

**IN THE HIGH COURT OF JUSTICE**

**ADMINISTRATIVE COURT**

**B E T W E E N:-**

**BADGER TRUST**

**Claimant**

**-and-**

**THE WELSH MINISTERS**

**Defendant**

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**BACKGROUND AND GROUNDS OF CLAIM**

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*Key documents (with essential reading marked in **bold** in bundle index)*

- *Ministerial Statement of 24 March 2009 [Bundle Tab C1]*
- *Consultation on the TB Eradication (Wales) Order 2009 under the Animal Health Act 1981 [Tab C3]*
- *Welsh Assembly Government official summary of Consultation responses [Tab C4]*
- *TB Eradication (Wales) Order 2009 of 28 September 2009 [Tab B1]*
- *Letter before claim dated 30 October 2009 [Tab D7]*
- *Response to letter before claim dated 3 December 2009 [Tab D8]*
- *Bern Convention [Tab E4]*
- *Habitats Directive 92/43/EEC [Tab E5]*
- *Protection of Badgers Act 1992 [Tab E3]*

- *Habitats Regulations 1994 [Tab E6]*
- *Animal Health Act 1981 [Tabs E1 and E2]*
- *Witness statement of Badger Trust Financial Director, Jeff Hayden, dated 22 December 2009 [Tab A3]*
- *UK Government's observations to the Aarhus Convention Compliance Committee dated 28 July 2009 [Tab F1]*

### **Introduction**

1. The claimant 'Badger Trust' is an organisation which promotes the conservation and welfare of badgers and the protection of their setts and habitats for the public benefit. It is the leading voice for badgers and represents and supports around 60 local voluntary badger groups. Badger Trust provides expert advice on all badger issues and works closely with Government, the police and other conservation and welfare organisations.
2. The defendants exercise statutory powers in relation to the protection of wild animals in Wales.
3. The claimant seeks permission to challenge the legality of an order [Tab B1] made by the defendants which (in the defendants' words) "makes lawful" the culling of badgers in Wales. The defendants contemplate a cull as an attempt to reduce the incidence of TB in cattle in the area (as yet unspecified) of the cull.
4. The order was made on 28 September 2009 to come into force on 21 October 2009. In between those dates, the order was laid before the Welsh Assembly and considered by members of the Assembly

### **Prematurity**

5. In their response of 3 December 2009 [Tab D8] to the letter before claim of 30 October 2009 [Tab D8] the defendants said that any challenge to the order would be premature because:

*"The order does not, however 'implement a cull of badgers'. Rather, it provides a mechanism by which a cull of badgers may in due course be lawfully carried out. For the avoidance of doubt, the Welsh Ministers have not taken a final decision to carry out a cull of badgers and, in particular, they have not taken any final decision as to where and when any such cull would (if it were to take place) be carried out. It is likely, however, that such a decision will be taken in the near future, possibly in the New Year."*

6. However, as note above and set out further below, the defendants consider that the Order has established the substantive lawfulness of the cull. It is that lawfulness which the claimant challenges. In particular, the grounds of challenge (as below) are to the legality of decisions taken as part of making the order. Those are matters which (the order having been made so as to permit a cull in principle in Wales as a whole) the defendant will not reconsider in the course of the future decisions it contemplates. The challenge is properly and necessarily brought now.
7. The claimant certainly does not want to be in the position where, on the strength of the defendant's (misplaced) assertion of prematurity, it does not challenge the order, only to be told later (by the defendants or the court) that it is then too late when it challenges the subsequent decisions.

### **Background**

8. As for the likely cull, the defendants have previously said that the cull would be likely to take place over an area of around 200 square kilometres and involve killing around 1000 badgers<sup>1</sup> with a minimum of five culls taking place over four years. As explained below, culling over five years is the only way in which even modest positive impacts on TB have been seen to come about.
9. However, it is anticipated that a badger TB vaccine will be trialled in May 2010 and come available in the near future (with an oral bait vaccine in 2014)<sup>2</sup>. Those are the methods which DEFRA (which makes the equivalent decisions for England) proposes to use in England.
10. Although the order also provides for badgers to be vaccinated, the intention, as the claimant understands it, is that, within the area of the cull, badgers will be killed, whereas vaccination may be used in other parts of Wales.
11. The claimant (and others) have argued that a policy of vaccinating badgers (and in due course cattle too) against TB combined with other cattle management measures<sup>3</sup> should be pursued rather than the cull of badgers, particularly given that, as below, scientists who conducted the most extensive and in-depth study of the subject<sup>4</sup> concluded that badger culling could not meaningfully contribute to the control of cattle TB in Britain. As explained

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<sup>1</sup> The Order provides for badgers to be killed by being shot without being trapped or by trapping followed by shooting or lethal injection. See Tab B1.

