



Neutral Citation Number: [2012] EWHC 1904 (Admin)

Case No: CO/2120/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2012

Before :

MR JUSTICE OUSELEY

THE QUEEN
on the application of

THE BADGER TRUST

Claimant

- and -

**THE SECRETARY OF STATE FOR THE
ENVIRONMENT, FOOD & RURAL AFFAIRS**

Defendant

- and -

NATURAL ENGLAND

**Interested
Party**

- and -

**ROYAL SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS**

Intervener

**Mr David Wolfe QC and Ms Joanna Buckley (instructed by Bindmans Solicitors) for the
Claimant**

**Mr Nigel Pleming QC and Ms Kate Grange (instructed by Treasury Solicitors) for the
Defendant**

**Natural England and the Royal Society for the Prevention of Cruelty to Animals were not
represented**

Hearing dates: 25th and 26th June 2012

Approved Judgment

MR JUSTICE OUSELEY :

1. The Badger Trust, the Claimant, promotes the conservation and welfare of badgers, their setts and habitat. It challenges the decision of the Defendant on 14 December 2011 to adopt a policy on bovine TB, “bTB”, and badger control in England pursuant to which she would authorise Natural England to license groups of farmers and landowners to cull badgers. The licences would be granted under s10(2)(a) of the Protection of Badgers Act 1992. The culling would be piloted in two areas; the first year of the pilot would test the Defendant’s assumption about the effectiveness, humaneness and safety of controlled shooting, also called free shooting, to contrast with cage-trapping followed by shooting. After that first year test within the two pilot areas, the Defendant would review the cost and benefit analysis in those areas to see if the scheme could be “rolled out more widely”. Even if it were not to be rolled out more widely, the cull in the two pilot areas, by using cage-trapping and shooting rather than controlled or free shooting, would have to continue for reasons to which I shall come.

2. The Badger Trust challenge is made on three grounds, two of statutory construction and one relatively narrow factual one. First, it contends that s10(2)(a) of the Protection of Badgers Act 1992 does not empower the Secretary of State to do what she proposes in her policy, since its powers can only be exercised for the purpose of preventing the spread of disease, whereas her purpose, on the Claimant’s analysis, is to prevent the transmission of disease and to reduce its incidence, which should be regarded as a different purpose. The Secretary of State says that her purpose is to prevent the spread of disease and that the distinction drawn by the Badger Trust is a false one. Second, the Badger Trust contends that in her assessment of the costs of the policy, the Secretary of State had failed to ask herself the right question, or to acquaint herself with information necessary for the task. The way that was put varied somewhat. Essentially, the Secretary of State failed to ascertain the full costs of the chosen option were controlled/free shooting not to prove itself in the first year of the pilot, and culling had to continue with cage-trapping and shooting for three years. She had also failed to reconsider various other options, which had previously been rejected before she knew the full and different costs and benefits of the chosen option, which as later refined became her adopted policy. The Secretary of State said that the former contention was wrong in fact and the latter unnecessary in law. The Badger Trust’s third ground was that the Secretary of State had no power to issue guidance to Natural England about the way Natural England should carry out the Secretary of State’s functions pursuant to a statutory agreement made under the Natural Environment and Rural Communities Act 2006. The Secretary of State submitted that as a matter of construction the Act did grant such a power.

3. There is no rationality challenge to the policy. Although I have received a significant amount of scientific evidence on behalf of both parties as to the advantages and disadvantages, the risks, costs and benefits of various options, almost all of the contentious part of that scientific evidence is irrelevant to the issues. I was favoured

with it so that I could avoid falling into an error, the error of treating as established fact or as generally agreed expert scientific opinion what was in reality contentious. I hope I shall benefit from it in that way. The RSPCA intervened with written submissions largely dealing with scientific issues, and, while acknowledging its role and learning, I have not been advanced by its submissions in this case.

The background

4. It appears that it was not until about 1971 that it was understood that badgers were a wildlife reservoir for bTB which they could transmit to cattle. There is no dispute but that badgers do transmit bTB to cattle, and that it can also be transmitted from cattle to cattle and from cattle to badgers.
5. The Government's Bovine TB Eradication Programme for England of July 2011 states in paragraph 7 that by the end of the 1960s, bovine TB was "confined to a few pockets in the south west of England and it was established that persistence of disease in these areas was due to a reservoir of infection in badgers. In 1979 there was the lowest recorded level of TB incidents with only 0.49% of herds tested having a reactor which equated to less than 0.02% of all cattle tested. However, despite continuous compulsory cattle testing and slaughter over 60 years, levels of TB in cattle in England have been rising since the mid-1980s." It worsened after the 2001 outbreak of foot and mouth disease.
6. Maps within the Defendant's July 2011 Eradication Programme show that the trend of cattle TB incidence in England has been rising for 25 years. The areas affected spread from isolated pockets in south west England and Wales in 1986-1990, to large parts of west and south west England and Wales. This case is not concerned with the position in Wales, where the Welsh Ministers have their own programme and powers since this is a devolved issue. By 2010 10.8% of herds in England were under bTB restriction, whereas the figure was 22.8% in the south west. The chief veterinary officer, Mr Gibbens, put the public cost of bTB in England in 2010/11 at over £91m; 25000 cattle were slaughtered for bTB control. Control also leads to financial costs to farmers from animal losses, testing costs and disruption to cattle movement, and stress and ill-health, which is not quantifiable financially. Although not as high as in 2008, new bTB incidents have been rising steadily since.
7. Mr Gibbens, in his witness statement, gives evidence that the current control programme which is founded on cattle control measures, has failed to stop the spread of bTB to wider geographical areas and to more herds within the infected areas, although it has been highly successful in eradicating disease and maintaining disease freedom in those parts of Great Britain without a wildlife reservoir. Cattle control measures alone could only reduce levels of bTB where there was a reservoir of disease in wildlife. He expresses the view that the areas of England with a high

incidence of TB in cattle also tend to have high numbers of badgers. He states that the scientific evidence is clear that a significant proportion of badgers are infected with the bTB bacterium in areas where bTB is endemic. I note that this latter point is disputed but it is not a relevant issue for resolution by me.

