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Case No: CO/4133/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2015

Before :

MR JUSTICE OUSELEY

- -

Between :

THE QUEEN (on the application of RICHARD McMORN)	**Claimant**
- and -	
NATURAL ENGLAND	**Defendant**
- and -	
DEPARTMENT FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS	**Interested Party**

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- -

James Maurici QC and Richard Moules (instructed by **Gordons LLP**) for the **Claimant**
Stephen Tromans QC and Colin Thomann (instructed by **Natural England**) for the **Defendant**

Hearing dates: 10th, 11th and 12th June 2015

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Approved Judgment

MR JUSTICE OUSELEY :

1. The Common Buzzard is protected under the Wildlife and Countryside Act 1981. It cannot be killed or captured without a licence issued by Natural England. Statutory tests have to be satisfied before Natural England can issue such a licence. But it is not a threatened species. It has the same legal protection as carrion crows, magpies, Canada geese and wild pigeons. There are now at least 300,000 common buzzards in the UK; it is a common and widespread species and "arguably the most abundant diurnal raptor in Britain", according to Natural England, with breeding pairs more than doubling between 1993 and 2008. It has continued to spread eastwards from its western strongholds and in 2008 was "well reported through the year in Northumberland."

2. The Claimant is a gamekeeper who managed six pheasant shoots over eleven farms covering some 2000 hectares in Northumberland. Each shoot had four days' shooting a year between 1 October and 1 February. It was the Claimant's task to provide a set number of pheasants for shooting on each day. There were ten sites at which he released pheasant poults, young pheasants, with some 250 poults released at each site. Poults are released to the pens in late July and August; their size makes them prey for buzzards, which are also then feeding fully or nearly fully fledged broods.

3. He applied to Natural England, NE, for licences on five occasions between 2011 and 2014 to kill a small number of buzzards which, he said, were doing serious damage to his pheasant poults by killing and disturbing them. He was refused such a licence on every occasion, despite recommendations by various NE Technical Assessors that some be granted.

4. He did obtain, on an application in April 2013 for a licence to kill some common buzzards, a licence to destroy four buzzard nests and any eggs in them. The last refusal of a licence to kill common buzzards was by a decision of 5 June 2014. That is the decision challenged in these proceedings. The Claimant was granted licences by NE to kill twenty herring gulls and five great black-backed gulls on the farms in 2011 and 2013, and, also in 2013, to kill three cormorants. The gulls were predating on wild grey partridges and the cormorants on trout at a local fishery.

5. NE has decided 90000 applications for licences since 2006, at roughly 10000 a year. There have been 43 reviews of Technical Assessments since 2011; the recommendation has not been followed on three occasions, all relating to this Claimant's applications: in 2011, his first application of 2013 and in 2014. Since 2006, only eight licence application decisions have been taken at NE Director level: three relate to this Claimant's applications and, of the rest, one more relates to buzzards. NE also operates a system of "peer review" in its decision-making to ensure sound and objective decisions are made. This different review, if at odds with the decision, leads to the decision-maker reconsidering the decision, but it is not an appeal system, and the eventual outcome may be no different.

6. The Claimant's pheasant shooting business is at an end; he contends that predation by common buzzards made it unviable. The income he received from managing the pheasant shoots was about £10,000 a year. Most of his income came from deer stalking the rights to which, over the eleven farms, were dependant on his providing successful pheasant shoots to the farmers. The Claimant had to give up managing

three shoots because they were no longer viable and the three other farmers terminated their shoots as the "bag returns" were too low for the cost of running the shoots.

7. The Claimant, supported by the National Gamekeepers Organisation, NGO, challenges that last decision of June 2014 on a variety of legal grounds at the heart of which is the contention that NE treated raptors differently from other wild birds, making it far harder, well-nigh if not quite impossible, to satisfy NE that the statutory conditions for the issue of a licence had been met, and that it treated them differently because of the public controversy which the grant of a licence for the killing of buzzards, to prevent serious damage to a pheasant shoot, would engender, or because of perceived adverse public opinion. The difference in treatment lay in the standard of proof and the quality of evidence required to justify a licence, making the threshold for its grant far higher in the case of buzzards or raptors than other species. NE has never granted a licence to kill or capture buzzards or other raptors preying on pheasant poults.

8. All of this led, it was contended, to a decision based on unjustified inconsistencies in NE's treatment of raptor and other birds equally protected; this was based on an undisclosed policy to apply these more exacting tests; public opinion was admitted to be legally irrelevant but in reality was taken into account as the basis for the inconsistencies and the undisclosed policy to apply more exacting evidential standards. The decision was also unreasonable; NE, unlawfully, had made applications for the grant of licences almost impossible to obtain in respect of buzzards predating on poults.

9. Permission had been refused for the first ground pleaded, which related to the way in which the June 2014 decision had dealt with the question of trapping some buzzards for capture as an alternative to trapping them for killing. Permission was refused on paper by Thirlwall J and the renewed application was before me effectively for a rolled–up hearing. I heard full argument; I grant permission.

10. The final issue before me was whether the claim fell within the scope of the cost protection of the Aarhus Convention. Thirlwall J concluded, on paper, that it did not. The Claimant renewed his claim before me that it did.

11. These grounds have involved consideration of NE's decisions on the Claimant's earlier applications, of emails between NE and the Department for the Environment, Food and Rural Affairs, DEFRA, an Interested Party, which did not appear and was not represented, whose role was not immune from criticism by both NE and the Claimant. No ground asserted that the decision had been pre-determined by NE, and Mr Maurici QC for the Claimant confirmed expressly that that was not how he put his case.

The legal and policy framework

12. The Birds Directive, 2009/147/EC, contains a general prohibition in Article 5 on the capture or killing of wild birds, the deliberate destruction or damaging of their nests or eggs and the deliberate disturbance of the birds especially during breeding or rearing. This is not for the protection of the species as such but for the protection of the individual birds. It requires Member States to establish a general system of

protection for wild birds. The common buzzard is not one of those species covered by Annex 1 which are the subject of "special conservation measures". Article 7 permits hunting of certain species of wild bird.

13. Article 9 contains provisions permitting derogation from Article 5:

> "Where there is no other satisfactory solution for the following reasons:
>
> (a) - in the interests of public health and safety
>
> - in the interests of air safety
>
> - to prevent serious damage to crops, livestock, forests, fisheries and water
>
> - for the protection of flora and fauna."

14. The relevant provision in this case is "to prevent serious damage to livestock." I note that, like the others, it is a preventive provision, and not one which requires serious damage already to have occurred.

15. The Directive is given domestic effect by amendments to the Wildlife and Countryside Act 1981, the WCA. Section 1 makes it an offence to kill or take a wild bird, or to damage or destroy its nest when it is being built or in use or to take or destroy its eggs. But that is subject to the provisions of the Act which include powers to grant licences for such actions, which reflect the derogation provisions of the Birds Directive.

16. S16 disapplies s1 in a variety of circumstances, which include those in the Directive, slightly differently ordered and phrased, of which at s16 (1)(k) is anything done "for the purposes of preventing serious damage to livestock… if it is done under and in accordance with the terms of a licence granted by the appropriate authority". "Livestock" includes any animal kept, as are the pheasant poults here, "for the provision or improvement of shooting or fishing"; s27(1). For the purposes of s16(1)(k), the appropriate authority is "the agriculture Minister"; s16(9)(d). Again reflecting the terms of the Directive, s16(1A)(a) provides that the appropriate authority: "shall not grant a licence for any purpose mentioned in subsection(1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution…."

17. A licence may be "to any degree, general or specific"; it may be granted to a class of persons or to a particular person, and granted subject to compliance with any specified conditions; it is valid for the period stated in the licence. It can be revoked or modified at any time; s16(5). It must specify the species of wild bird to which it applies, the method by which the action is to be taken and be valid for no more than two years.

18. Schedule 1 provides greater protection for some species, such as the Honey Buzzard but not the Common Buzzard.

19. NE, set up for a variety of general purposes under the Natural Environment and Rural Communities Act 2006, is a body to which s78 of the Act applies. This permits DEFRA to enter into agreements with NE, among others, authorising NE to perform a DEFRA function. Such an agreement was entered into in June 2006 in relation to the grant of licences under s16 of the 1981 WCA. The agreement itself, in authorising NE to perform the function of wildlife licensing or any other function, makes no reference to a distinction between a policy function and the decision-making function exercised by NE. DEFRA and NE however appear to have accepted such a distinction and that the policy-making function was retained by DEFRA, while the decision-making function was performed by NE, in accordance with that policy. In relation to licences to kill or capture common buzzards, or other birds of prey, this has been a point of friction, unhelpful to NE, as Mr Tromans QC for NE pointed out in explaining some of its actions.

20. There are three statements of policy by DEFRA. First is the "DEFRA wildlife management policy" of May 2011, its "Overarching Policy". It sets out four non-exhaustive situations in which wildlife management is necessary: (a) very rare or endangered species, (this does not include the common buzzard); (b) other protected species; this is what applies to the common buzzard; (c) invasive non-native species e.g. grey squirrels and (d) other native wildlife, e.g. foxes and rats. There is no specific policy for birds of prey, other than (b), since they are wild birds and so protected by the WCA.

21. The policy for "other protected species" points out that all birds and some other species such as badgers are legally protected against indiscriminate killing or disruption, but not all are endangered. The common buzzard is not an endangered species. The statement continues:

> "There are occasions where the presence or behaviour of protected species adversely impacts on people or their activities. The Government aim is to strike a balance between protecting species (and meeting international obligations to do so) and providing effective solutions to the problems that they cause (e.g. badgers undermining railway lines which may cause derailments).
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> **How:** the general presumption is that wildlife is not killed. In most cases, people and wildlife are not in conflict with each other. However when conflict occurs, most problems can be resolved using non lethal methods of control (e.g. scaring swans away from valuable crops). Defra promotes the use of non-lethal methods. However, there can come a point when damage caused by wildlife becomes unsustainable and lethal methods of control are required. As the legislation generally prohibits lethal control, Defra policy is to issue licences to kill in defined circumstances where 1) all other reasonable non-lethal solutions have been tried and/or shown to be ineffective and 2) there is a genuine problem/need; 3) there are no satisfactory alternatives; 4) the licensed action will be effective at resolving the problem and the action is proportionate to the problem. Wherever possible, humane methods of lethal control are used."

22. There is a more specific policy statement also of May 2011 entitled "Species licensing under Part 1…Wildlife and Countryside Act". Its scope says that it should be seen in conjunction with the s78 agreement. It relates to the licensing function under the WCA. DEFRA's relevant policy objectives are (i) to provide adequate legislative protection for all wild birds against prohibited activities, (ii) to ensure that the use of certain methods for killing or taking wild birds is strictly regulated, and (iii) that licences granted under s16(1) are granted for reasons compatible with the purposes set out in those provisions.

23. This statement also covers general licences under s16(5). These are important to the Claimant's case for the contrast which their grant provides to the way in which the licences for killing common buzzards have been refused. Such licences have been granted to kill birds, some more and some less common that the common buzzard but of no higher conservation status: corvids, pigeons, Canada goose and lesser black backed gulls, and in some instances to kill birds with a higher conservation status. General licences can be granted where the grant of individual licences "would impose disproportionate burdens on those needing to obtain a licence and the licensing authority, that cannot be justified by the conservation benefit yielded by such an individual approach" or "where the actions authorised are not detrimental to the conservation of the native species concerned." The licences are to be reviewed at least every two years to ensure that there continues to be no other satisfactory solution, and the methods licensed remain appropriate. This does not require evidence of serious damage by individual birds, nor does it protect individual birds, other than by reference to the conservation status of its species.

24. DEFRA has also issued a policy statement specific to cormorants, to balance the need to protect fisheries against serious damage caused by cormorants whilst ensuring that their conservation status is not jeopardised. The Claimant points to the terms and operation of this policy by way of further contrast to the way in which licences in respect of the common buzzard are refused. The policy aims to make "the licensing system accessible to those with a genuine need to obtain a licence" to kill or take cormorants to prevent serious damage at specific sites where non-lethal methods are "ineffective or impracticable". The policy sets out three fundamental tests. The first is that serious damage is being "or is likely to be", caused by cormorants at the site. That reflects the WCA, but, says the Claimant, contrasts with the high standards of proof of buzzards, and of specific individual buzzard predation. The next part of the first test is also relevant to the Claimant's case. "It is accepted that proving damage by direct evidence alone is extremely difficult in many circumstances. If, on balance, it is reasonable to assume from the indirect or circumstantial evidence that cormorants are causing serious damage at site then this should be taken as a basis for serious damage occurring." This is not language which featured in any of NE's appraisals of the Claimant's applications. The second test concerns non-lethal methods: all other methods must "either have been tried and found to be ineffective, or are impracticable at the site." The third test is "Damage Control: It is reasonable to assume that shooting cormorants will reduce, or prevent from increasing, the level of damage (whether through scaring or direct reduction of numbers)." This too presents a contrast in approach, relied on by the Claimant. For buzzards, NE requires evidence that those buzzards killed, will not be replaced by others who may also need to be killed. There is no such restriction for cormorants. If the tests are satisfied, the licence can permit

lethal shooting to scare birds in addition to those shot, or to reduce the numbers of cormorants at the site.