<sup>2</sup> See the Minister's announcement of 24 March 2009 in which this was confirmed at Tab C, pages 1-3.

<sup>3</sup> To improve "biosecurity"

<sup>4</sup> Bourne, J., Donnelly, C. A., Cox, D. R., Gettinby, G., McInerney, J. P., Morrison, W. I. & Woodroffe, R. (2007) Bovine TB: the scientific evidence, Defra [www.defra.gov.uk/animalh/tb/isg/pdf/final\\_report.pdf](http://www.defra.gov.uk/animalh/tb/isg/pdf/final_report.pdf)

below, the overwhelming body of evidence shows that a programme of culling in fact – overall - spreads TB in cattle.

### **Summary**

12. This judicial review application is – of course – concerned with the legality of the defendant's decision and not its merits.
13. The claimant challenges the legality of the order on the grounds that:
  - (1) Such an order could be made only if the defendants were satisfied (following a proper evaluation of the point) that there was shown by positive evidence to be no satisfactory alternatives to a cull; but the defendants failed to consider that question, let alone whether there was positive evidence to support a conclusion that alternatives (including vaccination) were unsatisfactory;
  - (2) Such an order could be made only if the defendants were properly satisfied that any claimed benefits (in terms of TB in cattle) outweighed the negative impact of killing thousands of badgers as is contemplated; the defendants did not consider that balance, even rejecting the need to consider such a balance;
  - (3) The scientific evidence relied on in support of culling consistently shows very limited net benefits in respect of defined areas of culling under particular circumstances, with detrimental effects if small areas are culled. Even then the benefits become apparent only after several years of culling and with there only being evidence of one year or so of ongoing benefit after culling is halted. Such evidence could not properly support (as it is relied on here to do) an order which purports to make lawful a cull conducted over any area or time period, in any or all parts of the whole of Wales.
14. The claimants thus seek permission for judicial review.

### **Legal framework**

#### **The Bern Convention**

15. The Bern Convention on the Conservation of European Wild Animals and Habitats 1979 says that [Tab E4]:

#### Article 8

In respect of the capture or killing of wild fauna species specified in Appendix III and in cases where, in accordance with Article 9, exceptions are applied to species specified in Appendix II, Contracting Parties shall prohibit the use of all indiscriminate means of capture and

killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in Appendix IV.

#### Article 9

1. Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and from the prohibition of the use of the means mentioned in Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:

- for the protection of flora and fauna;
- to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
- in the interests of public health and safety, air safety or other overriding public interests;
- for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding;
- to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.

...” [underlining added]

16. Badgers are one of the species listed in Appendix III.
17. The Bern Convention thus proscribes the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of (among other things) badgers albeit that exceptions can be made for one of the specified purposes “provided that there is no other satisfactory solution”.
18. In the present case, the defendant precisely has in mind the use of methods capable of causing a local disappearance of populations of badgers. Indeed, causing a local disappearance of populations of badgers is the whole point of the “cull” (the “methods” will be used precisely to that end).
19. It follows that such methods can only be permitted following proper consideration of whether there is any other satisfactory solution (i.e. for addressing the problem of TB in cattle). It is for persons advocating such methods to show (by positive evidence) that other methods are indeed unsatisfactory.
20. Moreover, the essential premise of those provisions is that such methods should not be used unless there is some overriding purpose of one of the

specified kinds. It follows that the achievement of the purpose is to be balanced by the impact on the affected (protected) animal population. Thus, for example, killing one badger to save 5,000 cows from TB might be considered justifiable under the Convention whereas killing 5,000 badgers to save one cow would not. A balancing exercise must thus be undertaken.

#### The Habitats Directive

21. The EU Habitats Directive 1992/43/EEC (which implements the Bern Convention within the EU) says that [Tab E5]:

#### *Article 15*

In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

- (a) use of the means of capture and killing listed in Annex VI (a);
- (b) any form of capture and killing from the modes of transport referred to in Annex VI (b).

#### Article 16

"1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

...” [underlining added]

22. Badgers are listed in Annex V(a).
23. The Directive thus requires Member States to prohibit “the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of [badgers]” albeit that such things may be permitted for one of the specified purposes “provided that there is no satisfactory alternative”.
24. Again, the defendant here precisely intends methods to be used which cause the local disappearance of populations of badgers – that is what the cull is all about.
25. Reliance on the derogation in Article 16 requires that proper consideration be given to alternatives to (here) culling and derogation is only permissible if there is positive evidence to show that other methods are not satisfactory.
26. And again, a decision to “derogate” requires the balance between destroying local populations of (here) badgers and the benefit which is sought to be gained, to be struck.