8. The Secretary of State had also concluded that vaccination on its own was not a sufficient response to the need to address bTB in cattle; in the package of measures, cattle control would continue to be a foundation of the bTB control strategy and other measures would continue, but the package of control measures needed to be reinforced. The particular measure now additionally proposed by the Government as part of that package of measures is badger culling. From 1998-2007 a Randomised Badger Culling Trial, RBCT, took place in thirty 100 km² endemic areas to test the efficacy of badger culling. The evidence before me shows a dispute over the reliability of the conclusions which can safely be drawn from this trial, but that dispute is not relevant to the issues which I have to resolve. Mr Gibbens says in his witness statement that the trial showed that the spread of bTB from badgers to cattle “was found to significantly reduce after culling...”; this was shown by the incidence of bTB being confirmed in a previously unrestricted or uninfected herd. The reduction of new cases through badger culling represented what Mr Gibbens called “prevented disease spread from badgers to cattle.” He continued: “With regard to geographical spread, whilst it is difficult to quantify the exact impact of the reduced risk of further spread of bTB in any other areas outside the cull areas, every confirmed new incident is a potential source of further confirmed new incidents. As the number of new incidents decline, the risk of spread should decline proportionately.” This decline in risk would have an impact both within and outside of the culling area.

9. Mr Gibbens then turned to a conclusion from the RBCT which is important for the decisions which the Secretary of State made and which are challenged in this case. There was a statistically significant decrease, associated with annual pro-active culling over the course of the RBCT, in confirmed herd incidence inside culling areas when compared with survey-only areas. However, this was also associated with an increase in confirmed TB herd incidents in the 2km ring surrounding the cull area, again when compared with survey-only areas. This ring is called the perturbation ring, because it is thought but not definitively shown that the increased incidence in the 2km ring is caused by disruption to the behaviour of the groups of badgers within the culling area. Taking the two areas together there was no net benefit from culling during the period of culling; there was an overall net benefit only after culling had finished. However, once the culling had finished, within a year to 18 months the increase in bTB incidence in the 2km ring disappeared and the level fell back to the background level. However, in the culled area the significant decrease remained. Taking the two effects together it was concluded that the culling had produced overall net reductions of between 12.4% and 17.7% in bTB incidence in cattle over a period of 9 years. These were in themselves substantial reductions in the incidence of disease in cattle and it might be expected that that would have a more significant and longer term effect because bTB was a “slow moving” disease.

10. With that background I turn to the evolution of the policy now challenged. The introduction of a “carefully managed and science-led policy of badger control” in areas of high and persistent levels of bTB was part of the Coalition’s May 2010 “Programme for Government”.
11. In September 2010 Defra published a consultation paper setting out six policy options for badger control as part of a package of measures to tackle bTB. It summarised its view of the RBCT as being that the scientific evidence suggested that proactive badger culling “done on a sufficient geographical scale, in a widespread, coordinated and efficient way, and over a sustained period of time of at least four years, is likely to reduce the incidence of bovine TB in cattle in high incidence areas”. The document then discussed various badger control techniques concluding that only cage-trapping and shooting, and shooting free-ranging badgers, were practicable techniques with the capability “to kill badgers humanely in line with the criteria suggested by the scientific evidence and without posing a risk to non-target wildlife.” Badger vaccination and culling were compared, leading to the view that for most farmers culling was likely to be the preferred option, but there were ways in which vaccination and culling might usefully be combined to maximise the benefits of both strategies. One possible option for that included vaccinating in buffer areas at the border of high and low cattle TB incidence areas to reduce disease spread. Using vaccination to reduce the risks from perturbation in any gaps within culling areas and on lands surrounding them was suggested to have the greatest practical potential to support wider disease control objectives in the short term. The consultation document put forward its estimate of the economic costs and benefits of addressing the disease in badgers; the economic case for such badger control was strongest when used as part of a sustained package of control measures in areas of high bTB incidence.
12. Six policy options were considered for the control of bovine TB in badgers. The first option was to continue with the current policy, that is with no additional control measures. The second and third options were Government- led policies of badger culling and badger vaccination under the Animal Health Act 1981. Options four to six involved what was described as “a partnership approach between the farming industry and Government based on any or all of issuing licences to cull badgers under the Protection of Badgers Act 1992” (option four), promoting greater use of licences under the 1992 Act to vaccinate badgers (option five) and the preferred option 6, which was the issuing of licences under the 1992 Act “to cull, vaccinate or carry out a combination of culling and vaccination.” That is a combination of options four and five. Option 1 was considered an unaffordable failure. Options 2 and 3 would be too costly to justify the benefits. Option 6 was preferred because this would enable farmers “to take control of the wildlife reservoir at the local level and decide for themselves which control measures to use.”
13. The consultation document also included an Impact Assessment and Evidence Base of relevance to ground 2, where I will need to examine them in more detail.

14. In July 2011, Defra produced a summary of the consultation responses and its Bovine TB Eradication Programme for England. This dealt with a package of measures. In relation to badger control it said that while cattle measures would continue to be central to the bovine TB control programme, the disease could not be eliminated unless it was tackled in badgers as well: “Scientific evidence indicates that, in areas with high incidence of bovine TB in cattle, it will not be possible to eliminate the disease in cattle without addressing the transmission of disease from badgers.” Following the response to public consultation, Defra remained strongly minded to proceed with a policy of badger control as part of the package of measures to address bovine TB. A “farmer-led approach remains our preferred option, to empower farmers to take control of the wildlife reservoir at local level and decide for themselves which control measures to use.” But before a decision was made, Defra said that it needed to ensure that a number of important issues raised in the consultation were addressed. It was therefore consulting on a detailed proposal articulated in draft Statutory Guidance to Natural England. These responses would be considered before a final decision was taken. “If the decision is to proceed, controlled shooting as a method of badger control would then be piloted initially in a maximum of two areas in the first year. The results of the monitoring in these areas would be examined by a panel of independent scientific experts. If controlled shooting is found to be effective and humane by this independent panel, then and only then would the policy be rolled out more widely.”

15. As envisaged in that programme, the Department also consulted in July 2011 on its proposed Guidance for Natural England on the implementation and enforcement of a badger control policy. Annexed to this document was an updated cost benefit analysis of Defra’s preferred option and an updated evidence base which changed some of the parameters, notably increasing the size of the cull area with its implication for the size of the surrounding 2km ring; and raising the assumed cost of controlled shooting. Specific aspects for consideration in the draft guidance were that applications for culling licences had to cover an area of at least 150 km²; there had to be access for culling to at least 70% of the total land; measures to minimise risk to non-participant farmers and landowners had to be taken; funding for a total of four year culls had to be in place with money deposited; applicants had to be able to satisfy Natural England that they would be able to deliver a co-ordinated cull sustained over a six week specified period, and a minimum number of badgers had to be culled in each year to achieve the objective of reducing the badger population in the area by at least 70%. After the first year in the two pilot areas, if monitoring showed controlled shooting to be both effective and humane, a maximum of 10 licences would be granted for other areas in each of the following three years. Each licence would be granted for a period of four years during which the culling would take place.

