

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

B E T W E E N:

THE QUEEN

on the application of

BADGER TRUST

- and -

THE WELSH MINISTERS

Claimant

Defendants

**SKELETON ARGUMENT ON
BEHALF OF THE DEFENDANTS**

For hearing: 22 and 23 March 2010 (as a “rolled-up” hearing)

Time estimate for hearing: 1½ - 2 days

Suggested pre-reading:

- (1) claim form and grounds of claim [tabs A1, A2]
- (2) summary of grounds for resisting the claim [tab A5]
- (3) Tuberculosis Eradication (Wales) Order 2009 [tab B1]
- (4) witness statement of Professor Christianne Glossop [tab A7/pp 1-28]
- (5) submission to Minister dated 23 March 2009 [tab A7/exhibit pp 23-60]

Time estimate for pre-reading: 1½ hours

INTRODUCTION

1. The Claimant seeks to challenge the Defendants' decision to make the Tuberculosis Eradication (Wales) Order 2009 ("the Order") [tab B1]. The Order was made by the Minister for Rural Affairs pursuant to the Animal Health Act 1981 ("the AHA 1981") because she was satisfied that tuberculosis exists in the wild badger population in Wales, that the disease is being transmitted from badgers to cattle, and that the destruction of wild badgers in Wales is necessary in order to eliminate or substantially reduce the incidence of tuberculosis in cattle in Wales.

2. The Order was made on 28 September 2009 and came into force on 21 October 2009, and it provides that an authorised officer may destroy badgers. In effect, the Order provides the necessary lawful authority for the Welsh Ministers to carry out a cull of badgers.

3. Tuberculosis in cattle is a serious problem in Wales and it is uncontroversial that a significant contributor to that problem is the transmission of tuberculosis from badgers to cattle. There was evidence before the Minister that the destruction of badgers would eliminate or substantially reduce the incidence of tuberculosis in cattle and, therefore, the Minister was properly satisfied that the relevant requirements of the AHA 1981 were met and that the Order could properly be made.

SUMMARY OF RELEVANT FACTUAL BACKGROUND

(a) Bovine tuberculosis

4. Tuberculosis in cattle (or "bovine tuberculosis") is an infectious disease that has a significant impact on the health and welfare of cattle. It is a serious, chronic,

debilitating disease arising from infection with *Mycobacterium bovis* (“*M bovis*”). Bovine tuberculosis is contagious and it is “zoonotic” (i.e. it can be transmitted from animals to humans). There is no efficacious treatment for it in cattle and wildlife (Glossop, paras 11-14 [tab A7/pp 5-6]).

5. Bovine tuberculosis is a particularly serious problem in Wales. It is one of the biggest threats facing the dairy and beef industry in Wales. As of 30 November 2009, approximately 10% of registered Welsh herds (1,325 farms) were subject to animal movement restrictions related to tuberculosis controls. A testing and slaughter programme is central to the eradication strategy for tuberculosis and is carried out on a herd basis. In 2008, over 12,000 cattle had to be slaughtered because of the disease, an increase of some 50% over the number slaughtered in 2007 (Glossop/para 20 [tab A7/p 8]).

6. Bovine tuberculosis is thus exacting a huge cost in terms of animal life and, along with the associated loss of quality breeding genetics and controls on the movement of cattle, is having a significant impact on businesses and society in rural Wales. Further, the Welsh Assembly Government is required by law to compensate owners of cattle slaughtered by reason of tuberculosis. In the 2000-2001 financial year, the compensation bill was approximately £1.8 million. In the 2008-2009 financial year this had risen to just under £24 million. To this must be added the additional costs incurred in respect of matters such as surveillance and testing cattle for tuberculosis prior to moving them (Glossop/para 21 [tab A7/p 8]).

7. There is clear evidence that the transmission of *M bovis* infection between cattle and wildlife species has become an important part of the epidemiology of this disease in Great Britain, including Wales. Certain wildlife species act as a reservoir of infection, which is then transmitted back to cattle, making eradication increasingly difficult. Preventing the spread of tuberculosis within wildlife populations, and between wildlife and cattle, is therefore a very important element of any eradication programme: there is no point tackling infection in cattle without also tackling infection in wildlife (Glossop/para 24 [tab A7/p 9]).