#### The Protection of Badgers Act 1992

27. The Protection of Badgers Act 1992 (PBA1992) creates (by its sections 1-5) offences in relation to badgers arising from the taking, injuring or killing badgers, from cruelty to badgers, from interfering with badger setts, from the selling and possession of live badgers and from marking of badgers.
28. However, section 6 of that Act provides a defence where the person is (among other things) “unavoidably killing or injuring a badger as an incidental result of a lawful action” or does so pursuant to a licence.

#### The Habitats Regulations 1994

29. Regulation 3 of the Conservation (Natural Habitats [etc]) Regulations 1994 (SI 1994/2716) explains that those regulations make provisions for the purposes of implementing the Habitats Directive for Great Britain.
30. Regulation 41 then provides that:

“(1) This regulation applies in relation to the taking capturing or killing of a wild animal—

(a) of any of the species listed in Schedule 3 to these Regulations (which shows the species listed in Annex V(a) to

the Habitats Directive<sup>5</sup>, and to which Article 15 applies, whose natural range includes any area of Great Britain), or

(b) of a European protected species, where the taking [capturing] or killing of such animals is permitted in accordance with these Regulations.

(2) It is an offence to use for the purpose of taking, capturing or killing any such wild animal—

(a) any of the means listed in paragraph (3) or (4) below, . . .

(b) any form of taking capturing or killing from the modes of transport listed in paragraph (5) below, or

(c) any other means of capturing or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in Schedule 3 to these Regulations or any European protected species of animal.

(3) The prohibited means of taking capturing or killing of mammals are—

(a) blind or mutilated animals used as live decoys;

(b) tape recorders;

(c) electrical and electronic devices capable of killing or stunning;

(d) artificial light sources;

(e) mirrors and other dazzling devices;

(f) devices for illuminating targets;

(g) sighting devices for night shooting comprising an electronic image magnifier or image converter;

(h) explosives;

(i) nets which are non-selective according to their principle or their conditions of use;

(j) traps which are non-selective according to their principle or their conditions of use;

(k) crossbows;

(l) poisons and poisoned or anaesthetic bait;

(m) gassing or smoking out;

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<sup>5</sup> Including thus badgers

(n) semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition.

..

(6) A person guilty of an offence under this regulation is liable on summary conviction [to imprisonment for a term not exceeding six months or] to a fine not exceeding level 5 on the standard scale[, or to both].

31. Regulation 44 provides for the granting of licences:

“(1) Regulations 39, 41 and 43 do not apply to anything done for any of the following purposes under and in accordance with the terms of a licence granted by the appropriate authority.

(2) The purposes referred to in paragraph (1) are—

(a) scientific, research or educational purposes;

(b) ringing or marking, or examining any ring or mark on, wild animals;

(c) conserving wild animals, including wild birds, or wild plants or introducing them to particular areas;

(ca) conserving natural habitats;

(d) protecting any zoological or botanical collection;

(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(f) preventing the spread of disease; or

(g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.

...

(3) The appropriate authority shall not grant a licence under this regulation unless they are satisfied—

(a) that there is no satisfactory alternative, and

(b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

(4) For the purposes of this regulation “the appropriate authority” means—

...

(b) in the case of a licence under any of sub-paragraphs (e) to (g) of that paragraph, the Secretary of State (in relation to England) or the Welsh Ministers (in relation to Wales)

...”

#### The Animal Health Act 1981

32. However, section 1 of the Animal Health Act 1981 (AHA1981) provides that [Tab E1]:

The Ministers may make such orders as they think fit--

(a) generally for the better execution of this Act, or for the purpose of in any manner preventing the spreading of disease; and

(b) in particular for the several purposes set out in this Act, and for prescribing and regulating the payment and recovery of expenses in respect of animals.

33. The National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 makes those powers exercisable in Wales by the National Assembly for Wales.

34. However, an order under section 21 AHA1981 (here made by the defendants) can specifically make lawful what would otherwise be prohibited under the 1992 Act and Regulation 41, namely the killing of badgers and in particular, the use of methods which are capable of causing (or and thus, here, which are precisely intended to cause) the local disappearance of the population of badgers.