16. A final impact assessment was produced on 30 November 2011. The policy now challenged was produced on 14 December 2011, together with guidance to Natural England. The programme explained the options including vaccination. It explained the cost benefit analysis, to which I shall have to return. It expressed the expectation

that the proposed culling would lead to “an average 16% reduction in the number of new confirmed cattle incidents in a 150 km² control area and the 2km neighbouring ring, over a 9 year period (including 5 years of culling, 4 years post-cull), relative to an epidemiologically similar un-culled area. An average 16% reduction equates to preventing 47 out of 292 breakdowns over 9 years, over the control area and surrounding ring. An estimated 1000-1500 badgers would be culled in each 150 km² culled area over the 4 years to achieve this benefit (based on data from the RBCT). Larger areas would result in a greater number of badgers being culled and a greater net benefit – preventing a larger number of herd breakdowns”.

17. At paragraph 4.30, it said “We are satisfied that culling badgers in line with the strict licence criteria outlined in section 5 below will prevent the spread of TB in the culled area and we consider a reduction of the scale seen in the RBCT to be substantial in the context of dealing with bovine TB, which is a “slow-moving, chronic, latent and infectious disease”. It repeated the point that in the first year culling would be piloted in two areas to test “our assumptions” about the effectiveness, humaneness and safety of controlled shooting. If the monitoring indicated that controlled shooting was an acceptable culling technique “then and only then would this policy be rolled out more widely”. I have already explained that once culling had started in the two pilot areas it would have to be maintained for the full four years but using a different shooting technique, namely cage-trapping and shooting, in the event that controlled shooting did not prove an acceptable technique.

The legislative framework: Ground 1

18. S.1(1) of the Protection of Badgers Act 1992 makes a person guilty of an offence if “except as permitted by or under this Act, he wilfully kills, injures or takes...a badger.”
19. S10(1) enables a licence to be granted by an appropriate conservation body for the killing or taking of a badger for scientific or educational or other specified purposes. S10(2) provides:
 - “(2) A licence may be granted to any person by the appropriate Minister authorising him, notwithstanding anything in the foregoing provisions of this Act, but subject to compliance with any conditions specified in the licence—
 - (a) for the purpose of preventing the spread of disease, to kill or take badgers, or to interfere with a badger sett, within an area specified in the licence by any means so specified;”
20. Mr Fleming QC for the Secretary of State points out that in order to vaccinate a badger, it must first be taken; and submits that s10(2) should be read so as to provide

a defence for those who take badgers to vaccinate them against bTB. The Defendant is proposing to issue or, more precisely, to authorise Natural England under statutory agreement to issue licences under that provision.

21. I mention in passing one of the general exceptions, in s6(c), by which a person is not guilty of a s1 offence “by reason only of... (c) unavoidably killing or injuring a badger as an incidental result of a lawful action, (d) doing anything which is authorised under the Animals (Scientific Procedures) Act 1986.” I mention it, not because Defra invokes it, but because it highlights that there is no specific or express exception to s1 for acts which are authorised under other legislation, upon which the Badger Trust relies for the distinction it draws between preventing the spread of disease, as in s10, and preventing its transmission or reducing its incidence.
22. The 1992 Act expressly consolidated earlier badger protection legislation, including the first such Act, the Badgers Act 1973, which contained essentially very similar provisions.
23. Mr Wolfe QC for the Badger Trust contrasts the terms of s10(2)(a) with the language of other related statutes. The Animal Health Act 1981 is itself expressed to be a consolidating Act, consolidating amongst others the Disease of Animals Act 1950. S1 is in very general terms:
 - “1. 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;”
24. S21 deals with the destruction of wildlife on infection other than by rabies. It provides, so far as material:
 - “(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.”
25. Bovine TB is a disease for these purposes. However, the Ministerial Order is made by statutory instrument, subject to negative resolution in either House of Parliament; subsection (10). And before destruction of wild animals commences, reasonable steps must be taken to inform the landowner and others on the land.
26. Schedule 3 to the 1981 Act contains a number of provisions empowering the slaughter of animals “for preventing the spread” of a particular disease; s32A permits those diseases to be added to by Order “with a view to preventing the spread of disease”. It is worth noting that Schedule 3 permits slaughter of animals which have been in the same shed or in the same flock as an infected animal, “to prevent the spread of the disease.”
27. The Animal Health Act 1981 contains powers, the use of which in relation to badger control was considered in *Badger Trust v Welsh Ministers* [2010] EWHC 768 (Admin), [2010] EWCA Civ 807. Its potentially problematic interaction with s1 POBA 1992 was not considered i.e. whether the lawful use of its powers provided a defence to what would otherwise be an offence under s1, or whether a s10(2) licence would still be required.
28. Two of the precursor legislative strands consolidated in the 1981 Act are the Diseases of Animals Act 1950 and, as a related enactment, parts of the Agriculture (Miscellaneous Provisions) Act 1976. S1 of the 1950 Act is the precursor to s1 of the 1981 Act; s9 of the 1976 Act is the precursor to s21 of the 1981 Act. For Mr Wolfe’s argument, s9(12) in particular and (13) are important. They provide:
- “(12) This and the following section and the Diseases of Animals Act 1950 shall have effect as if those sections were contained in that Act; and without prejudice to the construction of references to the Minister in any provision of that Act, an order of the Secretary of State under this section shall be treated for the purposes of any such provision as an order of the Minister.
- (13) The preceding provisions of this section are without prejudice to any powers conferred on the Minister or the Secretary of State by any provisions of the Diseases of Animals Act 1950.”

29. The 1950 Act, in s84, provides a special definition of “animals”: unless the context otherwise requires, it means “cattle, sheep and goats, and all other ...animals and swine”, but it can by order be extended to cover “any other kind of four-footed beasts”. “Beasts” is not further defined. The emphasis of the definition is on domesticated or farm animals. The main provisions of the Act, which permit the slaughter of animals, are plainly directed to domesticated or farm animals. S87 of the 1981 Act reflects the 1950 Act rather than the distinction in s9(2) of the 1976 Act, between “animals” which includes horses, and “species” which means any species of bird or mammal. S87(1) of the 1981 Act is the same as s84 of the 1950 Act, subject to subsection changes. Ministerial order can extend the definition of “animals” so that for differing statutory purposes, it can cover “(a) any kind of mammal except man; and (b) any kind of four-footed beast which is not a mammal”; s87(2).
30. I also need to refer to s11(2) of the Wildlife and Countryside Act 1981. This, and other provisions, prohibit setting any trap “calculated to cause bodily injury to any wild animal”, subject to other provisions of the Act. S16(3) provides that s11(2) does not apply to anything done “(g) for the purpose of preventing the spread of disease”, and “(h) for the purpose of preventing serious damage to livestock, food stocks for livestock, crops...” if it is done under and in accordance with the terms of a licence granted by the [Secretary of State]”.