25. NE is required to set "a prudent national upper limit to ensure that licensed removal does not irreversibly affect the conservation status of the species." It notes that under the policy up to 2000 cormorants may be killed under licence each year nationally with scope for 3000 for a short period. 2000 birds are about 11% of the English over-wintering population of just over 20,000. The shooting of buzzards to protect pheasant poults has never been permitted and very rarely for any other purpose, from a buzzard population over 300,000.

The applications

26. Although Mr Tromans is right that the decision under challenge is the decision of June 2014, the Claimant's arguments require consideration of the previous applications. Mr Tromans contended that applications relating to birds of prey were infrequent, and so even the fifth application from the Claimant required a much higher level of scrutiny than applications not relating to buzzards. However, the lawfulness of NE's decision on the last application cannot be judged as if each application had been considered and decided on in isolation from the previous one, and in isolation from what had passed between DEFRA and NE. Mr Tromans told me and I accept that Mr Cooke, the NE Director who took the decision under challenge, had not read the 2011 and 2012 decision. I do not know why he did not do so. NE had excused its delay in the first decision by the novelty of the application requiring a "much more detailed assessment" than a routine one. Its content ought to have been useful to him, and is important. The fifth application was not novel.

27. The Claimant's first application was made in March 2011; it was for a licence to kill common buzzard and sparrowhawk, at each of his shoots. It was subject to a Technical Assessment. The draft Technical Assessment, following a site meeting between the Claimant and a lead wildlife Adviser and Senior Specialist and the provision of further information as requested, recommended that the application be granted for the shooting of up to five adult buzzards between August and September at the rate of one bird per release pen. The draft Assessment described the application as novel and potentially very sensitive, but not for conservation reasons. The evidence provided by the Claimant was "plentiful"; they accepted, it appears, the Claimant's estimate that there was at least one buzzard nest associated with each release site; buzzard predation was causing serious financial damage to each of the five shoots, reasonable deterrence measures had been tried without success; lethal taking of a few buzzards at the release sites was likely to contribute to preventing the damage; nine other measures were considered but no alternatives were seen as realistic.

28. The draft conclusions bear noting in view of the final Assessment conclusions: the draft commented that the NE had required "a level of evidence beyond what is required for any other species of bird which we have issued licences for", applying precisely the same policy. The draft and final conclusions then differed over whether alternative measures had been adequately tried and over the potential effectiveness and proportionality of those which were said to be worth trying. Both concluded that the removal of a very small number of predatory birds was likely to be effective and would scare other buzzards and indeed sparrowhawks.

29. The final Technical Assessment of 11 August 2011, however, recommended that the licence be refused on the grounds that some alternative non-lethal methods had not been tried. That limited basis for the refusal is important because of what the Assessor accepted had been made out by the Claimant. Much of what is in the final Assessment adopts the draft Assessment.

30. The final Assessment sets out the nature of the Claimant's business and of the shoots. It referred to his openness about his guilty pleas in 2007 to charges of possessing poisons forbidden by the WCA. His existing methods of predator control for foxes, weasels and the like, crows and gulls were noted, as were risks from disease, straying and road traffic. None of these were seen as significant causes of poult losses. Poult losses to predatory birds were about 700 poults a year, about half the total losses: this was a monetary loss of £2700 at poult stage, and £19250 at shooting stage.

31. The Claimant's main concerns were buzzard predation of poults both in and out of the pens, and of buzzard and sparrowhawk causing distress at the pens. There was at least one active buzzard nest located at each of his pens. He had seen buzzard and sparrowhawk take poults from in and outside the pens; he had some predated poult carcasses. (NE examined two, finding that the wounds were consistent with buzzard predation; no alternative possibility was suggested). Adult buzzards took poults for food for themselves; juvenile buzzards were taught and practised killing, and non-breeding/non-territorial birds also took them. The buzzards' presence also forced the poults to stay out of their "home " wood, exposing them to greater risks of bad weather and road accidents, and to birds staying longer under cover without feeding or water.

32. The Assessor commented that yearly returns for the shoots, broken down by pen and shoot, showed a decline over a protracted period, sharper in 2010/11, and sharper and more severe for some shoots than for others. His more detailed evaluation of the evidence commented that stocking density was within relevant recommendations for stocking levels designed to reduce predation. Larger size poults had been released and killed this year, so that was not a likely effective solution. Cover crops were suitably placed; no pens were near roads. The Claimant had carried out extensive deterrent and scaring methods at the pens. The pens were suitable in location, construction and offered minimum perching opportunities. Suitable electric wire fencing was in place.

33. A variety of methods of reducing predation had been tried but each had limitations: playing car radios had a limited effect, the batteries ran down and replacing batteries took a great deal of time; gas guns produced but a short term deterrent; buzzards soon became habituated to a scarecrow and a human mannequin with eyes like a human would be a novel technique rather than a recommendation; buzzards had soon become habituated to flashing lights and reflective CDs close to and within the pens, but the Claimant should have removed the hanging food sacks at the end of the season. Human presence was the most effective deterrent, but the Claimant was self-employed and carried out most of the deterrent work himself, visiting each pen twice a day during the rearing season, each a round trip of 80 miles, whilst employing another would not be economically viable.

34. Although brash cover and shelters were installed at the pens, the cover was less than that recommended by the British Association of Shooting and Conservation, BASC, and the Assessor had advised the Claimant to increase the brash and to provide it in

wigwams, and to use reflective tape. The Claimant did not think that providing diversionary feeding for the buzzards would help since this would boost the local buzzard population, but the Assessor thought that the technique, apparently successful in Scotland, should be tried.

35. Then the Assessor said this:

> "At present it appears that there is a significant predation problem at some of the sites and common buzzard is involved in that problem, however the extent to which common buzzard is responsible for killing as opposed to scavenging is not fully understood. It is suggested that more work is done this season in order to try all available deterrent measures and also gain more evidence on the amount of predatory birds causing kills in the pens as opposed to scavenging fallen carcasses. It appears unlikely that the losses are due to another cause, with the applicant regularly (daily) finding several poult carcasses within his pens. If the cause was another predator e.g. fox or disease a rather more sudden mortality would be expected, also with some evidence pointing to the cause. The aim is not to eliminate predation but to reduce it to acceptable levels."

36. The Assessor felt that licensing the shooting of a single buzzard per wood at each release site, starting with two at the worst affected site, would have no lasting or significant effect on the buzzard population but would have a negligible effect on predation levels. Killing a large number of birds would be unacceptable. Some consideration had been given to trapping predating buzzards for falconers to keep or for release elsewhere, but this had its own difficulties "all for little conservation benefit for a common and widespread species". Trapping and holding in captivity during the rearing period for the poults was however worthy of further consideration, as was the removal of nests, or of the young from nests in spring, particularly at the worst affected sites. These modest measures would be "likely to have a beneficial impact on the level of predation but will not adversely affect the favourable conservation status of the population of the two raptor species in the local area and are all for consideration as potential options both for this case, and others." These were likely to limit predation to acceptable levels by targeting a few persistent individuals. Elimination of predation would be disproportionate since it would require the removal of buzzards and sparrowhawks from the area.

37. There were a number of non-lethal solutions to try as discussed, and a list would be provided; NE would work to gather evidence to verify or quantify the levels of losses directly attributable to the buzzard, through remote cameras and possibly observation, and monitoring of the additional methods.

38. The Assessment covered the conservation status of the common buzzard. The Claimant is recorded as saying that in autumn about 120 buzzards, 30 adult pairs and 3-4 offspring, were associated with the land he managed, with 1 per 200 sq.ms of woodland. There were 3-4 active nest sites on each farm, and at least one such nest very close to each of the ten release sites he managed.

39. The Assessor then answered the questions on the licensing criteria as follows: there was clear evidence that the species in question was or was likely to cause serious

damage, that there were no other evident causes of the serious damage, and that non-lethal methods had been used but found to be ineffective or impractical and not just difficult to implement. But there was another satisfactory solution.

40. The "Conclusions in Summary" included this: "The quantity and quality of information and evidence provided for this case by the applicant provides good support for the application. The applicant has given Natural England staff the impression that information recording is honest, thorough, systematic and accurate."

41. It accepted that the returns were declining and were 11% below those normally expected, dropping steeply in 2010-11. Eight steps were discussed: increased cover, which was being undertaken; reducing the availability of perches, but these were minimal anyway; releasing extra poults, but the optimum number were already being released; releasing older poults, but this was costly and unlikely to be effective; scaring devices, but these had been used and were ineffective, though a human mannequin with realistic human eyes had now been suggested. The remaining three steps were ones where further action was suggested: reflective tape which had not been tried, and about which the Claimant expressed reservations, but it had been installed for the present season; diversionary feeding, which had not been tried and which there was scope to explore despite the Claimant's reservations; leaving kills in situ, whereas the Claimant was moving the carcasses to places nearby where the buzzard could feed but without disturbing the poults.

42. The Section headed "Evaluation" described the application as novel. There was no specific guidance for raptor licensing applications. The application had been assessed under DEFRA's overarching policy statement on "Wildlife Management in England", with particular reference to "other protected species".

43. It appraised the application against the key requirements of that policy:

> "'*The conflict must be sufficiently serious to warrant such action'*: there is evidence of significant damage occurring to the applicant's pheasant poults both inside and in the immediate vicinity of the pens, and this is almost certain to be caused by predation by common buzzards.
>
> '*The least severe solution should be applied in order to resolve the conflict'*. The original proposal has been modified and although no licence is proposed for this year there are alternatives that require consideration for the future of both this and other potential cases.
>
> '*All other less severe methods of resolving the conflict should be shown to be ineffective or impractical and not just difficult to implement'*- The applicant has undertaken an extensive range of methods but has not resolved the problem. However there is some scope to do some more (e.g. taping and diversionary feeding)
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> '*The action is cost effective and proportionate to the actual or potential level of conflict':* Although not recommended for this season the removal of a very small number of predatory birds is likely to be very effective at resolving the predation issue.

'*Welfare disease and conservation obligations are met':* The welfare aspect for wild birds has been considered. The recommendation will improve welfare for the penned birds. Disease control for wild birds is not a factor, but reduced stress and injury levels to penned poults is likely to be achieved. Conservation of the species proposed to be taken has been considered on a local, regional and national scale. Common buzzard is a widespread species with an increasing population which can withstand limited control measures. It is green listed in terms of conservation status.

Conclusions

1. I consider that the application provides a high level of evidence of damage to this game shooting enterprise and that this is likely to be caused by, primarily, by common buzzard.

2. Other causes of damage to the poults have been examined and are considered to be at a level consistent with or better than any comparable game rearing project. Improvements in this area of management are unlikely to compensate for predation losses.

3. However, whilst the applicant has employed a wide range of recognised measures and expended considerable effort to deter predatory birds there are still a few other techniques which should be tried before a licence should be issued.

Recommendations

At the present time it is not recommended that the application is issued with a licence under section 16(1)(k) 'for the purposes of preventing damage to livestock…'. (*for the purposes of the Wildlife and Countryside Act 1981 any animal kept for the provision or improvement of shooting is considered 'livestock'*- see s27).

Instead further consideration should be given to alternative methods and analysis of this year's shooting returns, to establish if the extra methods have an effect at limiting predation by common buzzard.

Should the methods not improve the situation and there is continuing or more proof that common buzzard are responsible for the excess losses then it is recommended that in Spring 2012 the application is reconsidered with a view to considering alternative techniques."

44. The Assessment was submitted to Ms Ward, Director of Regulation at NE for signing off, and the decision to refuse the licence applications was then issued. The decision letter apologised for the length of time it had taken, but it was the first application for shooting raptors to protect game birds, and so was novel. Nor was there a specific policy covering this so it had "been necessary to undertake a much more detailed assessment of this application" than for a routine one. The information in support did

not permit the grant of a licence "at this time." Although it accepted that the Claimant had tried "a wide range of techniques" to prevent raptor predation, and had sought to address other causes of mortality, which had enabled the Claimant to achieve normal return rates, except in 2010/11 when "losses were high… despite your best endeavours; there is in our assessment further scope to explore the alternative solutions, including a number of untried recognised techniques…"

45. The letter listed those methods; diversionary feeding had the best chance of reducing predation. A novel approach was also noted. It offered to help work on reducing predation levels, and on the installation of two NE remote cameras, to be used at the worst affected sites with two which the Claimant had purchased.

46. The final Assessment was submitted for review to Ms Heydon, a more senior officer than the Assessor. Ms Heydon's review said that a "strong case had been made" for the licence which had "come close to meeting the legal and policy criteria." But it was a novel application and it could set a precedent. Although the application was urgent in view of the predation to be suffered in August and September, delay had occurred. Scottish ministers had decided that "for the present time the balance of public interest was not in favour of issuing licences for the control of birds of prey to protect reared game-birds". The RSPB was taking a keen interest. There was no specific policy guidance. The overall policy guidance set no criteria for such licence applications, nor thresholds of seriousness of livestock damage to be shown or guidance as to the nature of the evidence required for a licence to be granted. "While there is flexibility within the policy, Natural England does need to be consistent in applying the policy to the consideration of applications for different species and situations, or have suitable grounds for varying requirements. [The overall] policy guidance is used for determining applications for a wide range of protected species which are neither rare nor endangered." This range included the general licence for types of corvid, gull and pigeon, and to individual licences for such birds as greylag geese, heron, herring and great black-backed gulls.

