Secretary of State has reserved functions under s.78(2)(b) of the 2006 Act. The fact that the power to decide licence applications has been delegated to NE by agreement does not preclude the Secretary of State from performing any function to which the agreement relates.
77. In performing any such function herself, the Secretary of State could not be bound by guidance issued to NE under s.15, except insofar as the guidance served to inform the public of the Secretary of State’s policy as to the types of applicant to whom licences would be granted. If, for example, the Secretary of State used her reserved powers to grant a licence to an applicant who had failed to satisfy any of the specified requirements for a safe, effective and humane cull, there might be strong grounds for contending that this was an unlawful departure from policy even though the Guidance was directed to NE – because the Guidance says it expressly reflects the Secretary of State’s published views about what is required of an applicant for such a licence.
78. The reserved powers enable the Secretary of State to maintain oversight and responsibility for, and appropriate flexibility within, the statutory decision-making regime. They provide a mechanism by which the Secretary of State may make decisions which NE would not or could not make under the Guidance issued to it pursuant to the statute. In that context it is difficult to see how guidance issued to the body exercising delegated authority could bind the Secretary of State, unless, as in the example I have given above, it reflects a policy intended to be binding on whoever took the licensing decision.
79. If the Secretary of State had taken the impugned licensing decision pursuant to her reserved powers, there might have been force in the argument that the Guidance given to NE as to how it should go about performing its delegated functions did not affect the exercise of those reserved powers. However, the Secretary of State did not step in and take the licensing decision in place of NE. Instead, she used her powers under s.16 of the 2006 Act to issue a direction to NE as to the exercise of *its* [delegated] functions, which precluded it from implementing the decision that it had taken in principle to issue a licence to the Company for the whole of the Lunar area.
80. In truth, the Claimants’ complaint is not so much about a failure to apply the Guidance as about the use by the Secretary of State of her statutory power under s.16 to prevent NE from implementing the decision which it had taken. The key question which arises is whether the Secretary of State could lawfully exercise that statutory power in the way in which she did. On the face of it, that power exists so as to enable the Secretary of State to dictate to NE how it should exercise its delegated functions in circumstances in which NE would not exercise them in that way without being compelled to. It gives the Secretary of State a power of veto, which is what one might expect, given that the Secretary of State is at a level above NE in the decision-making hierarchy.

81. Miss Lester laid emphasis on the statutory requirement that a licence under s.10(2) of the 1992 Act shall not be unreasonably withheld; but this case is not about a decision to withhold a licence. It is about a decision, leading to a Direction under s.16, that no licences be issued in respect of Derbyshire for 2019, which prevented NE from granting a licence to the Company for the entire Lunar area. That achieved the same practical result, but by a different legal route, and one which was harder to challenge. It cannot have been unreasonable for the licensing authority to comply with a Direction that it should issue no licenses for a specific geographical area in that calendar year, given that the Direction was one it was obliged by statute to follow.
82. The fundamental problem with the argument that this is an unlawful departure from policy is that Parliament has decided that the Secretary of State should not only have a power to advise NE regarding the exercise of its delegated functions, but a power to tell it what to do; and there is nothing in the 2006 Act which fetters the circumstances in which that power of direction may be exercised. The power is plainly wide enough to cover a situation in which the Secretary of State has decided for wider political reasons that licences (or a licence) should not be issued in circumstances in which NE would otherwise have issued them (or it). The Guidance itself provides no such fetter on the exercise of the statutory powers under s.16. Ground 1 is not made out.
83. As to the legitimate expectation argument, there is nothing in the Guidance itself (or anywhere else in the evidence) that amounts to a clear and unequivocal promise being made to any applicant for a culling licence, let alone to the Company, that if the area for which it applies falls within the top 10 and the applicant fulfils the requirements set out in the Guidance it will be granted a licence. Nor is there a clear and unequivocal representation that the only criteria that will be treated as relevant to the grant of a licence are those set out in the Guidance, or that the existence of vaccinated plots within the designated cull area would be treated as an irrelevant consideration. Reasonable assumptions were made, and legitimate inferences were drawn from the behaviour of NE and Defra officials, but that is not enough.
84. In her oral submissions, Miss Lester concentrated on the alleged procedural legitimate expectation, but that argument fails for the same reasons as the argument based on a substantive legitimate expectation. It is insufficient for the Company to point to the fact that many licences have been granted in the past to applicants who got to the stage that it had reached in the process, or even that its directors were given to understand by NE and/or Defra officials that they had satisfied all the requisite criteria. The directors believed they would get a licence, they had good reason to suppose that would be the case, and no-one from NE or Defra said anything to disabuse them of that notion; but that is not the same as reliance on a clear and unequivocal promise that the licence would be granted. If the argument that there was an unlawful departure from policy fails, as I have held it must, it cannot be saved by re-casting what is essentially the same complaint as the frustration of a legitimate expectation.
85. In any event, though it is unnecessary for me to form a final view on the matter, even if there had been a clear and unambiguous promise to grant a licence to the Company, (which there was not) this was probably an example of a situation in which it would have been fair to allow the Government to depart from it. The decision which was ultimately taken was undoubtedly a nuanced political one, involving the weighing of a number of different factors, including wider policy matters, not least the