The submissions on Ground 1

31. Mr Wolfe submitted that the powers in the PoBA could only be used for the specific purpose of preventing the spread of disease. This was a geographical concept, and related to preventing the spread of disease from the area covered by the licence. Where the purpose was control within the area in which culling would take place, that purpose fell within the exclusive scope of s21 of the AHA1981: the disease is transmitted from badgers to cattle, and culling would reduce its incidence within the area. The contrast was marked because the prevention of the spread of disease under the 1950 Act was contrasted within it by s9 of the 1976 Act which was to be read as part of it, and was the precursor to s21. This position was made the more marked here since in the 2km ring outside the cull area, there would be an increase in the spread of the disease, and even 18 months after the cull had ended, there would be no reduction within that ring to a level below that which preceded what may be the perturbation effect. It was not Mr Wolfe’s contention that that increase of itself showed that the policy could not fall within the scope of s10, if he were wrong about its scope.
32. It did not matter that the Defendant or her witnesses expressed the policy purpose as being to prevent the spread of disease; the facts showed that that could not be its purpose, at least not once the statutory provisions had been properly understood. But there were indications in what they had said which showed that they had understood the distinction in the way for which he contended.

33. Mr Fleming contended that Mr Wolfe’s analysis of the statutes started from the erroneous premise that they had to be read as a single entity. The 1992 Act had to be read on its own. There was no sensible reason to apply the distinction drawn by Mr Wolfe to the 1992 Act; indeed it would create anomalies in relation to trapping for vaccination to which Mr Wolfe had no credible answer, and it would run counter to the mischief identified in Parliament which it addressed by the inclusion of s10(2). Conceptually, the distinction was illusory: when the disease was transmitted to an uninfected herd, the incidence increased, and therefore its spread. Were Mr Wolfe right, s10 could only be used on the fringes of an area of bTB infection and not where the incidence was highest. It was not clear whether action under s21 would still require a s10 licence, but there was no reason why Parliament should have required so much more severe a measure as under s21 of the AHA 1981 to be taken in support of Mr Wolfe’s distinction. The evidence submitted on behalf of the Secretary of State and the documents which led to and contain the decision challenged all show that she was engaged in a lawful use of the powers in s10. The scientific evidence supported the simple view that these measures would help prevent or reduce the spread of the disease.

Ground 1: Conclusion

34. Mr Wolfe’s contention was that preventing the spread of disease was a geographical concept, and that gave it a particular meaning in contradistinction to reducing the incidence of disease. I reject both aspects. First, construing the words of s10(2)(a) PoBA, I see no reason for confining the prevention of the spread of the disease to land outside the area of the licence in which the killing or taking of badgers is to take place. The terms of the subsection are met if the purpose is to prevent the spread of disease, whether inside or outside the licence area. If, which I do not accept, the section imposed some geographical limit to the area within which the purpose of preventing the spread of disease could lawfully be exercised, it would be to the area of the licence rather than the area outside. Either would plainly fit with the Defendant’s case.
35. Second, I see no reason for construing the words in s10(2)(a) “for the purpose of preventing the spread of disease” as containing the words found in s21 of the 1981 Act, so as to distinguish the general concept of “preventing the spread” of disease from “reducing the incidence” of disease through preventing its transmission, let alone to distinguish them in the hard and fast way for which Mr Wolfe has to contend, such that if the purpose is or substantially includes the latter, it falls outside s10. Whatever may be the way in which some scientists may choose to express themselves, where a badger transmits the disease so that it infects cattle in a herd which is not infected, the incidence of the disease is increased, and the disease has been spread in ordinary English. In ordinary English, the disease would also have been spread, and its incidence increased, where a badger infects uninfected cattle,

whether part of a herd which is already infected or not, and whether or not the newly infected beast is part of a herd at all. In ordinary English, preventing those events occurring is preventing the spread of the disease. The natural meaning of the words of s10(2)(a) does not involve the distinction necessary for Mr Wolfe's argument. Nor is the phrase one which obviously has a technical or specialist scientific meaning, let alone one on the meaning of which there is a general scientific consensus.

36. Third, there is no need to imply the words of distinction for which Mr Wolfe contends in order to achieve the obvious purpose of the Act or to avoid obviously unintended anomaly. Indeed, Mr Wolfe's contentions would be productive of pointless anomaly. I can see no reason for supposing that so artificial and pointless an approach as contended for by the Badger Trust was intended by Parliament. If there is anything in the point that such a distinction is drawn in s21 and s1 of the 1981 Act and its predecessor legislation, that rather highlights the absence of such a distinction in the 1992 Act. S10 permits interference at as low a level as an individual sett, and an area to be defined accordingly: the necessary application of his distinction would require that area to be very tightly defined so as to exclude the area where a beneficial effect was desired. His construction would require the licensor to decide whether it was granting a licence to prevent spread or to reduce incidence, which it would decide by reference to whether the spread would take place inside or outside the area of the licence. A licence to prevent the spread of disease, could only be granted at the edge of an area of high incidence with a view to preventing spread to uninfected areas beyond. It could not be granted within the area of high incidence to prevent the incidence in that affected area worsening. Applicants for contiguous licence areas could each rely on what would happen inside the adjoining licence area but not on what happened in the applicant's own licence area.
37. Mr Wolfe had no real answer either to Mr Fleming's point that if s10 is to be given the meaning for which Mr Wolfe contended, it would also restrict the application of vaccines to badgers, since they have to be "taken" for the vaccine to be administered, and a licence under s10 could only be granted to prevent geographical spread and not to prevent transmission and to reduce incidence. Yet vaccination is one form of treatment which the Badger Trust supports. Mr Wolfe suggested that the answer lay in ss11 and 16 of the Wildlife and Countryside Act 1981; no offence would arise under s11 because such trapping would not be likely to cause bodily injury, and if necessary, s16(3)(h), a licence could be granted for "preventing serious damage to livestock...", which would include vaccination. But, in my judgment, it would be strange indeed if the prohibition in s1 of the PoBA could not be overcome by a licence under s10, the badger specific legislation, for the beneficial purpose of vaccinating badgers, and vaccination could only be dealt with under general wildlife legislation. Indeed, the predicate for s16(3) is that the act would otherwise contravene s11, i.e. be likely to cause bodily injury. Were trapping for vaccination not to do so, it would be very odd still to have to rely on s16 nonetheless, and not on s10 of the PoBA. Yet odder is the fact that Mr Wolfe is reduced to reliance on s16(3)(h) and to the avoidance of (3)(g), an act done "for the prevention of the spread of disease". He has to so argue to avoid sinking his argument on s10, but in consequence, he also has to treat s16(3)(g) as subject to the same unexpressed distinction between preventing

spread and reducing incidence, and to treat the latter as incorporated in the broader power in s16(3)(h). That would be a perverse interpretation.