8. There is compelling evidence that badgers (*Meles meles*) not only act as a host for *M bovis*, but also contribute significantly to the disease in cattle. Failure to address the reservoir of bovine tuberculosis in badgers in Wales would leave a potentially significant source of infection for transmission to cattle. Accordingly, if tuberculosis is to be eradicated from cattle in Wales, the problem of transmission of tuberculosis from badgers to cattle has to be dealt with (Glossop/paras 25-27 [tab A7/pp 9-10]).

9. It is important to note, however, that although dealing with the transmission of tuberculosis from badgers to cattle is an important step towards eradicating tuberculosis in cattle, it is by no means the only step. This can only be achieved by a “package” of measures aimed at the rapid early identification of infection, controlling the spread of infection (e.g. through improved husbandry and movement restrictions applied to infected herds of cattle), and the effective management of cattle herd breakdowns (including the testing regime, and the isolation and removal of infected cattle), alongside preventative measures designed to reduce the risk of uninfected herds becoming infected (Glossop/para 27 [tab A7/p 10]).

(b) Decision-making process

10. On 8 April 2008, the Minister announced a policy of eradicating tuberculosis from cattle in Wales (Glossop/para 23 [tab A7/p 9]). Technical experts were commissioned to investigate the potential of different badger control strategies and a Tuberculosis Eradication Programme Board was established to provide recommendations, drawing on this expert advice (Glossop/paras 29-30 [tab A7/p 11]).

11. In a submission dated 23 March 2009 (Glossop/paras 31-34 [tab A7/pp 11-15, exhibit pp 23-60]),¹ the Minister was presented with three options for a badger control strategy (to be used in conjunction with additional cattle control measures) to remove the disease transmission link between badgers and cattle:
 - (1) a non-selective badger cull. The cull would be “non-selective” in the sense that it would not just be badgers infected with tuberculosis that would be culled, but all badgers that could be trapped. This was the option eventually decided upon, leading to the making of the Order;

 - (2) the vaccination of badgers against tuberculosis;

 - (3) a combined vaccination and selective cull strategy. The cull would be “selective” in the sense that only badgers that had tested positive for tuberculosis would be culled, and those that tested negative would be vaccinated.

¹ The Claimant appears to take issue with the redaction of certain parts of this submission on grounds of legal professional privilege, on the basis that (it is said) as the submission was drafted in the Chief Veterinary Officer’s name and not in the name of a lawyer, that privilege cannot attach. That is plainly a bad point. As the Chief Veterinary Officer makes clear in her witness statement, the submission included contributions from other officers; unsurprisingly, the parts containing legal advice were drafted by departmental lawyers.

12. On 24 March 2009, following consideration of the evidence, the Minister announced that she had formed the view that a non-selective cull of badgers was necessary alongside additional cattle control measures (i.e. option (1)) (Glossop/para 36 [tab A7/p 15]; [tab C1]).
13. Between April 2009 and 30 July 2009, the Minister consulted on a draft of the Order (Glossop/para 37 [tab A7/p 15]; [tab C3]). A summary of the responses received was published on 30 September 2009 (Glossop/para 37 [tab A7/p 15]; [tab C4]).
14. A further submission was provided to the Minister on 22 September 2009 (Glossop/para 38 [tab A7/p 16, exhibit pp 405-412]). This drew the Minister's attention to the outcome of the consultation exercise and various other matters, and recommended that she make the Order.
15. The Minister concluded that her March 2009 view remained valid and therefore she made the Order on 28 September 2009 (Glossop/para 39 [tab A7/p 16]). On 30 September 2009, the Minister published a written statement relating to the decision to make the Order (Glossop/para 39 [tab A7/p 16, exhibit pp 456-458]). The Order came into force on 21 October 2009.
16. The Order was laid before the Welsh Assembly on 30 September 2009, and on 4 November 2009 a motion to annul the Order was debated and overwhelmingly rejected (by 43 votes to 9) (Glossop/para 40 [tab A7/p 16]).

17. On 13 January 2010, the Minister duly decided to commence the culling of badgers pursuant to the Order in a 288 km² area lying mainly within north Pembrokeshire, an area within one of the most serious tuberculosis problems in Great Britain. It was decided that there will be annual culls over a five year period, and it is anticipated that the first cull will not commence before the end of April 2010 (Glossop/para 61 [tab A7/pp 23-24]).