47. Ms Heydon commented that, taking the applicant's evidence at face value, as was normal in the absence of reasons not to do so, the measures taken and the evidence provided were "certainly at least as good as is normally expected for licences of this type" for other wild bird species. Although the case was reasonably well-made, refusal was on balance right. He had two concerns; the critical one was the use of alternative solutions, notably diversionary feeding and reflective use of tapes; but also that the degree to which poult losses were attributable to buzzard predation, rather than other factors, was not well evidenced. He did not identify what those other factors might be, although he had the Assessment. Were the problem to remain after the other measures had been tried, a licence might be issued next year for the destruction of buzzard nests in the vicinity of the pens. The case should be discussed with DEFRA as it was a novel case. It had presented a number of challenges to the team which had limited experience in dealing with a raptor case of this kind, and there was no species specific policy guidance on a controversial issue involving the shooting of birds of prey, even more so to protect non-indigenous game- birds reared for shooting. The current policy was too general and gave insufficient clarity on this sort of issue, and DEFRA should clarify its policy.

48. However, the application had sparked a policy debate between DEFRA and NE well before Ms Heydon's review. NE disclosed the relevant emails for the purpose of this

action. I have the firm impression that NE did not find DEFRA's contribution as clear and specific as it had hoped; indeed that it was more than a little disappointed in it.

49. It was on 14 March 2011 that NE emailed DEFRA to alert it to the arrival of the Claimant's 2011 application and other similar applications in Northumberland. It asked whether DEFRA wanted to provide specific policy guidance on licensing the killing of raptors. A few days later, NE added that it was likely to be pressed to explain why licences to kill buzzards were not being issued when licences to kill gull species, which were a conservation concern, were issued. In the light of what happened to this application and later applications, the following comment is of interest: the situation the author wanted to avoid was "the applicant going away and collecting more evidence" only for the next application only to be rejected because "for policy reasons no amount of evidence is ever going to be enough." If there were to be a policy presumption against licensing the killing of raptors to protect game birds, NE ought to be clear about that. Differentiating between one sort of predator bird, such as the cormorant, where 10-15 percent were licensed for killing each year, and another such as the buzzard where none would be, but enjoying the same legal and conservation status, posed a challenge. The explanation proposed for the different treatment was: "The real difference is cultural and political but that is difficult to frame within a policy for objectively and fairly determining licences".

50. Mr Tromans explained that the rather coy language of "cultural and political" reasons was understood to mean a perceived public antipathy to killing raptors for the protection of game birds, and the more so for the protection of exotic game birds, kept for shoots. A policy should be developed and meanwhile licences would be put on hold and only then issued in exceptional circumstances, the examples given of which did not include killing buzzards to prevent serious damage to livestock when all other methods had failed.

51. A later email of 12 May 2011 to DEFRA reinforced the point: there was no legal, ecological or conservation justification for the different treatment of gulls/corvids and common raptors; the difference was "political and reflects public opinion"; NE however required a different level of evidence for their killing to be licensed. If NE justified refusing licences on the grounds that there was no adequate evidence of serious damage or that other methods existed, the case for the general licences would be undermined but removing all species, including "pests" species, from the general licence would face massive opposition; the argument as to why licences would not be issued for the killing of raptors to prevent serious damage to livestock therefore should not be based on evidential differences from other species, but on a policy reflecting public opinion or preferences or prejudices.

52. A week later, NE explained to DEFRA its view that the Claimant had made a very strong case for the licence to kill buzzards, far exceeding what NE normally required for other species.

53. On 20 May 2011, NE emailed DEFRA saying that buzzard applications had been granted in the handful of cases where air safety was involved, but NE was vulnerable to the charge of inconsistency unless it could justify the ""higher hurdle" (which is clearly) applied to raptor applications" and to some other species such as swans, "on the basis of consideration of social/cultural factors (i.e. public attitudes to such control and concerns over historic /current persecution)." The author would prefer openness

about the differential treatment rather than a claim that all species were treated alike "when plainly they are not". Raptors seriously needed a policy review.

54. This was reiterated on 24 June 2011: the essential difference between the ways for example magpies and buzzards were treated "is political (reflecting public views etc) and has nothing to do with conservation status, damage levels, alternative methods or quality of evidence." But this difference could only be justified if NE were given by DEFRA "a policy steer to do so –otherwise we have to treat them the same (because legally there is no difference)." Lesser black-backed gulls were amber listed but subject to a general licence: there was "next to zero quantifiable evidence that LBB gulls cause problems- it is just accepted that they do. The reason for this difference in treatment is policy/political/cultural." Buzzards had no greater legal protection than those on the general licence, including feral pigeons, ruddy duck, Canada geese, lesser black-backed gulls, rooks and magpies. NE allowed them to be killed without requiring any evidence of a need to kill them, or that alternative methods had been tried and failed. "Unless it is your [DEFRA's] wish that we routinely issue licences to kill buzzards and sparrowhawks, I would have hoped to have received a policy steer that provided grounds for distinguishing these species from those routinely controlled." And as that was not DEFRA's wish, a policy decision was required from DEFRA, which had made it clear that policy decisions of that sort were not for NE.

55. DEFRA stated, in an email also of 24 June 2011, that there was to be no raptor specific policy: the Minister, and this was a sensitive issue in which the Minister had an interest, had said that the existing policy was to be applied. There was to be no change to address raptor specific issues. But such clarity as that afforded was muddied by this sentence: "Do note the strong steer from the Minister." This steer was contained in a letter to the NGO in which he encouraged "gamekeepers to continue the good work they do for biodiversity and to explore a range of alternative solutions so that there is no need to resort to lethal control of raptors." If after considering the issues of serious damage and alternative methods, NE were minded to issue a licence, DEFRA would welcome discussion, to avoid surprises.

56. NE produced internal emails from July and August 2011, during its decision-making process, showing that one officer, commenting on the draft Technical Assessment, thought that withholding a licence appeared unreasonable. Another thought that if raptors were to be treated in the same way as other species then, though he had doubts about how far the problems were really caused by raptors, a licence should be issued. There was also concern that shooting to scare would not really work with a territorial bird, and they would have to be shot at when other birds could see the scaring. Another, reviewing the recommendation in the draft Assessment, commented that the application "judged according to current policy" merited a licence. The case, while not perfect, was as good as, if not better than, NE would expect for a similarly abundant problem causing non-raptor species. But he was certain that "most members of the public would question (if not unambiguously oppose) the issue of licences to kill birds of prey to protect game birds being reared and released for shooting." But NE could not apply a higher threshold or refuse an application because of what it suspected public opinion would be. DEFRA had declined to be chivvied into producing a raptor policy. Under current policy and practice, even those who would not licence such killing, agreed that the licence was justified. Policy criteria and legal requirements were met; if the short-comings

warranted refusal, it would be difficult to issue licences for a wide range of species, including general licences for problem species.

57. An internal NE email referred to a meeting between DEFRA and NE on 9 August 2011. DEFRA had thought that not enough deterrent action had been taken, and were not convinced of the economic case. They were glad that NE's thinking was along those lines, but did not want anything said about possible future licences in relation to nests. "Clearly this is because they don't in any event want us to license killing of buzzards/raptor for game purposes and this sets up potential for future difficulty". The NE Director of Regulation, Ms Ward, felt that it was in an unsustainable position, and could not tell how much of DEFRA's stance was based on a different interpretation of technical matters, which did exist, and how much was to "fit the politics". The reply said that NE could not agree not to mention the destruction of nests; if DEFRA did not want licences issued, it should state that as a policy, and NE could not refuse licences on the basis of such an unstated policy and describe it as a lack of evidence. DEFRA was deliberately ignoring the problem that the policy did not allow NE to treat raptors differently from other species. NE would either have to refuse more licences for those other species including those on general licences, or grant buzzard licences, yet DEFRA wanted more cormorant licences granted.

58. And that is where the NE/DEFRA dialogue had reached at the point when the first application was refused.

59. The second application was made on 22 February 2012. It was the same as the previous application. The Technical Assessment produced on 14 August 2012 was much the same, although there had been more site visits to each release site.

60. Although the information and evidence supplied by the Claimant was described as providing "comprehensive support" for the application, the Assessment recommended refusal. It did not take issue with the Claimant saying that there was at least one buzzard and one sparrowhawk nest associated with each release site, and that two release sites had been abandoned by poults because of the presence and chasing by buzzards and sparrowhawk, causing poor shooting returns at two sites and considerable stress to poults. The recommendation appears to have been based first on a question mark over whether the damage was "serious", though returns for some shoots and overall remained well below the industry norm, and the application "provides a high level of evidence of damage to this small scale game shooting enterprise and that it is my judgment that this damage is likely to be caused, primarily, by common buzzard." Other causes for the damage to the poults had been examined and were considered to be at a level consistent with or better than any comparable game-rearing project, improvements in which were unlikely to compensate for buzzard predation losses. The second reason for the refusal was the need for non-lethal techniques to be explored further before a licence to kill buzzards could be issued. Red and white barrier tape had been used extensively, rather than the more expensive single sided reflective tape, which the Claimant said he could not obtain. Diversionary feeding had yet to be tried at the time and in the manner recommended. Habitat improvement in some pens could help, (though the Assessment noted that there had been improved cover in 2012). (The Assessment had noted that diversionary feeding had been undertaken at four locations at the recommended time; ground based bait had initially been successful until badgers had discovered them, and so all baits

were now at post height with a post designed by NE, but those had not been successful).

61. However, the situation at two named sites should be kept under close observation with a view to considering a licence to remove a small number of problem buzzards in late 2012, if the advice on non-lethal methods was followed and significant mortality continued there. At four other locations, habitat improvement for the pens and adjacent woods would be of considerable benefit. The efforts of the Claimant should be judged in the light of what he could reasonably be expected to do, bearing in mind the limits on his time and money as a self-employed game keeper.

62. The decision letter itself, dated 21 August 2012, elaborated on those points. But first, the letter apologised for the delay in dealing with this application too. DEFRA had been expected to undertake relevant research with input from the Claimant; so the application was put on hold. Then on 30 May 2012, the Minister had decided that no decisions on licence applications should be made while DEFRA decided how to take the research forward; and then the Claimant had asked for the consideration of his application to be resumed.

63. The decision said that NE expected that there would be reductions in predation rates where ground cover was significantly increased, woodland structure improved and suitable diversionary feeding provided. Detailed recommendations for each release site had been provided in mid-July; they would be fine-tuned and needed to be given time to work. The returns did not show that the situation was worsening from the previous year, and some showed "encouraging increases." On one site, the return had fallen significantly, affecting the overall returns, and that, it was said, was due to the poor structure of the wood and levels of ground cover. The overall return, including that site, was only just below the lowest end of the range expected by the Game and Wildlife Conservation Trust (35%). But other industry experts expected a return within the range of 45-50%, and although the letter did not put it that way, only one site had a return over 45%, at 46%. Nor did the letter compare the returns to the historic returns.

64. However, NE said that it was not complacent, would continue to work with the Claimant to reduce predation levels, and to obtain evidence as to the effectiveness or otherwise of the deterrent methods and of the causes of predation. But the Claimant had warned NE of how precarious his position was becoming.

65. After the refusal of the first application, there had been further interchanges between NE and DEFRA. On 15 September 2011, DEFRA had received a further "steer" from the Minister: raptor licence applications were to be treated in the same way as application for other birds; if there was a good case, non-lethal options such as nest destruction should be licensed. But buzzards were not to be killed. The assumption was that non-lethal methods would always be successful. NE had persisted in trying to make the point that if buzzard applications were to be treated like those for other birds, either licences to kill buzzards would have to be issued or very few licences to kill any birds should be issued. DEFRA wanted applications refused on the grounds such as lack of evidence and failure to use alternative methods, so as to put off the day when a raptor policy was required, but the NE representative said that he had said that that was not acceptable. Few at DEFRA, commented NE, appeared to understand how much evidence requirements varied and appeared to think that raptor applications

could all be dealt with on the basis that there was inadequate evidence or alternative methods had not been tried. NE had argued that a specific policy could not be strongly based on conservation and ecology alone, but should be justified on the basis of public views, past persecution and controlling native species to protect non-native species to be released for shooting, but DEFRA was nervous about using any argument based on public views.

66. On 19 January 2012, DEFRA officials made a submission to the relevant Minister, Mr Benyon, Parliamentary Under Secretary of State, entitled "Requests to grant licences to control buzzards and sparrowhawks to protect livestock". DEFRA's policy was that there was a presumption against lethal controls. Licence applications from gamekeepers were expected and if under current policy all reasonable alternatives had been excluded, and other tests were met, a licence to control raptors would be justified, and that was a realistic prospect. The NGO was arguing that the tests were inconsistently applied; and both the NGO and RSPB were likely to press their opposing views through the media. DEFRA was to commission research into how growth in raptor populations had affected the take from pheasant pens, and methods of control such as diversionary feeding.