38. Mr Fleming referred me to Hansard in relation to the provisions of the Badgers Act 1973, the predecessor to the 1992 Act, to show the mischief behind what is now s10 of the 1992 Act, and to refute Mr Wolfe's contention as to the purpose which Parliament had in mind. I did not hear elaborate arguments on its admissibility, but Mr Fleming preferred to put his argument on the mischief basis after consideration rather than on *Pepper v Hart* [1993] AC 593, the conditions for which, though often ignored, do not really apply here. The Badgers Bill was a private member's Bill introduced in the House of Lords. Baroness Young, the Junior Environment Minister speaking for the Government, referred to the evidence that bTB was transmitted from badgers to cattle and that it was necessary to consider destroying some badgers for the health of cattle and of badgers themselves. In HL vol 338 15 February 1972 col 1692 and on, she said that the Bill was unacceptable in its then form since it contained no provision for any control measures to prevent the spread of disease. But by the time of the debate on 2 April 1973, the Bill had been amended to include what is now s10 of the 1992 Act. In HL vol col 341 col 22 and on, Baroness Young said that the new provision covered all purposes for which it might be necessary to issue licences to kill badgers. It is clear, were it not clear before, that the distinction drawn by Mr Wolfe was not what Parliament contemplated at all, and it used the words it did to create a broad power to grant licences to permit the killing of badgers because of the risk bTB infected badgers posed for cattle.
39. Fourth, Mr Wolfe's reliance on the combined provisions of the Diseases of Animals Act 1950 and s9 of the Agriculture (Miscellaneous Provisions) Act 1976, which were conjoined in the Animal Health Act 1981, does not help him. The structure, topics and powers of the 1950 Act make it clear that its focus is on "animals" as defined, essentially farm animals, and their diseases. It is not dealing with the protection or control of wildlife. There are obvious differences in the powers needed to control diseased wildlife, since it is not under the control as such of the landowner, and is less confined by his borders and fences. It has to be dealt with by entry on to private lands, perhaps against the will of one or more of the landowners in the affected area. The Badgers Act 1973 was a very early piece of species specific protection, introduced before more general wildlife protection and control legislation, but it was known that badgers did transmit a particular disease to cattle, and farmers had an obvious interest in the prevention of the spread of bTB, even if they might not all agree on the methods. The control is permissive, by licence, and not compulsory.
40. The 1976 Act covered any wild species, not excluding the badger. The requirement that, before the statutory powers to control disease can be taken, the wild species in the area have a disease which is being *transmitted* to animals in the area was a requirement already satisfied in respect of badgers so the Badgers Act did not need to have that language added. But s9 of the 1976 Act is expressed in that way, in my judgment, so that that specific requirement for justifying the destruction of wildlife

was satisfied before the intrusive powers were exercised. The further requirement that destruction be necessary “to eliminate, or substantially reduce the incidence of, that disease...in the area” reflects the fact that the Order would give compulsory powers of entry on to private lands. A general power to prevent the spread of disease, as I read the Act, is wider than the “elimination or substantial reduction” of the incidence of disease, but obviously includes it. The extra width of the general powers to prevent the spread of disease was not considered appropriate in view of the compulsory powers granted: “elimination or substantial reduction” are the crucial words to express the quantitative achievement in reducing disease which is required before powers of compulsory entry to kill wildlife are taken. Hence the same language in the 1981 Act. It is clear that the 1976 and 1981 Acts cover badgers, but they provide for a compulsory power and commensurate restrictions on its exercise. Schedule 3 to the 1981 Act does not support a narrow geographic approach to preventing the spread of disease or a mutually exclusive distinction between that and preventing its transmission and reducing its incidence.

41. I was also referred to Hansard in relation to these powers. In HC 1 December 1975 vol 901 col 1270 and on, Mr Peart the Minister of Agriculture, introduced clauses 9 and 10 of what became the 1976 Act saying that it was designed to give Ministers the full range of powers needed to deal with problems like that of the tubercular badger, for which the powers in the 1973 Act were inadequate. But the powers had been drafted so that they could be used in respect of any wild species infecting farm animals or poultry. The provisions at issue were seen as part of the safeguards for the exercise of the powers, both as respected wildlife and as respected the landowner. In HC 5 February 1976 in committee, Mr Strang for the Government said that the Bill would be used in respect of badgers. He contrasted the powers in relation to farm species in the Diseases of Animals Act with the powers in the 1976 Bill, but each was part of a two-pronged attack on disease. The clause rested on the assumption “that it is possible to prevent further spread of the disease from farm livestock to wild species by action under the 1950 Act.” In my judgment, these passages confirm that the purpose of the legislation was to provide for compulsory powers to control disease in wildlife, and is expressed in the way it is because of the nature of the powers taken. They are within but not as wide as the powers to prevent the spread of disease. The true interpretation of this legislation does not support, rather it refutes, the distinction drawn by Mr Wolfe for the purposes of s10 of the 1992 Act.
42. There may or may not be a need, in respect of badgers, for an order under the Animal Health Act 1981 to be supplemented by a licence under s10, in order to avoid an offence under s1; s6(c) which provided a general exception where the killing is the unavoidable incidental result of a lawful action does not fit the deliberate killing of a badger. But if a licence is necessary under s10 of the 1992 Act, as well as an order under s21 of the 1981 Act, it further demonstrates that s10, preventing the spread of disease, must include reducing its incidence, and so is wider than s21, rather than a distinct and narrow power.

43. In those circumstances, it is not necessary to delve into the language used on various occasions by the Secretary of State or her witnesses. It is plain that from what they said, although at various times using the language of “preventing the spread”, and at other times the language of “preventing transmission” and “reducing the incidence” of disease, and at other times both, that her purpose subjectively and judged by its intended effect was to prevent the spread of disease. That can include reducing its incidence. I did not understand Mr Wolfe to contend that if he were wrong on his construction that there remained some error of approach. It is clear that the Defendant is using the statutory powers for the purpose for which they were given.

