



# press release

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For further details,  
journalists should contact:

**Gwendolen Morgan**  
Badger Trust's solicitor  
**Bindmans LLP**

Tel: 020 7833 4433 or  
079211 65205

**Jack Reedy**  
**Badger Trust press team**  
Tel: 01564 783 129 or  
07751 731 107

**Jonathan Robinson**  
Head of Marketing  
**Bindmans LLP**  
j.robinson@bindmans.com

## **Victory for badgers on all counts as Court of Appeal declares proposed Welsh badger cull unlawful**

Campaigners were celebrating today as the Court of Appeal handed down judgment finding the proposed Welsh badger cull to be unlawful on all three grounds they raised on appeal.

On 5 July, the Welsh Ministers had conceded the appeal on the basis of one of three grounds: that the 2009 Order which permitted culling in the whole of Wales (even in the many areas where TB is not a problem) was not supported by evidence and was unlawful as a result.

However, the Court of Appeal today ruled that the Welsh Ministers had also acted unlawfully in misinterpreting section 21 of the Animal Health Act 1981 as giving them power to cull if they could achieve a potential reduction in TB which was merely more than trivial or insignificant. They also unlawfully failed to carry out a balancing exercise to weigh up the harm involved (i.e. killing over 2,000 badgers) against the potential benefit (which the Minister's own model predicted to be a reduction in the rate of cattle herd breakdowns of just 0.3% of farms annually).

On the balance point, Lady Justice Smith said [para 90]: *"In my view, [the Respondent's] submission rather missed the point. It is not necessarily a question of how many badgers will be killed; the important matter is consideration of the nature and extent of the adverse effects of killing a large number of badgers and whether the benefits to be derived from the proposed cull outweigh those adverse effects. The submissions*

*to the Minister contained nothing about the adverse effects of killing a large number of badgers; indeed, from those submissions it would not be possible to understand why killing badgers might be regarded as ‘a bad thing’.*”

Giving the lead judgment, **Lord Justice Pill** sounded a warning to the Welsh Ministers when he said that [para 72]: *“It is not open to the Welsh Assembly Government immediately to make a fresh Order in the same terms but covering only the IAPA [Intensive Action Pilot Area] and to proceed forthwith with a badger cull there.”*

Lord Justice Stanley Burnton made this observation [para 96]: *“If this order is valid, it would follow that, in the absence of devolution, the Act could be used, in effect, to disapply the Protection of Badgers Act 1992 throughout England and Wales, by means of a single statutory instrument [such as the TB Eradication (Wales) Order 2009, which is secondary legislation]. If the cull authorised by such an order were effective, the badger, an indigenous species, would be eradicated and become extinct in this country. I doubt that this is what Parliament envisaged or authorised when enacting section 21.”*

Two of the three judges also ruled that the short-term 9% potential reduction in TB to be gained from the proposed cull on the Minister’s evidence did not qualify as a ‘substantial reduction’ as required by the Animal Health Act 1981. Lady Justice Smith said this [para 83] about the short-term 9% potential reduction: *“I would call it modest. I would accept that that reduction might be worthwhile and might well be, to use the words of the submission to the Minister ‘a significant achievement that should not be undervalued’. I would even accept that it could be described as a reduction of ‘substance’.* *But that is not the test; the test is whether the reduction will be substantial and I do not think a reduction of 9% can be so described.”* [underlining added]

**Gwendolen Morgan** of **Bindmans LLP** who represents the Trust said today:

“This is a just outcome for a determined group of wildlife campaigners and an even better day for badgers. This case was the first in relation to section 21 of the Animal Health Act 1981

**Bindmans LLP**  
275 Gray's Inn Road  
London WC1X 8QB  
Tel: 020 7833 4433  
Web: [www.bindmans.com](http://www.bindmans.com)

and it will give important guidance to Ministers considering future culls, potentially in relation to different species and different diseases. The court emphasised the fact that Parliament deliberately drafted the Act so that wildlife could not be killed without robust scientific evidence proving that this would result in a 'substantial reduction' or elimination in the incidence of a disease. In future scenarios, the relevant Minister will now have to conscientiously carry out a balancing exercise weighing up the detriment in terms of the extent of wild animals to be killed, and the impact on the species, against the potential benefits in terms of disease reduction. Finally, the Minister may only make an order to cull following lawful consultation in relation to a specific area for which there is scientific evidence to justify a cull. As Lady Justice Smith said *'Hunch and anecdote would obviously not be sufficient; nor would impermissible extrapolation [from the scientific evidence].'*"

**David Williams**, Chairman of the **Badger Trust**, said: "We are delighted with this outcome. We are grateful to all the badger groups and supporters whose donations and encouragement made this crucial legal action possible.

"Of all the wildlife organisations the Badger Trust exists to secure the welfare of our native protected species, the badger, and we will continue to do so through lawful means. We are pleased to see that the protection offered by wildlife law cannot be vitiated by political smoke and mirrors and that the court saw the issues so clearly. We also note the court's criticism of the Welsh Ministers' failure to reveal their advice without heavy redactions.

"Scientific evidence about the futility of killing badgers to control bovine TB remains exactly the same. Although some farmers may see this judgement as a setback, the massive body of rigorously peer-reviewed literature shows that killing badgers can play no meaningful part in the eradication of bovine TB and that robust cattle measures are sufficient, as demonstrated by the fact that the rate of increase in new TB outbreaks is already starting to slow. We also hope that the Minister will now adopt a strategy of vaccination as a cost-effective, viable alternative."

**Ends**

## **Notes for editors**

By law badgers may only be culled if such culling would “eliminate or substantially reduce” the incidence of TB in cattle. The Badger Trust successfully argued that the High Court made an error of law in holding:

- that the words “substantially reduce” in section 21(2)(b) of the Animal Health Act 1981 meant simply any reduction in TB that was “more than merely minor or trivial”; and
- that, once it arose, the discretion to make an order under section 21(2) could lawfully be exercised without the Minister doing any balancing act to consider the harm involved (i.e. killing over 2,000 badgers) against the potential benefit (which the Minister’s own model predicted to be a reduction in the rate of cattle herd breakdowns of just 0.3% of farms annually).
- In addition, the Trust argued that the Ministers erred in making an Order for the whole of Wales having only consulted on the basis of the Pembrokeshire IAPA and on the basis of evidence which, at best, supported culling in the IAPA only. The Welsh Ministers conceded the appeal by reference to this point and the court unanimously agreed that it rendered the Order unlawful notwithstanding their findings on the first two points.

### **Details about Badger Trust:**

Since 1986 the organisation has been the leading voice for badgers. It now represents and supports around 60 local voluntary badger groups and around 1,200 individual supporters. The Trust’s objectives are to promote and enhance the welfare, conservation and protection of badgers, their setts and their habitats for the public benefit. It provides expert advice on all badger issues and works closely with Government, the police and other conservation and welfare organisations. The Trust uses all lawful means to campaign for the improved protection of badgers.

For further information please see:

<http://www.badger.org.uk/Content/Home.asp>

**Bindmans LLP:**

Bindmans LLP was founded in 1974 by a small group of solicitors specialising in civil liberties and the rights of the individual. These concerns have remained at the heart of the firm as it has grown to its present size of 16 Partners and around 100 other staff, and Bindmans is ranked by Chambers UK and The Legal 500 as one of the country's leading public law practices.

For more information about the firm:

- Tel: 020 7833 4433
- Web: [www.bindmans.com](http://www.bindmans.com)