67. NE officials continued to recognise the problems of consistency between applications for raptors and other species, in the absence of a specific policy justification for different treatment. DEFRA made a further Ministerial submission on 28 March 2012, after the second application, noting that no licences had been granted for raptor control other than for air safety, and that one was likely for the control of a buzzard causing serious damage to a free-range chicken farm holding. It referred to the work "ongoing with stakeholders" which involved DEFRA funding some research on control methods, which might include experimental removal to try to resolve the "vexed question of whether lethal control can ever be an answer." Two options were discussed. The first was the current policy which accepted that NE could issue licences and accept that it might do so on occasions; the second was to revise the policy specifically to exclude the grant of licences to control raptors other than in exceptional circumstances. For a licence to be granted under the first option, the applicant needed still to show that the only remaining alternative was lethal control, and NE would still need to be satisfied that the control would be likely to be effective in controlling the problem; a small number of licences for lethal control was very unlikely to have a detrimental effect on populations. NE needed to ensure that it applied a consistent approach to the licensing of similarly protected species, but there was a risk of an adverse reaction by stakeholders and the public to controlling raptors. Were the second option adopted, room for exceptions was required since, the briefing implies, a blanket ban might not be lawful. It would have to be explicit that this was because of the high value placed by society on raptors and some ongoing persecution affecting populations of some raptor species. Such an approach would require specific policy guidance to NE from DEFRA. The difficulty however was arguing for greater protection for all raptors than for other species, such as some species of gulls whose conservation status was more concerning than that of, say, buzzards and sparrowhawks. There would be strong and opposing views on that issue.

68. Even when faced with an application from a Cornwall poultry farmer to kill or remove buzzards predating on chickens, raptors were seen as making the decision more complicated, where otherwise there would have been no hesitation in granting

the licence. On 2 May 2012, NE warned DEFRA that the evidence in that case had already exceeded what was required for most other applications, and if generic guidance continued to apply to raptors, this licence "(and most likely many more licences)" would have to be issued or about 90% of all other bird licences should be refused.

69. On 4 May 2012, DEFRA responded on behalf of the Minister to specific points from NE about raptor policy: current policy should be applied to raptor licensing and did not need to be changed; the current policy was contained in the overarching wildlife management policy statement, for which purposes, the common buzzard was an "other protected species", and in the policy statement on species licensing under Part 1 WCA 1981. Point 3 was whether the Minister expected raptor cases to be "judged on the same basis as other applications for species categorised as other protected species" e.g. in terms of the threshold of evidence required to establish serious damage, and in the extent to which satisfactory alternatives had to have been shown to be used. "In other words, the fact that a problem species is a raptor is to have no bearing on how the policy is applied to the licensing decision process." I observe that this had been for NE the crucial issue on which it had long sought clarity from DEFRA. DEFRA's response was: "It is for NE to be able to show that it is applying the policies consistently if challenged." It was for NE to make the decisions though DEFRA wanted to be aware of the applications likely to be granted for lethal measures against raptors. DEFRA understood that on the basis of the current policy, some licences for lethal control of raptors would be issued.

70. NE did not view the response to point 3 as all that it might have been. On 8 May it explained why to DEFRA. It currently applied the current policy to a variety of species but using different evidence thresholds: no evidence was required for the grant of licences for lethal measures in respect of carrion crows and magpies; herring gulls and herons required the presentation of a credible case that serious damage could occur; but for species like buzzards the threshold was "extremely high". NE would struggle to show that it was applying the policies consistently if challenged, as the Minister had suggested that it should do. These differences did not emanate from any policy as the NGO repeatedly pointed out. Hitherto, NE had fended off criticism by reference to Article 7 of the Birds Directive, which permits national legislation to permit hunting of Annex II species, (which do not include common buzzard), but he doubted that "a good barrister" would be so easily convinced. Not all "easily" licensed species were on Annex II. Nothing in the policy permitted NE to treat Annex II species differently anyway. But if the threshold differences were not based on policy, NE would have to re-evaluate how it assessed licences and either adopt an approach which meant that far fewer licences were granted or that far more would be, covering raptors.

71. NE followed this up with an email of 14 May 2012 to DEFRA, saying that the current approach to licensing with widely differing evidential thresholds for different species could not be adequately justified in terms of policy, and so its current approach should be reviewed to ensure that its decisions were legally robust, with standardised and transparent thresholds across all species. Were the approach to buzzard licensing to become standard, there would be far fewer licences for other species.

72. Meanwhile through February and March 2012, discussion had continued between the NGO and NE on what form of research could be undertaken: the Claimant insisted

that it had to include some buzzard removal, lethal or otherwise, if he were to participate. By 29 March 2012 he had agreed in principle, as had his farmers, to a research project, and that his own licence application had to put on hold to avoid compromising the research. The RSPB had been part of the group considering this research. But comment in the media had reached such a stage that on 24 May 2012, DEFRA felt obliged to put out a statement denying that it was to cull buzzards or to implement a new policy to control their numbers. "We work on the basis of sound evidence. That is why we want to find out the true extent of buzzards preying on young pheasants and how best to discourage birds that may cause damage to legitimate businesses. This would only be in areas with a clear problem, using non-lethal methods including increasing protective cover for young pheasants with vegetation, diversionary feeding of buzzards, moving the birds elsewhere or destroying empty nests. The results of this scientific research will help guide our policy on this issue in the future. As the RSPB have said, the buzzard population has recovered wonderfully over the last few years and we want to see this continue."

73. It only took until 30 May 2012 for an email campaign led by the RSPB to see off this modest research. It invited the public to email the Minister to protest at an "illegal, scientifically illiterate and unethical trial". The Minister should be asked what evidence justified the trial. All that was needed were counter-measures. Other groups expressed "disgust" at the proposals. DEFRA released a press statement announcing that that planned research was never to start, and saying in the words of the Minister himself: "In the light of the public concerns expressed in recent days, I have decided to look at developing new research proposals on buzzards." He celebrated the success of conservation measures which had seen large increases in the numbers of buzzards and other raptors over twenty years; he celebrated all that "we" had championed since 2010. "But at the same time it is right that we make decisions on the basis of sound evidence and we do need to understand better the whole relationship between raptors, game birds and other livestock. I will collaborate with all the organisations that have an interest in this issue and will bring forward new proposals."

74. In an NE internal email of 18 June 2012, dealing with an RSPB information request, NE referred to the RSPB's private and then public campaign against the research proposed on 24 May 2012, and to the revised policy which it saw as now precluding the issue of any raptor licences, including to protect the free range chickens in Cornwall, a decision to issue which it had recently described as "nuclear". The chicken case and research needed "careful choreography" so that relations between DEFRA and the RSPB "did not worsen… at that critical point."

75. It continued: "Although publicly Defra have said they want us to treat raptor applications just like other applications we know they did not want licences issued. As [redacted] repeated on the call last week the policy team position from the outset has been "not over my dead-body" will a raptor be killed under licence. Policy team feedback on applications to date has tended to be focus on highlighting reasons to refuse an application, rather than (correctly) advising whether or not the application has been assessed in accordance with Defra policy." But NE had to decide cases on the basis of the published policy guidance, though in practice NE had applied a higher evidential threshold for raptors than for non-raptors "within reasonable bounds."

76. As I have said, the second application was rejected on 21 August 2012, in line with the recommendations of the Technical Assessment. The NGO contacted NE on the Claimant's behalf on 13 September, saying that he was too upset to contact NE himself; but this year's pheasant release was going badly; he was experiencing losses at every pen to buzzards and sparrowhawks, with about ten killed each day; at one site, there were at least five buzzards there whenever he visited; they were just "having a party" at the Claimant's expense. The extra diversionary feeding was not working; in general it was just drawing in buzzards, but was a significant extra workload; things were as bad as they had been over the last two years.

77. On 20 September 2012, NE responded saying that the Claimant could ask for the application to be considered again in the worst affected areas. NE later acknowledged that in the current climate, it was not as simple as that, but agreed to meet the Claimant, which the NGO asked for as soon as possible since he was in despair and "his farmers are livid."

78. There had been a further formal complaint to NE about its handling of the application, and continuing discussion with NE about the consistency of the way in which it treated buzzard applications and applications for other species.

79. On 21 September 2012, replying to the NGO, Ms Ward set out NE's position: the general published policy applied to every application for which no specific policy existed. But the application of generic principles to particular applications had to take account of different species and situations. It did not mean that each case had to be assessed in the same way. "The assessment of each case must take account of the ecology and behaviour of species, their response to different management techniques, as well as the type of and severity of the problems being caused." DEFRA's approach to species such as cormorants, corvids and gulls, routinely managed under NE licences, and to buzzards was consistent with government policy. She explained how that was so. Cormorants were subject to specific policy guidance based on a very significant body of scientific research examining the impact of predation and strategies, lethal and non-lethal, for combating damage. There was no equivalent evidence base for buzzards, or on the predation of game birds and livestock. For corvids and crows, "it is well-established practice and long-standing government policy that the management of several common species is permitted." From 1981, they could be lawfully killed without a licence; NE agreed with DEFRA that it would adopt the same approach by general licence unless a change were required for a particular species, as happened for two gull species in 2010. This policy "reflects a general consensus that they can cause serious damage and that management is justified in certain circumstances. Furthermore, the populations of these species are known to be able to sustain widespread control and remain in a favourable state." The European Commission was of the view that certain species were sufficiently common, fecund and widespread that, although protected, they could be hunted. In no country was there a general provision enabling birds of prey to be killed on the equivalent of a general licence, or hunted. The killing of the common buzzard to prevent predation in the UK had not been permitted under general or individual licence since possibly 1954. The generic policy guidance provided the framework for assessment but "we need to proceed with caution as we have neither a specific policy backed up by detailed research (as we have for cormorants) nor the long established policy (that we have for corvids and gulls) to inform decision making. Buzzards have only recently

re-established populations in some regions of England despite more than a half century of comprehensive protection. Our handling of recent buzzard applications does differ from that of the routinely controlled predatory species, but that is with good reason." The differences were not inconsistent with the principles in the overarching guidance.

80. The moratorium on decision-making on licence applications was lifted in October; NE and DEFRA officials met the NGO on 9 October. NE said that it would decide all future applications within 30 days, unless an extension was agreed. NE and DEFRA affirmed that public opinion had not been taken into account in past determinations nor could it be taken into account under current policy; any change would probably be subject to public consultation. NE supported the 2012 decision on the Claimant's application because, although the poults at some pens had been "hammered", not all the non-lethal interventions were out carried out in 2012 as well as they could have been. The refusal had also been because of improved returns. NE also made the point that the Claimant's shooting business was unusually heavy in the workload set for the game keeper, which left him little scope for dealing with problems. Reports showing high returns and low buzzard predation were nearly forty years old, when the buzzard population was much lower than now, and many estates killed buzzards illegally to reduce predation. DEFRA said that the new Ministerial team wanted to resolve the issue, with clear guidance on the tests and evidence necessary for a licence to be granted, as they would be if the tests were all correctly met. It was agreed that there was a link between illegal killing of raptors and a working legal approach for genuine need.

81. NE responded to an anguished email from the Claimant on 14 October 2012, about how his work had been made harder and more stressful by NE, making it up as they had gone along, while he had become a laughing stock with other keepers and his farmers, by giving him the telephone number of a Rural Stress Information Network.

82. On 22 November 2012, the DEFRA Minister, Mr Benyon, wrote to the NGO saying that the full extent of raptor predation on livestock and other birds was unclear, as was the point at which serious damage was likely. So a working group had been formed by DEFRA to gather "the best available evidence on the current impact of buzzard predation on pheasant poults and other game species." The RSPB and NGO were part of this group. DEFRA had commissioned research on this and on how non-lethal methods could prevent buzzard damage, but these proposals "caused a good deal of public concern so I decided to look at developing new research proposals to understand better the whole relationship between raptors, game birds and other livestock." The views of the NGO on the proposals were sought so that new research proposals could be put out to tender. This was proposed in October 2012: of the "stakeholders" invited to contribute, only the RSPB offered some funding. That, with DEFRA's money, would be insufficient. In fact, no such research was ever undertaken.

83. The Minister could not comment on individual applications but reassured the NGO that "licences should be determined in accordance with Defra's existing wildlife management policy…Within the policy there is a general presumption that wildlife will not be killed but the policy acknowledges that in exceptional cases action may be taken under licence." This, I observe, is neither the law nor DEFRA's published

policy and permitting licences only in exceptional cases was a policy it had eschewed.

84. On 10 March 2013, the Claimant made the first of his two 2013 applications: the first covered three of his six shoots, the ones showing the lowest returns. He wanted to cage trap and shoot four buzzards at each of two shoots, and six at the other, and three and four sparrowhawks at two shoots. At one he sought nest destruction as well. I take one application. He made very much the same points for each of the three shoots covered by the application; (strictly there was a separate application for each shoot).