Ground 2: Costs

44. The issue was not that the costs of the policy were relevant but had been ignored, since the evidence is clear that they were taken into account. Nor is it that they were irrelevant since, although the Defendant’s evidence, which I accept, was that the decision was not “cost-driven”, or “pre-conditioned” or based on economic or cost considerations alone, the costs of the various options and of the option which became the policy to be implemented were taken into account. This is not a challenge to the consultation process, nor is it suggested that the Secretary of State ignored the outcome of her various costs assessments. The Secretary of State was aware that the other options had not been reworked based on the larger area and increased assumed costs of controlled shooting. The issue is whether the Secretary of State was under a legal duty to, but failed to, acquaint herself with the costs of the chosen policy were the pilots to show that controlled/free shooting could not continue for the four years required for a worthwhile cull; and ought as a matter of legal duty to have re-examined the relative costs of the other options when the chosen option was changed and its cost/benefits were re-assessed less favourably.

45. The legal duty relied on by Mr Wolfe was derived from *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at p1056A in the speech of Lord Diplock. Summarising the principles derived from *Wednesbury*, he said:

“Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

46. For these purposes it is necessary to consider the way in which the options were assessed. In the September 2010 consultation paper, there was at Annexe F an Impact Assessment of the 6 options. It justified Option 6 as the preferred option saying that options 2 and 3, Government –led programmes for culling and vaccination of badgers were “not considered affordable in the current public spending climate”. Option 6 did

not present the best net present value (NPV), which was option 4, the industry led cull only programme, but “it does give greatest flexibility for farmers/landowners to formulate the most suitable local solution.” Option 6 showed a best estimate of NPV of +£0.40m. Option 6 was costed on the basis that there would be a mix of controlled shooting and cage-trapping and shooting in the cull area (on an approximately 2:1 ratio) with vaccination in the 2km ring, without an expectation that that is precisely how the split would end up in practice.

47. The Evidence Base said this:

“5.9 The analysis below sets out the costs and benefits of the different options. To allow easy comparison all costs and benefits are based on one roughly circular 150 km² area plus the neighbouring area up to 2 km away (about 100 km²). In options 2, 3, 4 and 5 it is assumed that badger control is applied in 75% of the 150 km² area but not in the neighbouring area. In option 6, it is assumed that badgers are culled in 75% of 150 km² area and vaccinated in 75% of the neighbouring area.”

48. 150 km² was effectively the size of area to be culled which would give the greatest certainty of a beneficial effect over the culled and ring area.

49. At 5.21, the Evidence Base recognised that, although the costs of cage-trapping and shooting had been well-established by the RBCT, there was less evidence of the costs of free shooting to achieve an equivalent impact. It was possible that it could be as low as £200/km² a year. For the best estimates in the assessment of industry-led culling, “we assume that a combination of cage -trapping and free shooting would be used, costing £1000/km² of participating land/year.” The cost of using only cage-trapping and shooting would be £2500/km².

50. There was a brief update in July 2011 as part of the consultation on the draft guidance to Natural England. This was confined to option 6. There were two changes: the cull area was increased to 350 km², which would increase the area of the 2km ring but reduce its proportion of the combined areas, and the cost of controlled shooting was increased from £200 to £300/km². The assumed area of participating land within the cull area reduced from 75% to 70%. The best estimate of NPV increased to +£1.78m.

51. The third impact assessment in November 2011 preceded the December decision by a fortnight. This too was confined to option 6. The best estimate of NPV was now -£0.88m. The commentary drew attention to the “considerable uncertainties around the central estimates”. A graph of variables showed as two separate variables culling

by cage-trapping and shooting only, and culling by free shooting only; the September 2010 graphs had used one combined variable for the mix of shooting methods. This showed how significant a cost variable was cage-trapping only. The greater costs had been referred to in the September 2010 Assessment.

52. Mr Wolfe submitted that the Secretary of State failed to ask herself the right question or to obtain the information relevant to her decision. She failed to take into account the increased costs were the free shooting component of the cull during the first year of the two pilots to show that it was ineffective, or inhumane or unsafe. This would mean that the subsequent three years of culling in the pilot area would have to be carried out solely by cage-trapping and shooting, which was much more expensive. This issue was crucial to the implementation of the policy, and the granting of licences in up to 10 areas for four year culling periods in each of the next three years after the first year of the pilot. She needed to ask whether option 6 should still be chosen on the basis of that risk, and to do that she needed to ask what the NPV of such a scenario would be. She also failed to ask herself whether option 6 remained the best option after comparing the other options on a like for like basis, particularly once its NPV had worsened in the November 2011 assessment. She needed this material because she regarded costs as important.
53. Mr Fleming submitted that in deciding whether it was lawful for the Secretary of State to make the decision on the information which she had, it was important to understand the decision and the basis for it. I quote from Paragraphs 3.29 and 3.32 of the December decision:
- “3.29. We have to make a judgement based on the available evidence and, having assessed the known and estimated effects of badger culling and vaccination, Defra veterinary and scientific advice is that culling in high cattle TB incidence areas, carried out in line with strict evidence-based licence criteria (explained in section 5 of this document), will reduce the number of infected badgers and thus the weight of TB infection in badger populations in the treatment area more quickly than vaccination, and therefore have a greater and more immediate beneficial impact on the spread of TB to cattle and the incidence of infection in cattle. When the potential risk of an increase in cattle TB at the edge of the culled area is included, the overall beneficial effect of culling is reduced. However, modelling still suggests that over time culling will outperform vaccination alone and the licence criteria include measures to mitigate against the risk of the perturbation effect on cattle TB at the edge of culled areas. ”
54. The economic aspects were but one factor: 3.26 of the decision said:

“3.26. The consultation stage Impact Assessment showed that the cost of a Government-led policy of culling would be high, and too high to justify the benefits achieved in the RBCT. However, there is a stronger economic case for badger control when carried out as a partnership between industry and Government (although depending on the assumptions used, the policy might still result in an overall net cost, see paragraphs 4.12 to 4.21). The case for licensed culling, in terms of the quantified costs and benefits, depends partly on whether culling, by employing a mix of methods (a significant element of controlled shooting where appropriate, with some, cage-trapping and shooting elsewhere) is capable of achieving an impact on the incidence of TB in cattle similar to that seen in the RBCT areas. We consider such a reduction in cattle TB would be significant in tackling the disease at a local level.”