(c) Randomised Badger Culling Trial and the Jenkins et al research

18. One of the pieces of information considered by the Minister when deciding to make the Order was the results of the RBCT. The RBCT was carried out in England from 1998 onwards. The design of the trial was for five years of annual culling of badgers in ten “triplets” of trial areas (although these were to a certain extent interrupted by the foot and mouth disease epidemic in 2001, as was the cattle testing regime for tuberculosis). The final culls were all completed by the end of 2005 (Glossop/paras 45, 49 [tab A7/pp 18-20]).
19. The RBCT did not, however seek to tackle all sources of infection together by imposing additional disease control measures. Rather, the RBCT sought to test the effect of badger culling alongside the then existing policy for control of tuberculosis in cattle. In fact, as a result of the foot and mouth disease outbreak, cattle testing for tuberculosis was halted throughout Great Britain for the majority of 2001 and early 2002 (i.e. during the course of the RBCT) and a dramatic increase in incidence of tuberculosis in cattle in England and Wales followed the end of that outbreak (Glossop/para 48 [tab A7/pp 19-20]).

20. The results of the RBCT had suggested that whilst culling was on-going, although the culling reduced the incidence of bovine tuberculosis within the cull areas, there was an increase in the incidence of bovine tuberculosis on neighbouring land. This was thought to be due to the effects of a phenomenon known as “perturbation”, whereby the process of culling disturbed the badger population, causing those that remained to roam more widely.

21. At the time of the decision to make the Order, the latest published information as to the results of the RBCT was a paper by Jenkins *et al* in the International Journal of Infectious Diseases (“the 2008 Jenkins paper”) [tab C6], with which the Minister was personally familiar (Glossop/pars 46-49 [tab A7/pp 18-20]). The 2008 Jenkins paper analysed the data from the RBCT that were available up until 6 January 2008. The paper recognised that [tab C6/pp 52-53]:

“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.”

22. In short, there was an overall 9% reduction in the incidence of confirmed cattle herd breakdowns. A cattle herd breakdown (or “CHB”) occurs where one or more member of a cattle herd is identified as having contracted bovine tuberculosis. There is a distinction made between confirmed cattle herd breakdowns and unconfirmed cattle herd breakdowns. Confirmed cattle herd breakdowns are those where a post mortem examination reveals signs of visible lesions typical of tuberculosis or samples taken for bacteriological culture disclose the presence of *M bovis* (these investigations give

an indication of the level and stage of tuberculosis infection in the animal and have an impact on the subsequent management of the cattle herd breakdown).

23. The 2008 Jenkins paper speculated that this was a consequence of decreased perturbation as a result of the cessation of culling at a time when badger numbers were still suppressed by the culling. It was noted that “if this explanation is correct, it suggests that the benefits observed in the first years post-culling will dissipate as badger numbers increase” [tab C6/p 53].
24. The 2008 Jenkins paper concluded that “the overall reduction in the incidence of confirmed herd breakdowns associated with widespread culling remains modest” [tab C6/p 53].
25. It is important to recognise, however, that the RBCT was simply a trial of badger culling, and nothing else. It did not involve any of the other biosecurity and disease management measures that are important part of the control of tuberculosis in cattle. Such additional control measures will be put in place in Wales and, therefore, when evaluating the likely effects of badger culling in Wales, the results of the RBCT (as analysed by Jenkins *et al*) can only be a starting point.

RELEVANT LEGISLATIVE BACKGROUND

26. The Order was made pursuant to s 21 of the AHA 1981, which (insofar as is relevant) provides [tab E1]:

“21. *Destruction of wild life on infection other than rabies*

...

(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.
- (3) Before making an order under this section the Minister shall consult with the appropriate conservation body for the area to which it will apply, and every order so made shall specify -
- (a) the area to which it applies;
 - (b) the disease to which it applies; and
 - (c) the one or more species to which it relates.
- (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.
- ...”

27. The powers conferred by s 21 of the AHA 1981 have been transferred to the Welsh Ministers insofar as they relate to Wales, and tuberculosis is a disease to which that section applies (pursuant to the Tuberculosis (Wales) Order 2006 (SI 2006 No 1053), art 4).

GROUND 1: INFORMATION PROVIDED AT DEFRA MEETING

28. The Claimant alleges that the Minister wrongly failed to take into account information that was made available to it at a meeting held at DEFRA on 22 September 2009. One of the Minister’s officials attended that meeting as an observer, at which a member of the research group responsible for the 2008 Jenkins paper presented a preliminary and confidential update on its findings (Glossop/paras 50-54 [tab A7/pp 20-21]).