85. The application detailed the extent of the problem at each shoot. There had been repeated predation at each release wood on this shoot; populations of buzzard and sparrowhawk were far higher than four years before; often 10-20 buzzards could be seen over a single wood at release time as NE's staff had seen. The losses at this shoot were so great that the bag return was "a disastrous 18%" , compared with around or above 50% four years before; the intervening returns had been 37, 41, 27 and 18 percent. Over 40%, 200, of all birds released there had been lost to raptors. Such losses used to be in the low tens. He ran the shoot in the same way; the difference was in the increase in raptor numbers, and his exhaustive attempts to dissuade them from predation. The farmers had paid thousands of pounds to shoot just 81 pheasants, and had told him that the shoot would not go ahead this year without a licence to control raptors. If he lost that shoot, he would also lose the deer stalking there as well. He referred to the Technical Assessment of his 2012 application.

86. His application dealt with preventive measures taken:

> "I have been in regular contact with NE's licensing team about possible non-lethal solutions at this shoot over the past three years and have done everything possible they have suggested.
>
> Scaring methods used have included my physical presence at/near the release sites at least twice a day, radios, flashing lights, reflective tape and gas guns. Experience has shown that the raptors rapidly learn to ignore them all and there is no discernable beneficial outcome in my case.
>
> The habitat management options at this shoot have been very limited, as up until now the owners have not allowed any thinning of the woods. There is a plan to thin the woods at this shoot this spring. The evidence from elsewhere on my shoots where similar work has been carried out is that it will make no significant difference, as shown by the 2012/13 bag returns for two other shoots.
>
> In 2012 I put a massive effort into diversionary feedings, constructing feed stations and locating them to NE's instructions and supplying them with fresh alternative feed in the form of dead wildlife killed by me elsewhere for pest and predator control. This was hugely time-consuming, coming near to doubling my overall workload, and although some of the food was taken by buzzards and sparrowhawks,

there was no discernable reduction of predation on my pheasant poults. The main effect of the diversionary feeding, particularly noticeable at this shoot, was to concentrate and keep raptors in the areas where the pheasants were. It was thus seriously counterproductive. Despite all the additional effort and cost, the bag return for this shoot went down 9% in 2012/13, not up.

In relation to the tests numbered 1 and 3 in Defra's Wildlife Management Strategy, therefore, it is my case that at this shoot there are now no satisfactory alternative to lethal control. Scaring and diversionary feeding have simply not worked. The results of the thinning- if it goes ahead, if any and if positive- will not kick in before 2014 and in any case without a raptor control licence, the shoot will fold before then (see letter from owners). Lethal control of raptors in 2013 is thus the only reasonable solution at this shoot and in law, a licence "cannot be unreasonably withheld." The NGO says it will go for Judicial Review in the event of refusal.

I would like to add a personal note to this application. I built up this shoot and the others small farmers shoots locally that comprise my livelihood, over a period of 30 years. My modest income comes from the farmers and other locals who shoot them and, very significantly, from letting the deer stalking rights that are linked to the shoots. If the pheasant shoots go, the lot goes and my livelihood and way of life with it.

In recent years, as the raptors hereabout have exploded, I have done all I can to dissuade them, first on my own initiative and, for the last two years to the requirement of NE. I have spent days and days felling trees, brashing and creating artificial cover. I have spent hundreds of pounds and hours and hours every week fiddling about with radios, flashing lights, scarecrows, coloured tape and reflective discs. Some of my pens look more like rubbish dumps than countryside and there have been local complaints. Still the predation by the raptors goes on. Last year, NE's request that I try diversionary feeding practically broke me. It doubled my workload during the release period, sourcing and servicing the feed sites, each of which had to be constructed and located to NE's requirements. It didn't make things better, it made the predation worse, holding raptors in the sensitive areas, destroying this shoot shoot and causing serious difficulties between me and my employers.

I am now under really serious pressure, from my farmers, from stress and from fellow countrymen, who think I am mad to carry on trying to address my problems via a legal route. By continuing to refuse me raptor control licenses and by requiring yet more non-lethal, ineffective suggestions year on year, NE has just about finished my business and finished me. I simply cannot accept, when there are so many buzzards and sparrowhawks in the UK, and they are doing so well in my area, why I cannot be allowed to remove just a few to save my livelihood."

87. The Technical Assessment of the first 2013 application, and made on 18 April 2013, was that at one of the shoots a licence should be issued to cage trap and shoot four buzzards, and to destroy two nests on another shoot, with further consideration of a licence to cage trap and shoot four buzzards if nest destruction were impractical. However, it recommended that no licence be issued for this shoot because some alternative methods had not been tried and there was insufficient evidence of serious damage being caused by buzzard or sparrow hawk.

88. The contentious nature of the applications meant that "a thorough assessment including site visit" was required. The common buzzard was the main concern. The Claimant had reported at least one active buzzard nest at each pen, with typically between two and five buzzards at each pen. NE had seen buzzards throughout the area managed by the Claimant. A maximum of nine had been seen by NE at this particular shoot woods. NE recognised the link between the pheasant shoot and the deer stalking, and that the stalking provided valuable local income at leaner times of the year. The Assessment analysed the returns on the three shoots: at one the current return was concluded to be comparable to returns between 2003-2006. At another there had been a marked decline in 2010/11 and it had stayed low. At yet another, the previous two years had shown a marked decline, to 18% from a previous 50%.

89. The Claimant's estimate of losses attributable to raptors, around 700 per season across the six shoots, was described as "reasonable". Other causes of losses were discussed, followed by non-lethal measures. The diversionary feeding for the period July to September 2012 had started at the recommended time: ground feed had been taken by buzzards but not feed placed on posts, and as badgers had discovered the ground bait, more had had to be placed on the feeding posts. The Claimant reported that the diversionary feeding had increased the number of buzzards at certain pens. He thought that the high density at this particular shoot, nine, as seen by NE on a visit, with a maximum of twenty, was caused by the birds concentrating in the area rather than by additional birds being drawn in. However, NE thought that this concentration "could be a result of the diversionary feeding as implemented by the applicant, which did not follow the guidelines provided." Carcasses were provided at ground level and left too long, the feeding posts were flat bird tables rather than a round T-section, and diversionary feeding was being carried on in October.

90. Measures such as trapping and offering buzzards to falconers, or relocating them or keeping them in captivity during the sensitive season were discussed and rejected. A modest level of trapping, shooting and nest destruction were seen as likely to have a beneficial effect on the level of predation.

91. The Assessment concluded that: "The quantity and quality of information and evidence provided for this case by the applicant provides comprehensive support for the application. The information recorded by the applicant appears to be thorough, systematic and accurate for this type of case. It still appears that there is a significant problem at some of the sites. It appears unlikely that the losses are due to another cause…If there were another predator (e.g. fox or disease), a rather more sudden mass mortality would be expected, also with some evidence pointing to the cause."

92. After considering the evidence of raptor predation, and the use of alternative measures, the key requirements of the overarching policy were analysed. There was evidence of significant damage in and in the immediate vicinity of the pens, almost

certainly caused by buzzard predation and, in some areas, sparrowhawk. The proposal to shoot adults with dependent young had been dropped. The extensive range of alternative measures undertaken by the Claimant had not resolved the problem and although some could be better implemented, the practicality of such measures in relation to the small shoots needed to be considered. But there was more which should be done at one particular shoot (in terms of woodland thinning and the creation of additional ground cover in the release woods). The proposals were seen as proportionate, and effective at least in the short term. The welfare and conservation obligations were met.

93. So the general conclusions were:

> "1. It is considered that the application provides a high level of evidence of damage to this small scale game shooting enterprise. It is Natural England's judgment that this serious damage is being (and is likely to continue to be) caused, primarily, by common buzzard and to a lesser degree sparrowhawk.
>
> 2. Returns for the three shoots covered by this application (and the overall return for all six shoots) remain at the lower end of the industry norm, and most importantly considerably below what has been reached previously on these shoots. It is reasonable to assess the level of damage in line with what has previously been provided on these shoots, when buzzard population levels were much lower than currently. The returns from one shoot have fallen well below the lower end of the industry norm and are simply unsustainable.
>
> 3. Other causes of damage to the poults have been examined and are considered to be at a level consistent with or better than any comparable game rearing project. Improvements in this area of management are unlikely to compensate for buzzard predation losses.
>
> 4. The applicant has employed a wide range of recognised measures and expended considerable effort to deter predatory birds. While improvements could be made to the implementation of these methods (e.g. consistency in use of methods, and using different methods in combination) the practicality of measures in relation to the scale of management of these shoots (i.e. the applicant alone managing six small shoots) must also be considered. The recommendations made for the shoots covered by this application have been implemented with the exception of habitat management at the one shoot, which is yet to be trialled."

94. The conclusions specific to each shoot reflected the general conclusions.

95. NE then reviewed this Assessment at Director level, and decided to refuse a licence for lethal control. Instead, on 23 April 2013, it granted two licences permitting the destruction of a total of four nests and any eggs in them at two shoots.

96. The Assessment was reviewed within NE because it would be the first lethal control of raptors for the protection of released gamebirds, and so was controversial; there

was no policy guidance specific to the issue, and judicial review had been threatened by the NGO in the event of a refusal. The reviewer's first area of concern was the proof of "serious damage". There was no body of published evidence that buzzards were likely to cause serious damage to a game shoot, nor was there a general acceptance that that was so. NE was therefore largely reliant on the evidence presented in support of the application. Although buzzards were "undoubtedly predating on the pheasants we cannot accurately predict the scale of the predation from the information provided, or even be confident in ascribing buzzard predation as the main cause of decline in return rates…" Only 14 percent of carcasses showed clear signs of avian predation.

97. Returns at the two shoots where nest destruction was licensed were not much lower than the industry average, but the cost per bird put down meant that higher returns were necessary for the shoots to be viable, and higher than had been achieved in the past. The returns were not exceptionally low for any of the Claimant's shoots. Even at the two where the nest destruction was to be licensed, the damage was not shown to be "serious". There was a danger in accepting a return of 38% as representing serious damage and setting a low benchmark.

98. The Claimant had increased his efforts on non-lethal methods, but questions still remained: at only one shoot were older less vulnerable poults released, the reflective tape was used less widely and was not of the type recommended by NE; further habitat management measures could be undertaken and more in line with what NE had recommended as to the form of brash cover; diversionary feeding on the ground was not recommended and that could have affected its efficacy. Returns had improved at two shoots since non-lethal methods were improved.

99. Nonetheless, the evidence justified exploring the benefit of nest destruction, which logically should reduce the risk or intensity of predation. Greater evidence was required for shooting to be commensurate with the impact on the species. The effect of nest destruction should be monitored since it was unlikely to feature in DEFRA's research programme. At only one of the two shoots where nest destruction was licensed had nests been identified.

100. The second application in 2013, the fourth overall, was made on 5 July. The application covered the same three shoots. The Claimant contended that the licensed nest destruction, which ought to be carried out before April, had failed to achieve any noticeable improvement; buzzard presence remained unusually high. Territorial pairs were still present. Poult release was due in July and they would be liable to predation till September. For one site, thinning and felling in some woods had left windows of brash and scope for further brash wigwams, but the licence was necessary in case predation became serious.

101. The application was refused by letter of 1 August 2013, in line with the recommendations of the Technical Assessment. At one site, the benefits of the habitat improvement had yet to be assessed, and it was expected that they would be effective. For the shoot where nests were actually destroyed, it was too early to say whether that would not reduce predation sufficiently. At the other shoot, there was no evidence of serious damage yet. Shortly after, he was granted a licence to shoot cormorant.

102. Between receipt of the application and the decision, NE again emailed DEFRA pointing out that NE could not develop policy or fill in policy gaps; there were "cultural" issues in relation to raptors which affected the way NE handled raptor applications, and those "cultural" influences originated when DEFRA took the licensing decisions. Although NE had dismissed the assertion of inconsistency based on "cultural" considerations, the NGO "do have a valid point." The NE had limited or no grounds for taking account of "cultural issues" without a discretion to do so being provided within DEFRA policies.

103. Not long before making his fifth application, the refusal of which is challenged in this action, the NGO passed to NE details of the Claimant's 2013 season, for which it apologised. The year had been "disastrous", the nest destruction made no difference; he had used a significant number of older birds, supposedly less vulnerable to predation, but the results had left him facing losses of £10000 and more on the shooting alone.

104. On 23 February 2014, the fifth application was made. It covered four shoots; but not the shoot for which nest destruction was refused on the first application of 2013. It sought a licence to kill two buzzards at three shoots and four at another. For some reason, the application was received by NE on 23 April. Meanwhile, the NGO had complained to NE about the release by mistake of details of an earlier application in response to an FOI request by the RSPB which had led to the Claimant being identified and "pilloried" on raptor protection websites.