35. In particular, section 21 of the AHA1981 provides that:

(1) This section--

(a) applies to any disease other than rabies which is for the time being a disease for the purposes of section 1(a) above; and

(b) is without prejudice to any powers conferred by other provisions of this Act on the Minister, the appropriate Minister and the Ministers.

(2) The Minister, if satisfied in the case of any area--

(a) that there exists among the wild members of one or more species in the area a disease to which this section applies which has been or is being transmitted from members of that or those species to animals of any kind in the area, and

(b) that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area.

may, subject to the following provisions of this section, by order provide for the destruction of wild members of that or those species in that area.

...

(4) An order under this section providing for the destruction of wild members of one or more species in any area may provide for authorising the use for that purpose of one or more methods of destruction that would otherwise be unlawful.

The order shall not authorise such use unless the Minister is satisfied that use of the method or methods in question is the most appropriate way of carrying out that destruction, having regard to all relevant considerations and, in particular, the need to avoid causing unnecessary suffering to wild members of the species in question.

....”

36. Section 21(2)(b) thus requires that the Minister (here the defendants) must be satisfied:

“that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area”

37. And section 21(4) requires that they must be satisfied that

“...the method or methods in question is the most appropriate way of carrying out that destruction, having regard to all relevant considerations and, in particular, the need to avoid causing unnecessary suffering to wild members of the species in question.”

38. Where, as here, an order under section 21 is to have the effect of making lawful what would otherwise be prohibited by the PBA 1992 and Regulation 41 (thus bypassing their express procedural and substantive requirements) the making of the section 21 order itself must secure compliance with the provisions of the Habitats Directive and Bern Convention.

39. In particular, in relation to the Directive as the ECJ said in Marks & Spencer – v- Commissioners of Customs & Excise [2002] ECR I-06325:

24. In that regard, it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or

particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts .... It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) ...

25. Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly ...

26. Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full ...”  
[underlining added]

40. Section 80(1) of the Government of Wales Act 2006 [Tab E7] reinforces those obligations:

“A community obligation of the United Kingdom is also an obligation of the Welsh Ministers if and to the extent that the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Welsh Ministers of any of their functions.”

41. Section 80(8) of that Act then specifically provides that the Welsh Ministers have no power to make any subordinate legislation (and thus here the order) which is incompatible with Community legislation, and thus here the Directive.
42. As for the Bern Convention, as the Court of Appeal (Carnwarth LJ) recently noted in Morgan (as below), international conventions are to be taken into account in resolving ambiguities in legislation intended to give to them (see Halsbury’s Laws Vol 44(1) Statutes para 1439)).
43. As to how that fits with section 21 itself, although section 21(4) requires consideration of whether the method chosen is “the most appropriate way of carrying out the destruction”, that is premised on the destruction taking place, and so does not obviously engage the test within the Convention and the Directive, namely whether there is a satisfactory alternative to causing the local disappearance of, or serious disturbance to, populations of badgers for one of the specified purposes.
44. However, as above, section 21(2) requires that the Minister (here the defendants) is/are satisfied:

“that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area.”

45. And it is thus through the application of that “necessity” test that the requirements (as above) of the Convention and Directive need to be satisfied.
46. In particular, the defendants could only be satisfied that the destruction is “necessary” (in section 21 terms):
  - (1) If satisfied on the basis of positive evidence that there was no satisfactory alternative (or alternatives) for achieving the purpose in question (here the substantial reduction of TB in cattle); and
  - (2) If satisfied that the beneficial impact of the reduction of TB was justified by the extent of the destruction which would be required to bring it about.
47. Turning finally to the making of an order covering the whole of Wales when the evidence is very specific to particular areas, as described below, the scientific evidence overwhelmingly shows that culling badgers is not generally an effective way of combating TB in cattle. There is, at most, limited evidence to suggest that destroying badgers over very specific areas can bring about some limited reduction over a limited time in the incidence of TB in cattle in the area in question; and even then the benefit only comes about (and then for a short period) some years after the commencement of culling (i.e. after, say, five years) and this benefit is itself of very limited duration.
48. In particular, the 2008 report particularly relied on by the defendants in support of their strategy<sup>6</sup> explains that:

“The Randomised Badger Culling Trial (RBCT) demonstrated that, while it was underway, proactive badger (*Meles meles*) culling reduced bovine tuberculosis (TB) incidence inside culled areas but increased incidence in neighbouring areas, suggesting that the costs of such culling might outweigh the benefits.”
49. The RBCT involved five years of culling, as is contemplated here. During that five year period, such TB benefits as were seen within the area of the cull itself were mostly offset by increases in TB in the surrounding areas due to “perturbation” – i.e. badgers ranging more widely and contacting more cattle herds as a consequence of the culling process. The only way to get any

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<sup>6</sup> See, for example, paragraph 9 of the defendant’s letter of 3 December 2009 [Tab D8] and Jenkins et al. (2008, ‘International Journal of Infectious Diseases’ 12, 457-465) [Tab C6]

substantial net benefit in that period was to cull over a much larger area (thus killing many more badgers)<sup>7</sup>.