(a) Witness statement of Rosie Woodroffe

29. This part of the Claimant’s claim relies entirely on the witness statement of Ms Woodroffe. It is clear that Ms Woodroffe is put forward as an expert witness. However, contrary to CPR 35.4,² the Claimant has not sought the permission of the Court to rely upon this evidence, and nor did it forewarn the Defendants of its intention to rely upon expert evidence. This is not a mere technical objection, because the statement is, on the application of established principles, inadmissible.

30. The circumstances in which expert evidence will be admissible on an application for judicial review were set out by Collins J in *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, where he commented that “in judicial review proceedings, the circumstances in which fresh evidence can be received are very limited” (paragraph 19). Having referred to the principles on which fresh evidence will be admitted on an application for judicial review laid down in *R v Secretary of State for the Environment, ex p Powis* [1981] 1 WLR 584 (none of which apply in the present case), Collins J held:

“22. I have no doubt that fresh evidence involving expert evidence should in general not be admitted unless it falls within the *ex p Powis* guidelines. However, it is and has always been recognised that irrationality is an error of law which can lead to a decision being quashed. If the decision in question is made by an expert tribunal or indeed by anyone dealing in a field involving consideration of matters which would not obviously be fully understood by a layman without some assistance from an expert in the field, it may be necessary at least to have some explanation of any technical terms. [Counsel for the defendant] accepted that expert evidence could be adduced to provide such explanations. Without it, the court might well be unable to consider properly any irrationality argument. When I use the word ‘irrationality’ I am intending to include not only perversity but also a failure to have regard to a material matter or a taking into account of an immaterial matter.

...

² “No party may call an expert or put in evidence an expert’s report without the court’s permission.”

24. It is clear that the court's function must not be usurped. But it seems to me that the court must be enabled to carry out its function. To do this it must understand the material which is put before it. There is in my view a real distinction between a report from an expert which seeks to explain what is involved in a particular process (in this case, treatment) and how complicated that process is and one which goes on to opine that it was irrational for the body to have reached the conclusion it did...it seems to me that in a truly technical field, where the significance of a particular process is in issue expert evidence can be admitted to explain the process and its significance. Cases where this can be permitted will be very rare and what I have said should not be regarded as opening the door to the admissibility of experts' reports in all cases such as this which involve judicial review of an expert tribunal or body. Equally, the court must be careful to recognise and to apply the distinction to which I have referred, albeit in some instances it may be somewhat difficult to see where the line should be drawn.

25. ...But a word of caution is appropriate. Where the tribunal or body is itself composed of experts or has been advised by an expert assessor (which can happen in appeals in cases such as the present), it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert. That is something which is inappropriate for a reviewing court."

31. Accordingly, whilst expert evidence explaining technical terms may be admissible on an application for judicial review, expert evidence opining on the conclusions of the decision-maker will not be. The witness statement of Ms Woodroffe falls into the latter category.

(b) Correct approach to ground 1

32. There is no dispute that the Minister's officials considered that it was not necessary to draw her attention to the information made available at the DEFRA meeting. As a matter of principle, there is nothing unusual about this: it is neither uncommon nor unlawful for a decision-maker to rely upon her officials to "sift" the information provided to her.

33. In this context, there was no requirement that the Minister be apprised of everything that was within the knowledge of her officials (*R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, paras 60-62 *per* Sedley LJ, citing with approval *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24). As such, it was not necessary for the Minister to have every point of detail drawn to her attention: it was sufficient if officials drew the attention of the Minister to “the salient facts which give shape and substance to the matter” (*R (Seabrook Warehousing Ltd) v Commissioners for HM Revenue and Customs* [2010] EWCA Civ 140, paras 40-43 *per* Etherton LJ).
34. The information presented at the DEFRA meeting was “work in progress” (Glossop/para 52 [tab A7/p 21]). The gist of it was that three years after the trial period, there was no remaining impact of culling either inside or outside the trial area [tab A7/p 467]. In a paper subsequently published in February 2010, the Jenkins research team again speculated that this that this was a consequence of the recovery of badger numbers after the culling [tab A7/p 463]. In essence, therefore, the information presented at the DEFRA meeting merely tended to confirm the hypothesis in the 2008 Jenkins paper that “...the benefits observed in the first years post culling will dissipate as badger numbers increase” [tab C6/p 53, left hand column].
35. In the circumstances, there was no need for this information to be drawn to the Minister’s attention. It did not add to the salient facts which gave shape and substance to the matter that she was considering (Glossop/paras 54-57 [tab A7/pp 21-22]). Although the Claimant has asserted that the Minister approached her decision on the basis that the benefits of culling would in fact continue over time, this is plainly not