55. The decision also discussed the impact assessments:

“4.16. The Impact Assessment suggests that the central estimate of the net financial impact of the policy in an illustrative 350km² area is -£0.88m – a net cost overall, with a net cost of £0.59m to Government. However, depending on the assumptions made about the costs and benefits of the policy (e.g. the savings achieved from having fewer cattle herd breakdowns, the cost of farmer-delivered culling, and the cost of policing), culling in one 350km² area could lead to a net benefit of £1.59m.

4.17. The cost assumptions used in the Impact Assessment are for the pilot areas, and it is likely that the Government costs would be lower for areas licensed subsequently as the monitoring costs in particular would be lower. The farming industry is also confident that it can deliver culling at a lower cost than estimated in the Impact Assessment. There are however plainly some uncertainties around the estimated costs and benefits. This provides an additional reason for the decision to proceed cautiously with a pilot in two areas initially before considering whether to proceed with a wider roll-out. (That cautious approach is in any event justified by the desirability of conducting a pilot to test our expectations in relation to the efficacy, safety and humaneness of culling by means of controlled shooting.)

4.18. Culling in two pilot areas will enable us to test our and the farming industry’s cost assumptions for elements of the policy where there is currently uncertainty. Alongside the outcome of the evaluation of culling in the pilot areas (see

paragraph 6.1), this will also inform our decision on wider roll-out of the policy.

4.19. Even if the experience of culling in the pilot areas provided evidence that culling could only be carried out at a net cost to Government and the farming industry, this would not necessarily undermine the case for wider roll-out for the purposes of preventing the future spread of disease (and the associated escalating costs to farmers and taxpayers), or for the contribution that effective badger control can make as part of a wider package of measures to tackle TB in cattle. This wider package of measures, set out in the TB Eradication Programme for England aims to stop the disease spreading in the short-term, bring it under control, and ultimately eradicate it. In dealing with a problem such as bovine TB, the costs and benefits of the package as a whole must be considered – the economic justification for wider roll-out of a badger control policy must therefore be considered in this wider context.

4.20. It is also important to note that the Impact Assessment does not take into account the non-monetary benefits of the policy such as the stress and ill-health that bovine TB can cause among farmers – something that is difficult to quantify, but nonetheless is an important consideration.”

56. This entirely supports the evidence of Witness A, a civil servant in Defra, that the Secretary of State was aware that it might be necessary to complete the culling in the pilot areas using cage-trapping and shooting and that that was considerably more expensive than controlled shooting. But the witness added that they had always been clear that culling, even with controlled shooting, might lead to a net monetary cost to farmers.
57. One of the licence conditions which would apply in the pilot areas, would be that applicants enter an agreement with Natural England which would include the requirement that an effective cull be carried out over the four years, and that a financial deposit be paid to cover the costs of the four year cull plus 25%. Failures in the cull could lead to the Government stepping in and recovering the costs from the defaulting applicants.
58. Witness A gave evidence that the farming industry was aware of the potentially higher costs if culling had to be completed using cage-trapping and shooting. In March 2012, the NFU had announced that it would cover the additional costs which licensees would incur in the pilot areas if cage-trapping were the only permitted culling method.

59. As Witness A put it:

“As explained in the Policy Statement, there are some uncertainties around the estimated costs and benefits and this is another reason for the Secretary of State’s decision to proceed cautiously by piloting the policy in two areas initially. Culling in two pilot areas will enable us to test both Defra’s and the farming industry’s assumptions about costs, alongside the outcome of the evaluation of culling in the pilot areas, this will inform the Secretary of State’s decision on wider roll-out of the policy.”

60. Mr Fleming, on instructions, would not be drawn further than has been set out above, as to what would happen in areas other than the pilot area were controlled shooting to prove ineffective, inhumane or unsafe. The matter would be reviewed.

Conclusions on Ground 2

61. Mr Wolfe’s submissions in practice invite the Court to interfere unduly in the political or administrative decision-making process, a long way short of the point at which an error of law could arise applying the test in *Tameside*, which was an alternative expression of the way in which a decision might fall foul of the *Wednesbury* tests.

62. It is important to remember the decision to be made before deciding that a particular piece of information is so essential that a decision made without it would be irrational and unlawful. It was whether to proceed with the two pilot tests, using controlled shooting. The purpose of the trial was to test the effectiveness, humaneness and safety of the less expensive technique of controlled shooting. There was no means of finding out about that for certain without trying it. The relative costs of each method were known however, to the extent to which current information permitted the cost of controlled shooting to be known. The Secretary of State knew, in so far as then possible, by how much the costs would be increased if the test of controlled shooting failed, and the cull in the two pilot areas had to be concluded with cage-trapping and shooting. There was also a method to deal with the increased costs, through the licence conditions requiring sufficient money to be deposited by the applicants to cover those costs. The Secretary of State had not decided to proceed with the culling in the other areas; that decision would be made in the light of what the test showed for the effectiveness, humaneness and safety of controlled shooting. So she had limited the effect of the risk of controlled shooting not being practicable.

63. The Secretary of State knew that the costs of the pilots would increase if they could not proceed using controlled shooting as the predominant method of culling after the first year test, but had to proceed using cage-trapping alone for the next three years. She also knew the currently assessed difference between the costs of each method. She was also aware that the licensed conditions would require the applicants for a licence within the culling areas to deposit sufficient to cover the costs were the cull to have to proceed by cage-trapping and shooting alone rather than controlled shooting.

64. A Minister could have chosen to consider an NPV on that scenario, with a different central estimate and range. However, producing a different NPV for the pilot culls on the basis that the NPV would be worse, as was known, is simply not necessary for the decision to proceed to be lawful. What was really needed was the information from the trials about controlled shooting, which only the trials could produce. The variant NPV simply is not of such relevance to the decision that no reasonable Secretary of State could proceed to take the decision to proceed with the two trial culls without it, especially knowing that there would be extra costs and of an approximate magnitude, were the first year tests to prove adverse to controlled shooting, and in view of the known mechanisms for covering those costs. Nor was she committed to pursuing culling in other areas regardless of the information from the trials.

65. Second, I do not accept the contention that, since the parameters for the assessment of option 6 had changed with the enlarged area and the increased costs estimate for controlled shooting, some further NPVs needed to be produced for the already discarded options, lest the decision be made on a false basis about the relative overall advantages of option 6. It needs to be remembered that the decision to pursue option 6 was not crucially dependant on its one time better NPV; other factors were dominant in the Secretary of State's mind. So refined NPVs for other options would be unlikely to alter the balance of the factors which were crucial. I note it is not alleged that the absence of iteration of NPVs for the other options is a breach of any Government policy in relation to impact assessments.