50. The report showed that benefits continued in the period after culling stopped, while disbenefits did not. But the reported period of net benefit was simply “more than one year after culling was discontinued.” There is not yet any published evidence as to whether that net benefit was sustained<sup>8</sup>. Thus, so far, the most that can be said is that:

“Our results show that the reductions in cattle TB incidence achieved through proactive badger culling, as conducted in the RBCT, persisted for more than one year after culling was discontinued. Beneficial effects inside culling areas increased in magnitude, and detrimental effects were no longer observed on neighbouring lands.

If this explanation is correct, it suggests that the benefits observed in the first years post-culling will dissipate as badger numbers increase. Continued monitoring will allow testing of this prediction...

...

Continued monitoring will determine how long the beneficial effects last, and will thus provide a measure of the overall capacity of badger culling (as conducted in the RBCT) to reduce cattle TB incidence.”

51. Accordingly, the evidence supported, at best, the proposition that 5 years of culling (during which time most of the benefit in the cull area was more than offset by disbenefits outside it) would gain “more than a year” (but no more could be claimed) of net benefit in the following period.
52. In the light of such evidence a proper conclusion<sup>9</sup> that culling was (per section 21 above) “necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area” would only be

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<sup>7</sup> Thus: “Results for the RBCT published at the completion of the proactive strategy, after roughly five years of annual culling, showed that proactive culling reduced cattle TB incidence inside the culled areas. However, incidence was elevated in neighbouring uncultured areas (up to 2 km outside the culled areas). The latter effect apparently occurred because culling induced changes in badger behaviour, which increased the transmission of infection both between badgers, and from badgers to cattle. Localised reactive culling as a once-only event in response to each herd breakdown, likewise was associated with an overall detrimental effect, apparently for similar ecological reasons. At the scale and over the period on which RBCT culling was conducted, the detrimental effects (24% increased incidence) observed outside proactive culling areas counteracted the benefits (23% reduced incidence) experienced inside; the relative magnitude of these effects would be expected to vary with the size of the area culled. The evidence available at the end of the RBCT indicated that a circular culled area of at least 265 km<sup>2</sup> would be required to provide 95% confidence that the overall impact would, on average, be a net reduction in the incidence of confirmed herd breakdowns.” [See Tab C]

<sup>8</sup> Such peer-reviewed evidence is expected very soon.

<sup>9</sup> i.e. a conclusion based, as it would need to be, on supporting evidence

sustainable if specifically linked to the timescale of the cull and, more particularly, to the particular area of culling. However, here, as above, the area specified in the order is simply “Wales” (and there is no suggestion that the defendants are contemplating a cull over that area – the cost would be huge apart from anything else).

### **The decision-making here**

53. On 24 March 2009, the Welsh Minister for Rural Affairs made a statement announcing a programme of TB eradication in Wales [Tab C1, page 3]. She explained that she was of the opinion that “a cull is necessary, alongside additional cattle measures”. She said that :

“I recognise that vaccination is another potential tool to reduce risks of bovine TB and I will continue to work with the Department for Environment Food and Rural Affairs<sup>10</sup> on research to explore the potential for the use of an effective badger vaccine. I welcome the confirmation that an injectable licensed vaccine for badgers is expected in mid 2010 and that an oral bait vaccine will be available by late 2014.”

54. Between 27 April and 30 July 2009, the defendants undertook a public consultation on their proposals [Tab C3]. The consultation document explained the Minister’s view that culling was necessary [Tab C3, page 13, para 3.2], that “to maximise the benefits, any culling would have to be carried out competently and efficiently, in a co-ordinated manner, covering a large area and sustained for at least four years” [page 14, para 3.5] and that “both culling and vaccination (of badgers) should form part of the measures required to pursue the eradication of bovine TB in Wales<sup>11</sup>” [page 14, para 3.6].
55. In September 2009 the defendants published its “Summary of Responses” to the consultation [Tab C4].
56. On 28 September 2009, the defendant made the section 21 Order [Tab B]. It came into force on 21 October 2009.
57. On 30 October 2009, the claimant wrote a letter before claim challenging the legality of the order [Tab D7]. Among other things, the claimant’s letter had contended that: (1) the defendants had failed to comply with the requirements of the Bern Convention, (2) the cull was not lawful if there were alternative ways of tackling TB, and (3):

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<sup>10</sup> DEFRA is the counter-part for England. In 2008, DEFRA Ministers decided that, in the light of the evidence, it would not progress any further plans for culling of badgers.