the case. First, the Minister was personally familiar with the 2008 Jenkins report and the caveats expressed therein (Glossop/paras 44-49 [tab A7/pp 18-20]). Secondly, in the submission of 23 March 2009, the Minister's attention was expressly drawn to the fact that further research would be required before it could be determined that the benefits identified in the 2008 Jenkins paper would continue over time (submission, para 6.3.8 [tab A7/pp 35]). Thirdly, the advice provided by the Programme Board was predicated only on the benefits identified in that paper (submission, para 9.2.3 [tab A7/p 48]).

36. It is noted that the Claimant alleges that the Minister overestimated even the benefits identified by the 2008 Jenkins paper because, so it is said, she treated the figure of a 9% reduction in the incidence of cattle herd breakdowns as relating to both confirmed and unconfirmed cattle herd breakdowns. This allegation is wholly without merit: a fair and proper reading of paragraph 6.3.4 of the 23 March 2009 submission to the Minister clearly demonstrates that it was referring to confirmed cattle herd breakdowns [tab A7/p 32].

GROUND 2: "ELIMINATE OR SUBSTANTIALLY REDUCE"

37. Section 21(2)(b) of the AHA 1981 required that the Minister be satisfied that, first, the destruction of wild badgers in Wales would "eliminate or substantially reduce" the incidence of tuberculosis in cattle in Wales; and, secondly, that such destruction was "necessary" to eliminate, or substantially reduce, the incidence of tuberculosis in cattle in Wales. The Claimant did not previously contend that the Minister was not

reasonably entitled to be satisfied that these two express conditions were met. However, it appears that it now belatedly seeks to do so.³

38. As to the first requirement, it is plain that the phrase “substantially reduce” in s 21(2)(b) of the AHA 1981 refers to a reduction that is more than insignificant or trivial. The AHA 1981 is, as its short title suggests, an Act concerned with animal health and, as the broad general power conferred by s 1(a) indicates, it is concerned with the purpose of preventing the spreading of disease in any manner. Part II of the AHA 1981, where s 21 is found, is particularly concerned with the control of disease. This context indicates that Parliament’s intention was to prioritise the control of disease.
39. Section 21 itself confers a power to take steps to protect certain types of animals⁴ by the destruction of other types of animals (animals which will not necessarily be specially protected). In that context, it would be extremely surprising if Parliament had intended that there should be no power to make, for example, an order authorising the destruction of a small number of unprotected wild species despite the fact that that would result in a 50% reduction in the incidence of a serious disease in domestic livestock.
40. That, however, is the effect of the Claimant’s argument that “substantially reduce” means “almost completely eliminate”. Not only can this not have been Parliament’s intention, but if it had been Parliament’s intention, it would have been easy for it to legislate in the terms now contended for by the Claimants.

³ Presumably as a result of it having to abandon its misplaced claim based on the Habitats Directive, on the ground that that Directive does not apply to badgers.

⁴ In this context, “animals” plainly includes at the very least livestock and horses: AHA 1981, s 21(9) and 87(1).

41. In the circumstances, it is clear that the word “substantially” bears the meaning that the courts have accorded to it in a variety of contexts (see recently, for example, *Majorstake Ltd v Curtis* [2008] 1 AC 787, para 40 *per* Baroness Hale), and it refers to a reduction that is “more than insignificant or trivial”.
42. Accordingly, the Minister did not misdirect herself in law as to the effect of s 21(2)(b) of the AHA 1981.
43. There was sufficient information before the Minister to justify a conclusion that the destruction of badgers would result in a substantial reduction in the incidence of tuberculosis in cattle in Wales, particularly when carried out in conjunction with additional control measures. Even taking the 2008 Jenkins paper as a starting point, a 9% reduction in the incidence of confirmed cattle herd breakdowns is more than insignificant or trivial. It follows that it is unarguable that it was irrational for the Minister to reach the conclusion that she did.