105. The Technical Assessment recommended that no licence to kill be issued but that instead consideration be given to live capture and removal. This "contentious" application required "thorough assessment" including site visits; there had been many site visits now in connection with the various applications. It referred to the importance of the previous decisions and what had been accepted by NE in the course of dealing with them. It had been "accepted by NE that the density of buzzard in the area is high." There then followed a detailed analysis of the shooting returns and of what was required in general and at these shoots for a viable shoot. There was no evidence that the release of older poults had reduced predation, and it was unlikely to be an effective solution. It had been accepted in previous reports that very few of the Claimant's pheasants were lost to predators other than raptors. The cover and shelter were satisfactory except at the shoot which was not covered by the application anyway. A number of sites would benefit from woodland thinning, including one where he had permission to fell trees. At some sites, the feeders were poorly placed, in a straight line, and without suitable cover nearby. Some scaring devices, which should be removed once the poults had matured, had been left in place at various pens. A red and white tape, not the one-sided type recommended, had been used, and not consistently enough for its effectiveness to be evaluated. Human mannequins had not been used because of the time and resources needed. An increase in the Claimant's presence was not possible for a single gamekeeper, and it would not be viable to employ someone in addition to him. He was already putting in far more time than he was paid for. Shooting to scare had not been tried, as the Claimant was concerned about how the public would react if he were seen to be shooting towards buzzards. The diversionary feeding had not been tried in a measured and controlled manner, using the methods recommended. The Claimant believed that it took a

disproportionate amount of his time and simply concentrated buzzards rather than alleviating their pressure.

> "The removal of small numbers of buzzards from the area of the pens, as is being applied for, is consistent with the theory being put forward by the applicant, and which is largely agreed as plausible by the assessor, that a small number of buzzards have specialised to predate on pheasant poults and are causing the majority of the predation. Considering the numbers of buzzards that are alleged to be present in the area, taking such a small number of these birds at each site with the aim of significantly reducing predation is wholly dependant on this theory. If the theory is incorrect, then the removal of only a small number of buzzards is unlikely to reduce predation levels, since these birds would quickly be replaced by others in the wider environment.
>
> Assuming that theory is correct, and there is currently no evidence to support it, cage trapping buzzards in or near the release pens in question would maximise the chances of catching the birds which have specialised to hunt within the woods and at the pens.
>
> **Lethal Control and alternative**
>
> The applicant is applying to trap and shoot buzzards, an action which not been previously licensed for the purposes of preventing damage to livestock. Given the theory being tested, that a small number of buzzard have specialised to predate on pheasant poults and are responsible for the majority of the predation, there are a number of options available all of which would see birds to be taken from the wild but some that would have less of an impact on the protected species than others."

106. The report then considered means of dealing with the birds after trapping other than shooting them; shooting was described as the applicant's preferred option. The others all had drawbacks. Killing a large number of birds would undoubtedly reduce predation but would be disproportionate. The shooting of buzzards, five on one application, for air safety had not had an adverse effect on the local population.

107. The conclusions and justification for the recommendation were then set out:

> "As mentioned previously in this report, as a consequence of the extensive case history, including the issue of nest destruction licenses in 2013, many aspects of this case have been accepted and agreed within documents which are now in the public domain. Therefore departure from these accepted opinions would require a full and thorough justification and consequently, considerable reliance was placed on preciously accepted conclusions within prior assessments, peer reviews and correspondence."

108. The most recent decision to refuse lethal licences had been reviewed by NE's Chief Scientist and upheld, but he had concluded that the regular discovery of poult carcasses and the good control of other causes of loss meant that buzzard predation

must be the main cause of poult loss, albeit that there was very little direct evidence which categorically demonstrated that buzzards were responsible for predating on the poults to the level claimed. But the difficulty of obtaining such evidence was recognised and the returns provided some quantification.

109. Although the seriousness of the damage had been queried in the past, it was felt to be serious enough in 2013 for nest destruction to be permitted; the returns for 2013-14 were significantly lower than in the previous three years. The returns, 15%, down by 18% on the previous three years, 24%, down by 11% from the previous three year average, and 24%, down by 19% on the same basis, meant that the cost per bird shot was far in excess of the national average and over twice the target cost per bird shot set by the Claimant. Based on that, "it is concluded that serious damage is occurring at [three shoots]."

110. The Claimant had not used non-lethal measures in quite the way or as consistently as NE had recommended, but his limited resources and some of the difficulties with untried methods, for example shooting to scare were accepted. However, as the scale of damage was high, and if buzzard predation were the main cause of damage, "it is reasonable to assume that the failure to employ some non-lethal methods to the degree requested would be unlikely to make a significant difference." While improvements in non-lethal control methods were still required, "it would not be reasonable to withhold a licence to remove a small number of buzzards from the environment solely on the fact that these measures have not always been implemented to the level required."

111. The removal of more nests near to the pens was not likely to reduce predation to a significant degree because buzzards were adaptable birds, known to perch on trees overlooking pens and to fly considerable distances in search of prey. As nest destruction had not proved effective, it was not a viable solution to the present problem.

112. The Assessment then set out the framework for the decision. There remained no specific guidance on raptor applications and so it had to be judged on its merits within the general policy guidance. There was very little information available on the impact of buzzard predation on pheasant shoots or on the effects of management techniques on reducing predation. There was often very little to base decisions on except evidence presented by the applicant.

113. The Assessment dealt with the six tests: 1: *"The conflict must be sufficiently serious to warrant such action"*: shooting returns for all six shoots had declined to the lower end of the industry average, and below that reached in the past, with a significant drop in returns for all six shoots over the 2013/4 season. "It has been accepted by Natural England that serious damage is being caused and that the most likely cause of this damage is from predation of pheasant poults by buzzard in and around pens…."

114. 2: *"The least severe solution should be applied in order to resolve the conflict"*: A variety of non-lethal methods had been tried and "shown not to work."

115. 3: *"All other less severe methods of resolving the conflict should be shown to be ineffective or impractical and not just difficult to implement"*: although a wide range of techniques had been tried, there had been a drop in returns, after a slight increase,

suggesting that these measures were not working. Although consistency in execution of the techniques, commitment to their correct implementation, and use of different methods in combination could be improved on, "it is accepted that given the applicant's limited resource for managing these small shoots he has undertaken a satisfactory effort and within that which could reasonably be accepted."

116. 4: *"The action is cost effective and proportionate to the actual or potential level of conflict"*: "the proposal to non-lethally remove small numbers of buzzard from the wild…is considered proportionate to the level of predation", and the costs were appropriate. In fact, the applicant's proposal was for shooting; non-lethal removal was proposed in the technical assessment by the assessor.

117. 5: "*Such action would reduce, or prevent from increasing, the scale of the conflict"*: "based on the theory that a small number of buzzards are responsible for the disproportionate amount of poult predation, the removal of a small number of buzzards is expected to be effective at reducing predation".

118. 6: *"Welfare, disease control and conservation obligations are met"*: The buzzard was a greenlisted widespread species, increasing in population and able to withstand limited control measures. The welfare of those removed would be fully addressed, and the welfare of the penned birds would be improved.

119. Accordingly, the Assessor recommended the licensing of the removal from three sites of a total of eight buzzards. At one site, the Assessor did not accept that serious long term damage from buzzard predation had been proved, and at the fifth, he thought that there was a lack of woodland edge whereas a greater depth would protect the poults from adverse weather which could contribute to an increase in poult loss through other causes.

120. Since the Assessor was of the view that his decision was wholly dependent on the Applicant's "theory" that the majority of the predation was from a small number of buzzards which had "specialised to predate on pheasant poults," were the licence granted, he should be required to improve his non-lethal management, using a specific sort of reflective tape, placing the feeders correctly, using scarecrows or mannequins in a novel manner, shooting to scare, using scaring devices in a novel fashion, and thinning trees around pens to encourage shrub growth.

121. Trapping would be undertaken by suitably experienced and licensed individuals; permanent captive accommodation would be found for some birds, and the two largest females should be kept permanently captive.

122. Lethal control was not recommended "at this time" because, although there was a genuine problem, taking buzzards into captivity was a reasonable non-lethal solution that had not been tried to see if it would work, and was a satisfactory alternative. Until that had been shown to fail, killing buzzards was not proportionate to the problem.

123. NE then reviewed this recommendation by the Assessor. Mr Cooke, its Director of Sustainable Development, rejected the recommendation and refused any form of licence in his letter of 5 June 2014. The decision applied the four tests in the DEFRA wildlife management policy, set out earlier:

124. 1: "*All other reasonable non-lethal solutions have been tried and/or shown to be ineffective"*: it was clear that this test had not been satisfied since the Technical Assessment had noted methods not tried or tried consistently or as recommended by NE. It allowed for the specific circumstances of the Applicant. But it would be reasonable for him to use, for example, human mannequins, the specific type of tape recommended, which it said was readily available, and shooting to scare. The Technical Assessment had said that improved diversionary feeding and re-siting of feeding stations "in a more structured way and in combination" would be likely to improve the situation. Greater disturbance to buzzards in and around the pens was likely to be beneficial and had not been properly explored.

125. 2: *"There has to be a genuine problem or need"*: The letter said, that "It appears…that it is difficult to run a viable shoot." However, NE thought that a number of factors contributed including "poult loss, limited time spent at each release pen and apparent restrictions placed by the landowners" on measures to optimise the environment for poults.

126. 3: *"There has to be no satisfactory alternative"*: In addition to the non-lethal measures he had already referred to, Mr Cooke dealt with the recommendation in the Assessment that there should be a removal of birds to captivity. But he decided that this was not a feasible alternative: it was not known where the birds would be removed to, nor who would pay for removal and captivity. It would not be reasonable to ask the Applicant or the public purse to pay. And the majority of the birds would only be in captivity temporarily.

127. 4: *"…the licensed action will be effective at resolving the problem and the action is proportionate to the problem"*: it was clear that there was no evidence to support the conclusion that removing ten birds would effectively resolve the problem; indeed the application did not cover all the pens "allegedly impacted by buzzards." No evidence had been produced to support the view that a small number of birds had specialised in predating on poults. The argument was wholly dependent on that unproven idea, and that the birds in question could be identified. Were the theory wrong, there would be no effect, since buzzards in the wider environment would quickly replace them; nest removal had been ineffective because the birds simply nested elsewhere as the Applicant supposed but could not prove, or additional buzzards had moved in. Killing a small number of buzzards at random would not be effective since it was not known:

> "(i) if it is only 10 birds that are causing the problem; (ii) if removing these birds will solve the problem; and (iii) if it is in fact 10 birds causing the problem then which 10 birds they are. In the absence of this information Natural England has determined that it cannot licence the trapping and shooting of 10 birds which may or may not be the cause of this problem. Furthermore without further evidence that it is a particular 10 birds causing the problem a licence could lead to the circumstances whereby you apply for future licences to lethally control further birds until such time as he has resolved the problem, potentially to the point of an adverse impact on the local conservation status of buzzards. ""

128. Mr Cooke, in his first witness statement, denied that public opinion had influenced his views, accepting that that was an irrelevant consideration. Public interest would affect the level of scrutiny given to an application but not its outcome, and that was "simply good administration."

129. Mr Nodder of the NGO replied on 5 June 2014 seeking a review of the decision: he complained about the inconsistencies in NE's approach to the various applications made by the Applicant, and inconsistencies with its licensing decisions on other wild birds with a conservation status similar to or less favourable than buzzards. This was the third time on an application by the Claimant in which the pro-control recommendation of the Assessor had been turned down. He also complained that NE had never sought to explore with the Applicant why the solution favoured by the Assessor, and used by NE in 2013 to deal with buzzards predating on poultry, could not work.

130. The review, dated 16 June 2014, and carried out by an NE officer with no previous involvement, supported the decision. A high level of loss for whatever reason of released poults was normal for the industry, and it could be a matter of little surprise that a wild predator would predate on a ready supply of prey. The questions related to the extent of this interaction and of the application of mitigation measures. The introduction of ex-layer birds in the latest shooting season created a new variable and this data was best excluded from trend analysis.

131. The review concluded that there were gaps in the evidence creating uncertainty over what could be attributed to buzzards. "Shooting effort" was a considerable variable not addressed: numbers of days, guns, shots recorded, weather, estimated number of birds remaining at the end of the season: "the default assumption was a constant harvest factor." The paperwork had concluded that efforts at reducing alternative sources of predation had been fully and constantly applied. Yet the number of fox shot had declined, and this correlated with the decline in pheasant yield, and there was no evidence of a declining fox population. The reviewer did not know whether there had been any variation in release numbers before 2007/8, which could affect the way the decline in the numbers of birds harvested was judged to be. Mitigation measures had not been implemented in full, in particular improved ground cover, siting of feed hoppers, diversionary feeding, and reflective tape.

132. Direct predation by buzzards was to be expected, but the exact scale and the extent to which this was the main or major contributory factor to mortality levels, and the extent to which this might be avoidable through more effective mitigation measures was not clear from the evidence. There was no "compelling case" that buzzard predation was the primary issue putting the Applicant's business at risk. Further efforts to mitigate predation and evidence about other causes of mortality were required before such a conclusion could be drawn.