<sup>11</sup> The claimant understands that to mean that there will be culling in one area (or areas) and vaccination elsewhere, not both together.

“Plainly, a cull cannot be lawful where there is evidence that, rather than “eliminating” or “substantially reducing” disease incidence, the beneficial effect is marginal, and the cost in terms of badgers (and possibly other protected species) culled is substantial. A disproportionate cull of badgers would frustrate the principal purpose of the Act.”

58. On 3 December 2009 the defendant replied to that letter saying [Tab D8, page 44]:

“17. We note that whilst you rely upon article 8 of the Bern Convention, you do not deal anywhere in your letter with the exception to article 8 provided by article 9. We consider that the Order is permissible pursuant to this exception and we do not accept that your reliance on article 8 assists your case. We also note that you have failed to explain how an alleged breach of an international treaty to which the United Kingdom is a party (and not the Welsh Ministers) and which has not been directly incorporated into domestic law can provide the basis for a claim in domestic law.”

and

“13. Insofar as you allege that there was no evidence before the Welsh Ministers on which they could conclude that the destruction of badgers was necessary to eliminate or substantially reduce the incidence of disease, it seems to us that this allegation is predicated on the same assumption as that referred to above in relation to your ground i(a) (see, in particular, your third paragraph under this ground). As such, we reject this allegation for the reasons set out in relation to ground i(a) above.”

And:

“11. We note that you appear to contend that the Welsh Ministers were not entitled to be satisfied that the destruction of badgers would eliminate or substantially reduce the incidence of disease because the beneficial effect of a cull would be “marginal, and the cost in terms of badgers ... is substantial”. It seems to us that this is tantamount to an argument that is s 21(2)(b) of the AHA 1981 required the Welsh Ministers to conduct a balancing exercise between, on the one hand, the extent to which the destruction of badgers would eliminate or substantially reduce the incidence of disease and, on the other hand, the likely number of badgers that would be destroyed. With respect, we cannot see where in s 21 (2)(b) you find the words that mandate such a balancing exercise, and we note that you have not pointed to any such words.”

59. Accordingly, the defendants:

- (1) Rejected the relevance of the Bern Convention;
- (2) Failed to recognise the need only to permit a cull if there were no satisfactory alternatives; and

- (3) Rejected the contention that a balancing exercise was required between the number of badgers to be killed and any benefit to TB in cattle.

### **Grounds of challenge**

60. However, as above:

- (1) The Bern Convention is engaged indirectly (as part of the construction of the domestic law) and directly (through the Habitats Directive);
- (2) By those routes the cull could only be lawfully permitted if there was positive evidence to show that there were no satisfactory alternatives to culling; and
- (3) As above, the defendants needed to balance (on the basis of evidence) the benefits (limited as they are) against the harm to badgers, but failed even to recognise the need to undertake such a balance.

61. On (2), although the reply to the letter before action did not address the option of vaccinating badgers, the analysis of consultation responses had commented on the question (posed by some respondents to the consultation even though not raised by the defendants in the consultation) “Why is culling being chosen rather than vaccinating?” thus:

“Both the ISG report and the subsequent analysis<sup>12</sup> have shown that badger culling does have a beneficial effect in the reduction of cattle TB incidence; other trials have shown similar results.

Vaccination is, as yet, unproven as a tool in the management of disease in cattle. We are working closely with Defra on the development of a vaccine and will consider its introduction into Welsh policy as and when it is available and appropriate. Only an injectible vaccine is likely to be available for at least the next five years; the practicalities of delivering an injectible vaccine to wild animals and the scale of the epidemic mean that an alternative proven course of action is needed as a priority. The intensive Action Pilot Area [i.e. the cull in contemplation here] is set to run for at least four years, by which time an oral vaccine should soon be available and may be used to reduce the risk posed by remaining or recolonising badgers.” [Tab C4, page 38]

62. However, that in no way shows proper consideration of the legal issue as raised by the Convention and Directive, let alone on the basis of proper evidence. In particular:

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<sup>12</sup> Being – presumably - the RBCT report as above.