GROUND 3: “NECESSARY”

44. As set out above, the second condition imposed by s 21(2)(b) of the AHA 1981 was that the destruction of badgers was “necessary” to eliminate or substantially reduce the incidence of tuberculosis in cattle in Wales.
45. Bearing in mind the context of the AHA 1981 and the purpose of s 21 itself (as set out above), the term “necessary” in s 21(2)(b) cannot import any thing more than a requirement that there be no reasonably practicable alternative to the destruction of

members of a wild species. The Claimant does not appear to dispute this interpretation of s 21(2)(b).

46. On the contrary, the Claimant's case appears to turn on the assertion that vaccination was a reasonably practicable alternative to the destruction of badgers. Of course, to make good an argument advanced on this basis, the Claimant would have to demonstrate that it was irrational for the Minister to conclude that vaccination was not a reasonably practicable alternative to the destruction of badgers.

47. Presumably recognising the difficulty of maintaining such an argument, the Claimant attempts to do so by pointing to various extracts from the Defendants' documents which it says constitute admissions that vaccination is such a reasonably practical alternative. However, the extracts are selective and fail to present the true picture, which is that whilst the Minister recognised that vaccination may in the future be a reasonably practicable alternative, she did not accept that this was the case at the time of her decision. For example:

(1) whilst the Claimant quotes two passages (out of context) from the 23 March 2009 submission to the Minister, it notably fails to refer to the main text on vaccination, which states [tab A7/pp 35-37]:

“6.4 OPTION 2: Vaccination of badgers

Vaccines for badgers are seen as potentially significant *future* contributors to the control of bovine TB...

Bacille Calmette Guerin (BCG) is currently the only candidate bovine TB vaccine that *could* be available for use in badgers in the near future...Information on the safety of BCG in badgers *will be* provided from a field trial being carried out in England...

Delivering a BCG vaccine to badgers is problematic and the use of an oral bait perhaps holds the greatest *promise* for mass vaccination. No oral bait formulation *currently exists* for use in the UK. However, a

scientific study, funded by the UK's Department for Environment, Food and Rural Affairs (Defra), is currently underway to develop suitable oral bait and investigate the most effective method of delivering an oral vaccine. The oral bait is *anticipated* to be available for use in *late 2014*. In the meantime, an *initial* vaccination deployment project being developed by Defra is considering the capture and injection of badgers. The aim of this project is to demonstrate *the potential* to vaccinate badgers in the field as part of bovine TB control policy...

6.4.5. Summary

The BCG vaccine has been demonstrated *experimentally* to generate an immune response in badgers, which is associated with protective badger immunity from TB. Therefore BCG is likely to be a suitable vaccine for use in badgers in the wild... However, the level of benefits, in terms of reduction of cattle herd breakdowns and *the timescale to realise these benefits is not yet known.*"

(emphasis added)

- (2) the Claimant has failed to point out that the quotation from the advice provided to the Programme Board comes from a section entitled "points for discussion". In any event, the passage relied upon states only that vaccination "may" deliver benefits, and this must be read in the context of the overarching statement in the document that "vaccines for badgers are seen as potentially significant *future* contributors to the control of TB" (emphasis added) [tab A7/p 324]).

48. It is abundantly clear from these documents that the view was taken that whilst vaccination might be a reasonably practicable alternative to the destruction of badgers in the future, at the time of the decision under challenge, it was not such an alternative. It follows that the Claimant's irrationality challenge must fail.
49. Insofar as the Claimant relies upon extracts from the DEFRA website to support its case in this respect, those extracts themselves make it clear that the vaccination of

badgers as a means of reducing the incidence of tuberculosis in cattle is (as recognised by the Minister) is at a very early stage of development:

- (1) in July 2008, the Secretary of State for the Environment, Food and Rural Affairs announced an investment “in developing usable cattle and badger vaccines”; stated his view that “effort should be put into strengthening Defra’s research programme to develop cattle and badger vaccines and maintaining cattle controls”; announced “a deployment project to build confidence in the long term contribution badger vaccination could make to tackling bovine TB and to provide valuable information which could help move toward the long term goal of an oral badger vaccine”; confirmed his intention to “strengthen our chances of successfully developing” vaccines; announced the setting up of “a practical project to prepare for deploying vaccines in the future”; and stated his view that “it could be some time before an oral vaccine for badgers...becomes available” [tab C7/p 56];
- (2) in March 2009, the Secretary of State announced a “deployment project” focusing on “developing practical approaches for use” of vaccines, stating that “developing an effective vaccine for bovine TB is only half the challenge. The other is to deploy it effectively. This project will help us do that”.