133. The reviewer then responded to specific points made by Mr Nodder.

1: He accepted that the application was being treated with caution, explaining that:

> "However, it is entirely legitimate that close scrutiny should be given to licence judgements in new areas, and our judgment of risk should include consideration of where there is likely to be strong public

> interest; risk level of course does not determine the eventual judgment, it merely ensures scrutiny. Ultimately, our advice here is open to public scrutiny and legal validation."

2: Although buzzards had an effect, he was concerned by evidence gaps.

3: NE was not unreasonably emphasising the exploration of non-lethal methods, since it had to be satisfied that such measures had been adequately explored before licensing lethal control. Caution was justified where there were uncertainties and assumptions within the evidence base, and especially where there was an assumption that the primary source of predation was the result of learned behaviour by specific birds.

4: He agreed that NE could not operate to a "moving standard baseline" but denied that NE had done so. The "novelty of the application" and the uncertainties made it "appropriate for us to look for a high evidence base before any form of *lethal* control was licensed." (My italics, and the novelty must surely have worn off by the fifth time of asking; the only novelty, as Mr Maurici said, would have been in the grant of a licence.)

5: NE was not being unreasonable in seeking to identify specific birds for control measures: there was a high level of uncertainty over whether specific birds were the major source of buzzard predation, and, if so, over whether it would be possible to trap those specific birds. Taking a small number of birds indiscriminately would be unlikely to make much difference, and non-lethal methods had to be applied in full before considering experimental approaches.

6: Live capture and removal from the wild or temporary storage were options if there were clear indications that it might work, in terms of knowing that specific birds were the cause and that those specific birds could be captured. But there was no more than a conceptual theory that it was specific birds which were responsible for the predation. And those measures could not be used before established means of protecting ground game had been put into effect.

Grounds 2-4: general observations

134. I start with these grounds as they are at the heart of the case. I propose first to make some observations about the role of DEFRA policy and its relationship to the law since I was struck by NE's emphasis on DEFRA policy and its lack of emphasis on the law. I will also deal here with one of Mr Tromans' general observations.

135. First, law and policy. The Birds Directive permitted but did not require derogations from its general prohibition on killing or capturing wild birds. But where the derogations are adopted, they must be given effect according to their terms. The WCA gives effect to them, and its powers must be used for the purpose for which they were given. Those terms strike the balance at the general level between the protection of wild birds and the interests which they may threaten, where there is no other satisfactory solution to that conflict. The balance struck is that wild birds are protected unless their control is necessary to prevent serious damage to livestock, there being no other satisfactory solution. Neither the Directive nor the WCA provides any specific protection or status for raptors or buzzards, nor does it treat game birds and

other livestock differently. The provisions made for the protection of certain species do not apply to the common buzzard. As I have said, the Directive does not require that serious damage to livestock has already occurred; the licence is to be granted to prevent it. The WCA is in the same terms. The WCA is consistent with the Directive. The WCA, and any lawful policy giving effect to it, needs to be interpreted conformably with the Directive. I see no power in the Directive or WCA for NE to decide, on some discretionary basis, not to grant licences if it is satisfied that there is no satisfactory alternative solution to shooting or other disturbance of wild birds for the purpose of preventing serious damage to livestock. There is no power, on some discretionary basis, to treat one common species causing serious damage differently from another common species causing serious damage. At times, NE's approach appeared to be that it was simply exercising a straightforward and wholly domestic executive discretion. That is not the nature of its power**.**

136. I do not consider that the general management policy is of itself necessarily contrary to the requirements of the derogation, though it would have to be interpreted and applied so that the balance struck in the Directive and therefore by the WCA between the various objectives of the Directive was given effect. The role of proportionality in the interpretation and application of the Directive is in giving effect to the purpose of the balance struck by the terms of the Directive and Act.

137. Second, there are two relevant CJEU decisions. In *Commission v Finland C*-344/03 [2005] ECR I-11033, it held that the derogation provisions should not be interpreted in such a way as to negate them. The phrase "no other satisfactory solution" was at issue. Finnish and Swedish legislation permitted hunting for certain duck species in the spring pursuant to the derogations in the previous Birds Directive. Where hunting was permitted at a time of year for which the Directive sought to provide particular protection, here spring, a particular derogation was required but could only be legislated for if there were no other satisfactory solution. The Commission contended that there were satisfactory solutions other than hunting those species in the spring. For certain species, the Court found that the Government had not proved the absence of a satisfactory alternative. The species were present in the autumn, albeit in considerably smaller but not inconsiderable numbers, and so autumn hunting was a satisfactory alternative. For another species, this test was proved; to prohibit its shooting in spring on the grounds that it would be a satisfactory solution to shoot *another* species in spring or autumn would render the derogation at least partially nugatory since, even if the permitted level of spring hunting met the other requirements of the particular derogation, hunting that species would still be prohibited.

138. In *Commission v Republic of Malta* [2009] C-76/08 ECR I-8213, the same derogation from the previous Birds Directive's permission to hunt species listed in Annex II was at issue - here over Malta's legislative permission for the hunting of two species during the protected period of the spring migratory return to breeding grounds. This derogation was from a specific restriction on an activity permitted but controlled as an exception to the general protection for wild birds. "It is a derogation which must, accordingly, be interpreted strictly…." [48]. The two species were present in adequate numbers in autumn for hunting in the spring hunting areas, but that did not of itself provide a satisfactory alternative solution. The Directive had not intended that the derogation should be interpreted so as to prevent hunting during a

protected period simply because the opportunity for hunting existed during the open season authorised under the Directive.

139. The Directive "sought to permit derogations from that provision, only so far as necessary, where hunting opportunities during those periods, in the present case in the autumn, are so limited as to upset the balance sought by the Directive between the protection of species and certain leisure activities." [56]. The use of the derogation so as to permit hunting in spring still however had to be proportionate to the needs which justified it. Applying those considerations, the CJEU found that there was no satisfactory alternative; hunters could only capture "an inconsiderable number of birds" during the autumn season, the species visited only restricted areas, and the population of the species was satisfactory. The fact that there was no alternative satisfactory solution, as the CJEU found, did not mean however that hunting in spring was without limit; it was permitted only in so far as it was strictly necessary and provided that the other objectives of the Directive were not jeopardised. However, because the number of birds actually killed during the two month spring derogation was far higher than in the autumn season, the extent of the derogation did not meet the requirements of the Directive.

140. These cases illustrate that it is for the state which seeks to rely on the derogation to show that the requirements of the Directive are met in its application; by analogy, where an individual seeks to rely on derogation, it is for him to make out the case. There is, second, no general rule that a general derogation must be interpreted strictly, although derogations from a particular limit on an exception to a general protection should be construed strictly; but even then not so as to nullify the derogation in whole or part. The phrase "no satisfactory alternative solution" must not be construed so as to make the derogation nugatory in operation. Third, the derogation should be interpreted with the other objectives of the Directive in mind. Its application should be proportionate to the needs which justified it. The Directive balances the protection of species and certain leisure pursuits.

141. Mr Tromans submitted that the Directive and WCA required "a strict system of protection" for wild birds, and the derogation for preventing serious damage to livestock had to be "narrowly construed and confined." I disagree, and in its practices, so does NE. The Directive provides a broad and general protection, sufficiently broad to require derogations in a wide variety of interests so as to create the desired balance between wild life and human interests. There is no warrant for requiring the principal derogations to be construed narrowly; they should be construed with proportionality and the balance of the objectives in the Directive in mind. The language of the *Malta* case supports the view that "strictness" of construction arose from the particular derogation at issue in that case: derogation from a ban at particular vulnerable periods on hunting wild birds, rather than the enunciation of a general principle. Still less is there any general or specific principle that derogations should be applied with particular stringency, and NE plainly adopts no such approach - generally. If Mr Troman's general submission is correct, the general licences and the cormorant policy appear unlawful as does its general approach to the grant of licences. It is only to raptors, and perhaps swans, that this strictness is applied.

142. It also seems to me that political and cultural attitudes towards shooting wild birds or types of wild bird, including simply hunting them as a leisure activity, are already allowed for in the various permissions and derogations to the Birds Directives, past or

new, in so far as allowed for at all. Hunting of Annex II species is allowed for, including by derogation from a more general prohibition, in protected periods of the year. I see no basis for implying additional restrictions on the interpretation of the Directive by reference to "political or cultural" considerations not already reflected in the provisions of the Directive. The Directive gives no general discretion to those member states which have adopted the derogating power to add further categories or degrees of derogation. That would be to nullify in whole or part the derogations adopted. It would not have been lawful for DEFRA, and certainly on "political and cultural" grounds, to adopt a policy which made licensing the shooting of raptors or the shooting of raptors to protect game birds more difficult than for other birds covered by the same derogation. That would be to introduce an impermissible further derogation, or one which nullified in whole or part the existing derogations. The UK could only do that by a derogation which excluded certain species; Article 9(2), and it has not done so. The Directive has already specified, so far as it intends to, the matters set out in Article 9(2).

143. Mr Tromans, referring to Mr Cooke's first witness statement, said that NE's discussions with DEFRA on a different policy for raptors contemplated using Article 2 to establish different criteria, having regard to "cultural requirements". Mr Cooke does not refer to Article 2 as the basis for the discussions; that was not the express basis for them, which instead was the need NE felt for policy cover from DEFRA for what in fact was being done by NE. Article 2 does not deal with "political requirements", and it is not easy to see from NE or DEFRA any consideration of the population level of buzzards which would correspond to the unidentified "cultural requirements, while taking account of economic and recreational requirements." The purpose of Article 2 is not to allow the popularity of one species over another to determine population levels; indeed it may be more concerned to ensure that the level of protection still permits hunting. But if that Article could have enabled some further restriction on granting licences for buzzard control, it was not in fact used. This undermines the alleged consideration of vague "cultural or political" factors as justifying a different approach to the control of buzzards from that applicable to other species, and suggests that it is language disguising the role of public opinion or controversy. And an application of the same general policy which makes the practical operation of the derogation much more difficult in relation to some species than others of the same conservation status is relevant to seeing whether or not derogation is being nullified.

144. The second group of observations relates to one of Mr Tromans' general submissions. He contended that the application of DEFRA's policy by NE involved the exercise of expert judgment, by an expert body with specialist knowledge, which permitted the Court only to interfere in a very clear case. He also said, in response to Mr Maurici's contention that, if so, the true expert was the Technical Assessor and that Mr Cooke had no relevant personal expertise, that Mr Cooke and the Assessor had equivalent technical expertise. But in fact none of their expertise was directly in ornithology or any other aspect of the decision, business, statistical or other, so far as I could tell. I say that because Mr Cooke did not think his or their qualifications or background sufficiently relevant to warrant mention in either of his statements. I see nothing in the decision-making process to suggest that the ability of the Assessor to decide is greater than that of the Directors, though the issues raised by an Assessment which is to be rejected normally call for careful consideration, and the Assessor did at least

have the advantage of speaking to the Claimant and visiting the sites. I see no particular individual expertise in either Director or Assessor.

145. Mr Cooke said that he was able to draw upon the Technical Assessment and the resources, relevant internal expertise and experience of NE, and that most decisions, (whether that included this one was not stated), were arrived at by internal discussion often involving more senior staff. But one of the points made by NE was that NE lacked research knowledge to assist its decision on unprecedented applications requiring careful consideration; it was all new for NE. NE, on its own case, has no particular expertise, and perhaps not much expertise at all, on this type of application. All of this is however largely beside the point: the decision-makers at NE have the duty to take the decisions, and, if personal and institutional expertise are lacking, they have to do their best. There is nothing particularly unusual about that in public law decisions.

146. However, the existence of institutional experience upon which it is to be assumed Mr Cooke can call is relevant to one point: the significance of the emails of 2012 between DEFRA and NE. He said in his second witness statement that in April 2014 he had been briefed on and made aware of the exchanges, though not of the detail and he had not read them. But if Mr Cooke is to be treated as having available the knowledge and experience within NE rather than being purely dependant on his personal expertise, I am sure that he was well aware of the policy debate, the reason for the stances taken by NE and DEFRA, the abandonment of any research project, and the strong and often expressed concerns within NE about the quality of evidence now being demanded by NE for these applications, which that debate with DEFRA had not resolved. The fact that Mr Cooke had not read the exchanges did not leave him personally isolated from and unaffected by NE's institutional knowledge of all of the significant aspects of the emails, since they were of considerable importance to how the applications were to be handled in the light of NE's concerns and of DEFRA's institutional approach. I agree with Mr Maurici's approach.

Grounds 2 and 3: inconsistent application of policy, reliance on an undisclosed policy and taking account unlawfully of public opinion.

147. These grounds plainly overlap. Mr Maurici effectively argued them as variations on a theme. The inconsistent application of policy takes the form of the application of far more exacting standards to the grant of buzzard or other raptor licence applications than to the grant of licences for other species of equal conservation status, whether predating on fish including those caught in sports angling or predating on livestock kept for food or sport. There is also a policy that much more exacting scrutiny should be given to raptor control applications than for almost any other species of bird, which has not been published or disclosed, and is unlawful for that reason. This policy application of more exacting standards is driven by "political" or "cultural" factors, which are the views of some that raptors should not be controlled in the interests of livestock consisting of game birds, thereby unlawfully taking account of an irrelevant factor- public opinion.