- (1) As above, the “beneficial effect” relied on is, during the culling period, limited to the area actually culled and is offset by negative effects in the surrounding area; and, in the subsequent period (i.e. some 5 years later) only proven to last for a year or so. Accordingly, there is only positive evidence to support little over a year of post-cull benefits arising from culling.
- (2) It is no answer that vaccination is as yet unproven (as above, the “benefits” of culling are only supported by very limited evidence, with evidence of detrimental effects if culls are not conducted according to highly specific protocols). The point is that it has not yet been tried. There is no evidence to show that it will not be a satisfactory alternative. And indeed, it is precisely what is being relied on to achieve the same end in England.

As above, positive evidence of alternatives not being satisfied is required to make out the derogation, as above. There is none.

As for the claim for “urgency”, culling is not imminent (no decision has yet even been taken to cull) and is unlikely to show net positive benefits until the cull has been underway for several years; meanwhile, an injectable vaccine for badgers is expected to be trialled in mid 2010 and an oral bait vaccine is due to be available by late 2014 (and bio-security measures can be undertaken now). There is simply no positive case to say that culling will bring positive benefits (let alone longer term) any more quickly or cheaply than vaccination.

### **Overall**

63. Overall, therefore:

- (1) The defendants have unlawfully failed to give effect to the obligation that culling can only be permitted if there are no satisfactory alternatives. In particular, the defendants have simply failed to address the question; and, insofar as they have evaluated alternatives, have done so on a flawed legal basis (including, in particular, without there being positive evidence, as there would need to be, that alternatives were indeed unsatisfactory);
- (2) The defendants have unlawfully failed to consider whether the very limited benefit in terms of TB reduction which would be obtained in the longer term and which may well not be sustained beyond the short term from then on justifies the eradication of thousands of badgers as contemplated; and

- (3) The defendants have made an order which purports to make culling lawful across Wales (that being the “area” specified in the order), with a view to then permitting it in some unspecified sub-area, when the evidence it relies on is very much based on evaluation of the efficacy of culling over areas of particular sizes. In simple terms: evidence of efficacy over areas of particular sizes can only support an order in relation to such an area, and not an order covering a very different (and much larger) area (in relation to which there is no evidence and for which no cull is contemplated). The logic of the defendant’s position is that the order permits a cull in the whole of Wales, or any part of it, when the scientific evidence *at best* supports culling on a very precise basis.
64. The claimant thus seeks permission for a judicial review of the legality of the order, as above.
65. At the substantive hearing, the claimant will seek:
- (1) An order quashing the Order; and
  - (2) Such further or other relief as the court considers appropriate.

#### **Application for a Protective Costs Order**

66. The claimant pursues this matter on a purely public interest basis and with a view to protecting the environment.
67. However, as set out in the witness statement of Jeff Hayden dated 22 December 2009 [Tab A3] it simply does not have the resources to be exposed to the potential adverse costs order which might be made if the action was unsuccessful.
68. It thus asks the Court to make a Protective Costs Order limiting its liability in this claim for the costs of other parties to no more than £10,000. It makes that application within the framework set out by the Court of Appeal in *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192 which must now be applied flexibly to secure compliance with the requirements of the Aarhus Convention on Access to Environmental Justice where (as here) that Convention applies (as to which see *Morgan –v- Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107). In particular, the Aarhus Convention requires that:

*Article 9(3)*: “In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law,

members of the public<sup>13</sup> have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

*Article 9(4):* “In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”

69. Compliance with those provisions requires that a judicial review (such as this one) must not be prohibitively expensive

70. In its submissions of 28 July 2009 to the Aarhus Convention Compliance Committee, explaining how the regime in England and Wales complied with those requirements, the UK government explained that (paragraph 15):

“As is apparent from the Court of Appeal’s judgment [in *Morgan*], and is re-emphasised in these observations, as a matter of law the provisions of the Convention are to be taken into account by the Courts, and are provisions to which they should have regard in exercising their discretion as to costs. This is so even in a case (such as that in *Morgan & Baker*) falling outside the scope of the EC Directives. As appears from Annex III, this is in fact what appears to be happening in practice where the provisions of the Convention are raised and relied upon.” [underlining added]

71. In paragraphs 41-42, the Government described the mechanisms by which compliance is to be achieved:

- (1) Legal Aid – i.e. public funding by the Legal Services Commission
- (2) Conditional Fee Agreements (CFAs) (assumed backed up by some form of insurance against an adverse costs order)
- (3) Protective Costs Orders (PCOs)
- (4) The court’s discretion when making a costs order at the end of a case.