66. When the various options are examined it can be seen how limited is the role which a further set of NPVs for the other options would have had. It is of course clear that the Claimant has produced no work to begin to suggest that if reviewed on a comparable basis to the updated option 6, some other option, let alone one which the Claimant would approve of, is better. Option 1 was essentially carrying on as before. This was said to be unacceptable because of its proven ineffectiveness, rather than because of its NPV. Options 2 and 3 were Government-led operations, with the costs borne by the public. These were rejected because of the costs which the public would bear, which were not acceptable in the present circumstances. No revised NPV could alter that precisely because it is where the burden lay that made it unaffordable. Options 4-6 were the "partnership" options, and the essence of the increase in the land area of the cull to 350 km² was to reduce the overall costs of it and the relative size and hence costs of the ring, in relation to cull area. Option 5 was vaccination only: it was rejected on the grounds of ineffectiveness. Option 4 was cull without vaccination, but

the latter was an additionally useful tool not just for the 2km ring but also as an alternative for landowners in the cull area, so as to give them maximum flexibility. Hence the selection of option 6, on bases that were not primarily cost bases, but its effectiveness and flexibility. Cost had to be examined but was for those reasons not a determinant.

67. I cannot see in those circumstances that the absence of revised NPVs for the other options shows that the Government has failed to acquaint itself with the information necessary for the decision to be rational, or that it had approached it without obtaining information which is necessary for its decision to be lawful. It could have gone down Mr Wolfe's route but such revision to NPVs would be at the margin of the decision, and its absence cannot show the decision to be unlawful. Accordingly Ground 2 fails.

Ground 3: the lawfulness of Guidance

68. This challenges the lawfulness of the Secretary of State issuing Guidance to Natural England in respect of her functions which Natural England has agreed to perform. Mr Wolfe contends that those functions do not thereby become Natural England's functions and the Secretary of State cannot issue guidance to it about those functions.

69. The relevant statutory provisions are in the Natural Environment and Rural Communities Act 2006. By s1(2) Natural England is to have the functions conferred on it "by or under this Act or any other enactment". By s15:

"(1) The Secretary of State must give Natural England guidance as to the exercise of any functions of Natural England that relate to or affect regional planning and associated matters.

(2) The Secretary of State may give Natural England guidance as to the exercise of its other functions.

(6) In discharging its functions, Natural England must have regard to guidance given under this section."

70. By s16 the Secretary of State may give Natural England general or specific directions "as to the exercise of its functions".

71. S78 permits the Secretary of State to "enter into an agreement with [Natural England] authorising that body to perform a DEFRA... function...."

72. By s83:

“(2) The Secretary of State or a designated body (“A”) may, under an agreement, authorise a designated body (“B”) to perform a function even though under the relevant enactments or subordinate legislation—

- (a) the function is conferred on A by reference to specified circumstances or cases and the same type of function is conferred on B in different specified circumstances or cases,”

73. Mr Wolfe drew attention to s84 which covers agreements with local authorities to perform a function. Subsections (2)-(4) dealt with internal delegation:

“(4) A designated body which is authorised under an agreement to perform a function—

- (a) is to be treated as having power to do so;
- (b) may, unless (or except to the extent that) the agreement provides for this paragraph not to apply—
 - (i) authorise a committee, sub-committee, member, officer or employee of the body to perform the function on its behalf;
 - (ii) form a body corporate and authorise that body to perform the function on its behalf.”

74. Mr Fleming drew attention to paragraph 26 of Schedule 1 to the Act which required Natural England to provide the Secretary of State with the information he required relating to the discharge of “its functions”.

75. The argument turns on what is meant by “its other functions”, in s15(2) and “its functions” in s15(6).

76. The agreement between the Secretary of State and Natural England under s78 provides for Natural England to perform the Secretary of State’s function under s10(2) of the 1992 Act of issuing Licences for the killing or taking of badgers. There is no challenge to its lawfulness.

77. In my judgment, once the Secretary of State has lawfully authorised Natural England by statutory agreement under s78, as it has done here, to perform a function of the Secretary of State, that function becomes another of “its” i.e. Natural England’s functions for the purpose of s15(2), giving guidance, and s16, giving directions. Performing that function is, under and by virtue of the agreement, a function of Natural England’s.
78. There is no sensible practical reason why the Secretary of State should be able to give guidance and directions to Natural England in respect of a function laid by statute directly upon Natural England, but not when the function is performed pursuant to an agreement empowered by statute. Those are perhaps circumstances in which it would be the more likely that such guidance and direction could be given, as well as the other power in paragraph 26 of the Schedule being relied on. Parliament is unlikely to have drawn a distinction such that that could be left for non-statutory guidance, whereas guidance to Natural England on the functions directly laid on it had to be statutory. It might have thought that inserting a provision in the statutory agreement to that effect might not suffice, if a power to give statutory guidance was given expressly in the Act in relation to other functions.
79. The Act does not refer to delegated functions. I do not regard the distinction Mr Wolfe drew between an act “delegated “ to Natural England, which would have become “its” function and an act “authorised to be performed” by Natural England which would not, as useful in this context. I can see, in the abstract, that there is something in the point that s83 and s84 are powers of delegation which would be unnecessary if the functions became simply functions of Natural England, or of the local authority. But those provisions also contain enlarged powers: in s83(2) for authorisation in particular circumstances in which there may be a permitted sub-authorisation to a designated body; its powers are deemed extended under s83 (4), and provision is made for a restriction in the agreement on how functions are to be performed, but a power to form a company for that purpose is also given. These seem to me to be powers specifically drafted for a particular purpose, and the provision for a committee to carry out functions is a matter of certainty or clarity, rather than a signal that the performance of the function is not Natural England’s function under s15.
80. S84(2) reflects the delegation provisions of s111 of the Local Government Act 1972, unnecessarily, says Mr Wolfe, if the function performed under an agreement were performed as a delegated function. That may be so, although the provisions for the exclusion of a joint committee would still be required. But I regard the likelier explanation of Parliament’s intention is that it was making the position clear rather than in some obscure fashion or by sidewind drawing a distinction in ss15 and 16 between those circumstances in which guidance and direction could and could not be given, and excluding one area in which guidance and direction would have seemed the more likely to be necessary. Accordingly Ground 3 fails.

81. This application is dismissed.