recommendations of the Godfray review and the ongoing consideration of whether those recommendations would give rise to changes in the way in which the balance would be struck between vaccination and culling in the Edge Area. As Lord Kerr said in *Re Finucane* [2019] UKSC 7 at [76]:

*Where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it”.*

### GROUND 3 – RATIONALITY

86. Although it was originally articulated as a separate ground of challenge, one basis on which the decision was submitted to be *Wednesbury* unreasonable was that immaterial considerations were taken into account, whilst material considerations were excluded. This objection is unfounded. It was for the Secretary of State to decide what factors to take into account. Unless a particular factor was so obviously material or immaterial to the decision that no rational decision maker could have ignored it (or taken it into account, as the case may be), the choice of relevant factors cannot be impugned: see *R(Khatun) v Newham LBC* [2005] QB37 per Laws LJ at [35] and the more recent restatement of the principles in *R(DSD) v Parole Board* [2018] EWHC 694 (Admin) [2019] QB 285 at [135]-[141].
87. Assiduous efforts were made to obtain and consider the relevant factual and scientific information and advice before the impugned decision was taken. The Claimants have failed to demonstrate that any factor that was material in the sense described above was omitted, and that any factor that was immaterial in that sense was considered. In fact, their case on this point appeared to turn upon the proposition that the court should reject the account of the conversation between the Minister and the Secretary of State (and the factors that had a bearing on the decision) that was given by the Minister to the senior civil servant who included it in a witness statement signed with a statement of truth, in favour of drawing an inference that the decision was really taken because the Prime Minister had failed to give his express blessing to the suggested compromise involving the introduction of buffer zones.
88. There is no justification for drawing an inference that the Minister in this case had made up a story to tell one of his senior advisers about his conversation with the Secretary of State, though the absence of any contemporaneous record of that conversation is regrettable. This was bound to be viewed with a degree of suspicion by the Claimants, particularly in the light of the Minister’s apparent *volte-face*. Occasionally in a claim for judicial review the decision-maker will provide an after the event rationalisation for the decision which the court is not prepared to accept, because it does not accord with what was said and done at the time when the decision was taken, and the contemporaneous documents are more likely to be reliable. However, in the present case the Minister’s account is consistent with the reasons for the decision that were given contemporaneously to NE, (albeit that those reasons focused specifically upon the Government’s wish to defer consideration of how to balance culling and vaccination in Derbyshire until it had formulated its response to the Godfray review). It is also consistent with the reasons given by the Minister to his advisers on 4 September, and recorded in the advice sent to the Permanent Secretary

on the day before the key conversation between the Minister and the Secretary of State took place.

89. The one factor mentioned in the Minister's account of the conversation which did not loom large in the contemporaneous documents is the consideration of the Company's position, including the effort and expenditure it had incurred; but the fact that when explaining the decision to Parliament only a few days later the Secretary of State made it clear that the idea of an award of financial compensation to the disappointed applicant was under consideration, indicates that this must have been something that was taken into account at the time.
90. The sole question that remains is whether the decision itself was *Wednesbury* unreasonable. On the face of it, a decision not to commit to the introduction of a four-year cull in a county within the Edge Area where there is already a flagship vaccination project, pending consideration of expert recommendations that could lead to a change in policy, seems to fall comfortably within the boundaries of decisions open to a reasonable decision-maker in the position of the Secretary of State. Yet the issue is not quite so clear-cut.
91. Miss Lester put the argument on the basis that there was no reasonable justification for the decision, and that all the relevant factors strongly pointed in favour of granting the licence. The events leading up to the taking of the decision indicate that the Minister's view evolved from initially strongly favouring the grant of the licence, to seeking to find conditions that might acceptably mitigate the risk of killing vaccinated badgers, to finally deciding that the safest position to adopt was that the cull should not go ahead in 2019 and advising the Secretary of State accordingly. In formulating that view, he was entitled to take into consideration the views that had been expressed to him by other senior colleagues, including the Prime Minister, the specific and unique position of Derbyshire, and the likely impact of the recommendations in the Godfray review on the next stage of implementation of the long-term Strategy. Miss Lester correctly pointed out that cull licenses were granted in other areas where there was vaccination, including Cheshire, which like Derbyshire was in the Edge Area – but Cheshire was not under the spotlight in the same way that Derbyshire was.
92. If the only considerations relevant to this decision had been scientific, the Claimants would have had a very strong case. There was the clearest possible disease control justification for permitting culling in the whole of the Lunar area, and the Company had satisfied NE that they met the criteria in the Guidance. The Minister (and thus presumably the Secretary of State when he advised her) knew that the area of the DWT vaccination project was some distance away from the boundary of the proposed cull area, and because the pockets of vaccinated areas within the cull area or on the edges of it were so small, in all probability fewer than 20 vaccinated badgers were potentially at risk of being culled. The distance between the DWT vaccination area and the Lunar area would be unknown to protesters, who would therefore be labouring under the misapprehension that there was a realistic threat to the flagship BEVS project, but the two Ministers knew the true position, just as they knew that the protesters did not and that telling them risked the security of the contractors.
93. In purely scientific terms, the advantages to be achieved in terms of disease control by allowing the cull to go ahead plainly outweighed the consideration that a few vaccinated badgers might be culled in the process. Whilst the CVO was prepared to