72. On PCOs the UK said this:

The jurisdiction to grant PCOs has developed over the last few years, and been clarified significantly very recently, in light of the Convention. The Convention can be, and is in practice, taken into account by the Courts in exercising its discretionary powers. Furthermore, the ‘one set of costs’ principle applied in judicial review cases also has a significantly liberalising effect on the ability of interested organisations,

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<sup>13</sup> Which expressly includes NGOs such as the claimant.

in particular NGOs, to make substantive submissions in environmental cases (as well as other cases of public interest).

73. Then, at paragraph 58:

“[PCOs] are the most important feature of the United Kingdom’s in filling what may otherwise have been argued to be a gap in the achievement of full compliance with Article 9(4) notwithstanding the other measures.”

74. Then this:

“The *Corner House* principles were stated as follows:

“1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- (i) *the issues raised are of general public importance;*
- (ii) *the public interest requires that those issues should be resolved;*
- (iii) *the applicant has no private interest in the outcome of the case;*
- (iv) *having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;*
- (v) *if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*

2. *If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.*

3. *It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”*

Recently it has become apparent that these principles are subject to the following clarification and qualification:

(1) The principles should be applied flexibly – see *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749; *R (Buglife) v Thurrock Gateway Development Corp and another*<sup>14</sup>. In *Buglife*, the Court of Appeal underlined the flexible nature of the PCO, stating that the court must take account of “all the circumstances” when deciding whether to grant a PCO and, if so, in what form. (paras 17-23)

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<sup>14</sup> [2008] EWCA Civ 749.

(2) The reference to 'exceptionality' is not of itself a criterion to be met before a PCO can be made. This is made expressly clear by the Court of Appeal in *Compton* in approving the following passage from the Sullivan Report<sup>15</sup>

"In *Corner House*, the Court of Appeal accepted that PCOs should only be granted in "exceptional" cases. But it now seems this 'exceptionality' test is being applied so as to set too high a threshold for deciding (for example) 'general public importance', thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, *Bullmore*, the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus."

Thus a PCO may be made in any case meeting the criteria. As one commentator has put it, the reference to 'exceptionality' is "a jurisprudential reminder, as it were, that a PCO is not a routine order"<sup>16</sup>.

(3) A narrow public interest is sufficient to justify a PCO. It does not have to be of national interest, nor for the social benefit of the community at large: *Compton* at para 23, implicitly disapproving the narrower approach taken in *R (Bullmore) v. West Herefordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin) at §14 (in which the judge had found no public interest on the basis that the action was not for the benefit of the 'community at large').

(4) It does not follow that where the claimant's liability for costs is to be capped, the defendant's liability should be capped in the same amount (or necessarily at all, although it is generally apparent that some cap on the defendant's liability will be made if a PCO is granted). The levels of the two caps require separate consideration. See *Buglife* at para 26.

(5) Perhaps most importantly, the requirement for there to be no private interest is not strictly applied. Pursuant to the flexible approach endorsed by the majority of the Court of Appeal in *Compton* and *Buglife*, this was made clear in comments by the Court of Appeal in *Morgan & Baker*: see detailed critique at paras 35 to 39 of the latter judgment.

The Court of Appeal in *Corner House* had set out the procedure for applying for a PCO, and the limited liability for costs of the defendant, even if the application were unsuccessful: see paras 78 and 79, and conclusion at §81:

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<sup>15</sup> *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749, per Waller LJ at para 24 and Smith LR at para 76

<sup>16</sup> *Corner House Revisited*, Opperman et al [2009] JR 43 at §15.

*81. It follows that a party which contemplates making a request for a PCO will face a liability for the court fees, a liability (which should not generally exceed a proportionate total of £2,000 in a multi-party case) for the costs of those who successfully resist the making of a PCO on the papers, and a further liability (which should not generally exceed a proportionate total of £5,000 in a multi-party case) if it requests the court to reconsider an initial refusal on the papers at an oral hearing. We hope that the Civil Procedure Rules Committee and the senior costs judge may formalise these principles in an appropriate codified form, with allowance where necessary for cost inflation in due course.”*

In reality, any individual to whom such costs were prohibitive would be likely to be entitled to legal aid. Organisations, including NGOs, would not be prohibited from accessing justice by the costs risk in failing to obtain a PCO.”

The claimant asks the court to act in accordance with those considerations and the facts as set out in the witness statement of its Financial Director, Jeff Hayden, dated 22 December 2009 and to make a PCO limiting its liability for the costs of other parties to £10,000.

**David Wolfe**

**MATRIX**

**22 December 2009**