50. If anything, these extracts support the approach adopted by the Minister.

GROUND 4, 5 AND 6: BERN CONVENTION

51. The Claimant’s argument on the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (“the Bern Convention”) is predicated on the assertion that it constitutes the “overarching legal obligation” and that ambiguities in the AHA 1981 are to be construed in accordance with the Bern Convention.⁵ The basis for these sweeping assertions is unclear. As the Defendants pointed out in their summary grounds, the Bern Convention has not been incorporated into domestic law and the AHA 1981 was not enacted to give effect to it. Accordingly, the Court has no power to enforce it (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL, 476-477 *per* Lord Templeman, 500 *per* Lord Oliver; *R v Secretary of State for the Home Department, ex p Brind* [1991] AC 696, HL, 762 *per* Lord Ackner).
52. The Minister took the Bern Convention into account when she reached her decision (Glossop/paras 58-60 [tab A7/p 23]), as she was entitled to do (*R (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189, para 55 *per* Lord Brown). However, as a matter of principle, the Court should not embark upon the exercise of attempting to ascertain whether the Minister properly understood the United Kingdom’s obligations under the Bern Convention: there is no established body of binding jurisprudence on the relevant obligations, the state parties to Bern Convention having provided for a mechanism for resolving differences of interpretation that does not involve binding judicial determinations⁶ (*R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, paras 44-46 *per* Lord Bingham, para 65-67 *per* Lord Brown).

⁵ In any event, the Claimant has failed to identify what ambiguities there are said to be in s 21 of the AHA 1981.

⁶ See articles 13, 14 and 18. The Claimant has itself referred this matter to the Standing Committee of the Bern Convention.

53. In any event, there is no basis for concluding that the Minister approached the United Kingdom's obligations under the Bern Convention on anything other than a proper basis. The Claimant's arguments to the contrary largely rehearse those made in respect of grounds 2 and 3. For the reasons explained above, those arguments are ill-founded and, further:

- (1) in relation to ground 5, the requirement in article 9 of the Bern Convention that there be "no other satisfactory solution" simply means that, at the relevant time, there is no reasonably practicable alternative. As set out in relation to ground 3 above, the Minister was entitled to conclude that there was no reasonably practicable solution to the destruction of badgers;
- (2) in relation to ground 6, there is nothing in the wording of article 9 of the Bern Convention that requires that the beneficial impact of the destruction of badgers somehow outweigh the extent of that destruction.⁷ Where the state parties intended that there be a limitation on the extent to which the article 9 exception may be relied upon, they set that limitation out in express terms. Accordingly, article 9 expressly provides that it may not be relied upon where to do so would be detrimental to the survival of the population of the relevant species. In the light of this express provision, there is no room for implying additional limitations into this international instrument in the manner contended for by the Claimant.

⁷ Although the Claimant relies upon a resolution of the Standing Committee of the Bern Convention in this respect [tab E11/p 39], it is to be noted that the resolution in fact deals with the definition of "serious" (as in "serious damage") in article 9(1), bullet point 2, and does not purport to introduce a balancing exercise into article 9 as a whole.

54. In the context of the alleged breach of the Bern Convention, it is also relevant to note that s 82(2) of the Government of Wales Act 2006 provides that, if the Secretary of State considers that any subordinate legislation made by the Welsh Ministers is incompatible with any international obligation, he may revoke that legislation. There has been no suggestion by the Secretary of State that such a step is required here.

PROTECTIVE COSTS ORDER

55. It is noted that the Claimant contends that that part of Burnett J's order which capped the amount costs that it could recover to £10,000. The Claimant's submissions appear to veer between accepting that it should be entitled to "no more than modest" solicitors' fees and junior counsel's fees and contending that it should be entitled to all its reasonable costs (i.e., in effect, no cap). In any event, the Defendants face the same difficulty in dealing with this matter now as it did when the application for a protective costs order was first made, in that the Claimant has still failed to provide the Court with any evidence as to the likely level of its own costs in this matter.

CONCLUSION

56. For the reasons set out above, the Claimant's claim is ill-founded and should be dismissed.

Timothy Corner QC
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15 March 2010

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CO/15769/2009

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

B E T W E E N:

THE QUEEN

on the application of

BADGER TRUST

Claimant

- and -

THE WELSH MINISTERS

Defendants

**SKELETON ARGUMENT ON
BEHALF OF THE DEFENDANTS**

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