support the compromise involving 200m buffer zones, neither she nor the Chief Scientific Adviser advanced any scientific justification for maintaining the status quo, and the CVO warned that to do so would risk making the position worse and allowing the disease to spread in an area which already had one of the highest incidences of bTB in the country.

94. However, the evidence indicates that this decision was not taken on purely scientific grounds. It was taken on political grounds. Miss Lester complained, with some justification, that the Minister never really explained why he changed his mind about the buffer zones. However, the final decision rested with the Secretary of State, not the Minister, and it does not really matter why the Minister changed his mind. What matters is whether the position he and the Secretary of State ultimately adopted was a rational one. Although attempts had been made to find an acceptable compromise that might go some way towards placating the anti-cull lobby, the Minister and the Secretary of State were not obliged to go down that route, which had received a negative reception from the NFU when their views were sought. Nor were they obliged to accept the advice that they had been given by their civil servants as to the preferred option. The decision was ultimately one for the Secretary of State to make.
95. The proposed buffer zones could not guarantee that a vaccinated badger would not be culled, and the prospect of this happening and the fallout if it did was felt to be too high a political price to pay. However strongly a farmer facing the threat to his livestock and livelihood from the spread of bTB might disagree with that view, it was open to the Secretary of State to make that judgment call.
96. It is important to bear in mind, as the decision-maker did, that there had been no previous badger cull in Derbyshire. Any licence, once granted, had to continue for four years, whereas the effect of the decision to issue the Direction was simply to put any licence for the Derbyshire part of the Lunar area on hold for a year, so as to enable the position of that county to be considered under less pressure of time, in conjunction with the Government's response to the Godfray review and the decision on how best to combine culling and vaccination in the Edge Area going forward.
97. Derbyshire was a county with a particularly substantial vaccination programme and a particularly vocal animal-rights and anti-culling lobby. As the Minister and the Secretary of State appreciated, permitting a cull to take place in Derbyshire was liable to inflame local and national tensions, and in turn risked limiting the Government's future policy options. If there was a desire to shift the balance away from culling and towards non-lethal methods of control in line with the recommendations of the Godfray review, it is understandable why senior politicians might have felt that it was more important to keep the pro-vaccination lobby on side and risk the alienation of farmers by deferring the licensing decision for just a year.
98. Even if the decision could have been characterised as a capitulation to the anti-culling lobby (which in my view would not be a fair reflection of the evidence) at the end of the day a political judgment had to be made about whether it was worth risking the fallout in terms of adverse publicity and the loss of goodwill among such lobbyists if a vaccinated badger was killed by mistake. There was nothing irrational about concluding that it was not. The decision was a difficult one which involved the exercise of complex political and ethical value judgments of a type which are quintessentially matters for the democratically accountable decision-maker. The

weight to be given to the various competing factors was a matter for the Secretary of State, and whereas a scientist undoubtedly would have weighed those factors differently, that does not make the decision irrational.

99. In short, however compelling the case for permitting the licence to be issued might appear, there were countervailing political considerations which legitimately led the responsible decision-maker to conclude that no licence should be granted in Derbyshire for that year. The decision did not preclude an application being made for the following year, by which time the Government would have had the opportunity to formulate a considered response to the Godfray review and make any consequential changes to the Guidance.

## **CONCLUSION**

100. For those reasons, despite Miss Lester's able arguments, I have concluded that the claim for judicial review should be dismissed on all grounds.