148. Indeed these grounds overlap with ground 4, that the decision was unreasonable, because much of that ground is concerned to show that the test applied rendered the derogation nugatory, and the decision unreasonable in the light of the earlier

conclusions reached by NE on the Claimant's applications. But I take ground 4 separately.

149. I regard it as clear that a decision made by a public body is unlawful on the grounds of inconsistency if like cases are treated differently without a rational basis for the different treatment. Such a decision is merely arbitrary or random, or based on an immaterial consideration, or a disguised or hidden policy. The principle was not at issue. NE agreed that it did apply a different approach to buzzard or raptor applications from those applied to other species of birds, but contended that the differences were justified, in the application of the same general DEFRA policy, by the different circumstances which affected raptors and buzzards in particular and these applications. That is where one issue lies.

150. It is also clear that if a public body has a policy to guide its decisions, lawful decision-making requires that the policy should be public, and the more so that the policy should not be concealed behind a partially different policy. That again is not at issue; Mr Tromans' contention was that the policy applied was the published policy. The issue is whether that is correct, or whether there was in reality some further policy, by whatever name, adopted by NE in its consideration of buzzard applications, and more particularly in relation to those concerning serious damage to game bird livestock. Again, it was not at issue but that public opinion was not a relevant consideration; the question was whether in reality, the different approach or policy took into account public opinion, or at least a sector of public opinion.

An undisclosed policy

151. First, I deal with whether there was an undisclosed policy about how buzzard licence applications were to be treated.

152. I am satisfied that there was indeed a policy to treat buzzard or raptor applications differently from those relating to almost every other species, and that that policy was not disclosed to the Claimant or more generally. The disclosed policy was that buzzard applications would be decided on the basis of the general policy, and that the general policy would be applied with greater scrutiny. I have set out what MS Ward wrote to the NGO in September 2012, providing a justification for treating buzzard applications with greater scrutiny than those relating to other species, and this very much reflected the position expressed by Mr Tromans on NE's behalf as the basis for the different treatment: the need to proceed with caution in view of the general lack of knowledge and research about buzzard predation and these were not routine applications. While this is a form of policy, and it was disclosed to the NGO and Claimant, it does not dispose of this part of the Claimant's case. I shall come later to the problems with that as a policy justification for the difference in treatment, but I believe that it is evident from the long recitation of the treatment of the Claimant's applications, which form the majority of buzzard applications considered by NE, that that seemingly reasonable and anodyne letter does not disclose anything like the real approach which NE adopts towards a buzzard application. Besides, if this letter represented the full picture of NE's policy, and was rationally justified, it would not have been necessary for NE to test DEFRA so anxiously over the lawfulness of the practices which it was adopting and for which it recognised it needed but lacked, and continues to lack, other policy justification.

153. The real approach of NE, as I shall come to, was to require more factors to be proved and proved by far higher quality evidence than for other species, to require individual birds to be identified as predators with proof that only those would be controlled, and to require any suggestions it made to be carried out punctiliously on pain of refusal.

154. In August 2012, and shortly before the letter from MS Ward, a policy to explain how the buzzard licence applications were to be treated differently was drafted by DEFRA so that while "robust research" was being gathered "particularly careful scrutiny needs to be given to applications to control raptors predating livestock." This included such comments as "Where best practice guidance exists for managing the impacts of raptor predation on livestock, it must have been followed". "Clear evidence" was to be required of counter-measures methods tried, and why the applicant concluded that they did not work. Applicants should explain clearly and convincingly why they had not tried those methods which they had omitted. Non-lethal other measures such as nest removal outside the breeding period and relocation were only for consideration after all other measures had been applied. Proof of serious damage required the applicant to prove, "quantifiably and verifiably", that the losses were sufficient "to threaten the long term viability of the business" and substantially exceeding normal business risk. The applicant should show how his turnover had been affected, details of the costs of mitigation measures, and the extent to which he could mitigate the impacts of the losses by e.g. putting out additional livestock "at a relatively small cost". "There should be clear and verifiable evidence (e.g. photographic) that a specific raptor(s) is causing serious damage." He had to show that the licensed action "will be effective in resolving the problem", meaning that it had to be a permanent solution and not one which would require continued action beyond the limited duration of the licence…." e.g. if a raptor were removed, the applicant should show that another would not simply move in, leading to a recurrence of the problem. There was some NE comment on this: were specific birds to be identified, given that opportunities to capture predation on film are limited and most people did not have access to the type of resource necessary? Some technical recommendations were not based on NE's own technical input or published evidence. Auditory scaring could scare the vulnerable prey species as well as the predator. While licensed action would be expected to contribute to resolving the problem, very little predation management provided a guaranteed permanent or long–term solution when dealing with generalist predators such as buzzard. But these comments were made in the context of the overall comment that this was very much how such applications were judged at present.

155. This draft never saw the light of day, and was never an adopted final policy, and NE's internal comments have no particular status, but it demonstrates to my mind that there can be a policy for governing the way in which different applications are to be treated differently within the same overall policy. The draft policy however encapsulates, in my judgment, the practice adopted and deployed by NE, before 2012 and ever since, as the treatment of the Claimant's five applications demonstrates. The admonitions of the draft policy are closely reflected in Mr Cooke's decision, and in the review. It captures the approach adopted far more closely and accurately than does Ms Ward's letter of 21 September 2012. It also demonstrates that a policy may include the manner in which applications are to be treated within a more general policy.

156. This is borne out by the other documentation relied on by Mr Maurici relating to the period 2011-2012. It concluded with DEFRA saying that buzzard applications should be decided under the existing general management policy, though leaving NE with a strong sense that DEFRA would not wish to see any buzzard applications granted in relation to game birds. DEFRA and NE left matters there without resolving the crucial difficulties which, time after time, NE tried to point out to DEFRA it faced in adopting its different approaches, to different species. These difficulties arose because the different approaches had no objective legal or conservation basis, and needed but lacked what was assumed would be a lawful policy justification related to "political and cultural" considerations. NE did not respond to the dilemma which DEFRA left it still facing by changing the way in which it dealt with applications. It did not tighten up its approach to general licences or the large number of other individual licences granted each year, as it had said would be one alternative, nor did it relax its approach to the grant of raptor application, which was the other. It carried on as before.

157. Mr Tromans urged that it would be wrong to treat informal and unguarded comments in internal emails as representing a considered policy or the approach which an institution would adopt, two years later, when the policy flux had ended. In general, I would agree. But that does not meet the significance of the internal debate and the debate between NE and DEFRA for the way in which NE has approached these applications over a number of years, which reflected and contributed to what actually happened. This goes far beyond stray and informal comments in an internal debate.

158. The difference in treatment of applications for raptor licences compared to those for other species is stark and not denied. The manner in which the difference in treatment is given effect is a routine practice, properly called a policy. This draft policy fits too closely what in fact NE did on these applications for the thinking behind the policy not to have become its policy, but undisclosed. That policy was in reality partly disguised by the reference to the application of the overarching general policy to all applications. A statement that the general policy was to be applied with particular scrutiny for unusual applications would not have alerted any one to this approach. The true and full picture was not spelt out, but instead the Claimant had a partial and misleading picture.

159. Disclosure of the true policy setting out the true differences between the way in which buzzard applications had to be evidenced and proved and the way the other 10000 annual applications were to be evidenced and proved, along with the general licences and cormorant policy, would have helped the Claimant prepare his applications to meet what NE actually was going to do, rather than waste his time in hopeful but in reality doomed applications. It could have enabled the Claimant to make a case for an exception or to have challenged the lawfulness of the policy from the outset. The actual policy was not made public; NE and DEFRA would have been only too well aware that a policy statement of how it actually approached buzzard applications would be controversial whatever it said. It was unlawful for NE to reach its decision on the Claimant's application on the basis of its undisclosed policy, purporting to do so on the basis of a policy stance, at least to the NGO, consisting only of the general policy, even read with Ms Ward's letter to the NGO of 21 September 2012. In my judgment, its decision falls to be quashed on that ground.

Taking account of public opinion

160. I consider next whether NE did take account of public opinion, an admittedly irrelevant consideration. Again the starting point is the acknowledgment by NE that it did adopt a different approach to its consideration and scrutiny of buzzard applications and in particular of those involving predation on livestock. But the Claimant contended, and NE denied, that in fact the reason for the higher evidential threshold and stricter approach, was the opinion of some sections of the public, spoken of sometimes as "political and cultural" considerations, which really meant the opinion of some sections of the public that licences should not be granted for shooting or other control of raptors to protect game birds, which were shortly to be shot for recreational purposes anyway.

161. Mr Tromans said that it was clear that the applications were controversial, the NGO and RSPB were threatening legal action if the outcome went against their interests; there was a great deal of public interest and all of that merited greater scrutiny. That was not unlawfully taking account of public opinion in the outcome. Such an application was a "novel application type for a controversial activity", which could set a precedent, and was highly important with wide significance. It was determined by a Director because of the novel, contentious or politically sensitive issues involved, as NE's system of delegation required.

162. Mr Maurici contended that that did not represent the true position because of the documents internal to NE and passing between NE and DEFRA in 2012. The "political and cultural" considerations had previously led to the adoption by NE of the higher evidential hurdle, and stricter approach, which went beyond merely a greater scrutiny. Licences for shooting birds which evoked no great public interest or sympathy, despite a worse conservation status, were and continued to be routinely granted. It was inherent in Mr Tromans' argument that if the public were not particularly interested in some species of bird, an application to shoot it would be granted more readily than in respect of a species which the public favoured. That was in reality taking public opinion into account as a factor in the decision –making.

163. I accept Mr Maurici's submissions on this aspect. The public controversy which the decision on the application would generate does in my view entitle NE to approach it with care, but examining the basis for a grant and a refusal with *equal* care. There can be no objection to the decision, unusually, being made at Board or Director level. But the outcome should not be affected by whether the issue is publicly controversial.

164. What has happened here, however, in my view went beyond careful consideration and a higher level of decision-making in the hierarchy and directly affected the substantive outcome of the application. NE accepts that it has adopted a much more demanding approach towards the grant of licences for the control of buzzards or raptors than it has for the control of other species because of the strong public controversy which a grant would generate. NE's demands for evidence of a higher quality, and for far more factors to be covered by that evidence, were a response to perceived public opinion about raptors and game birds. As Mr Maurici said, if the species were not one in which members of the public had any great interest, this high level requirement simply would not arise. Requiring an applicant to prove so much and on that unusually high quality of evidence plainly puts a significant barrier in the way of a grant. It does affect the substantive outcome, and does so because of public

opinion, adverse to the grant. The effect of the public controversy has not been to make NE scrutinise with special care what decision it should make on the application; it has been to make it examine with special care whether it could justify granting a licence. The scrutiny is not neutral in effect but weights the decision making process against the grant of a licence. The grant but not the refusal of an application would be unprecedented. It is to the evidence for a *grant* that this level of scrutiny has in fact been applied. It is the public opinion adverse to the grant which in reality affects the outcome. It has in effect been taken into account.

165. The justification for the refusal has not been examined in that same way, in particular, the evidential basis for supposing that the shortcomings, as NE saw them, in the application of alternative methods, was likely to be of any significance, and the reality of any other cause of the increase in poult mortality at the level experienced, or for the decline in the overall business after four years of applications. Nor did NE consider the impact on the material produced by the Applicant or the manner in which it had accepted factors as resolved, only to change its mind later. NE did not go through all its previous decisions on this Claimant's applications and explain why on a number of factors it changed its mind, requiring further evidence, nor did it consider the practicalities of obtaining that evidence. Issues of this sort had been raised by NE officials in relation to the draft policy; but those critical comments were not considered. NE did not deal with the points made by the Claimant about the problems which diversionary feeding created in drawing in buzzards near to the pens, nor about the problems of a gamekeeper shooting towards buzzards to scare them, especially in his case where he was under some surveillance as a result of NE disclosing his name to the RSPB, and his being pilloried in consequence on raptor protection websites. Every single aspect of the demanding scrutiny, because of public controversy, was directed at whether a grant could be justified. The public controversy existed because buzzards are a common species which some members of the public think should not be shot, or shot for this reason, whereas a licence would have been granted on this evidence for shooting any other species of equal conservation status to which the public was indifferent. The swift about face by DEFRA on the research project showed NE the clear direction in which the policy wind blew. There is no evidence that refusals of a licence have led to the hostility of public objection which the groups opposed to grants had demonstrated in their response to a research project.

166. The purpose of the more demanding approach was not to put the grant of application for buzzard control on the same basis as other species. In my judgment, it was a reflection of the "political and cultural" considerations, that is, the vocal opposition from some members of the public to the control of raptors to protect game birds. These are the factors which NE thought might allow for a policy in 2012 to treat buzzard licensing applications differently from those for non- raptor species. Mr Tromans said all that was over and done with in 2012. I disagree. Those factors have not gone away, to be ignored; they have continued to play a part in the decision-making and with the same effect, albeit termed by NE as reasons for greater scrutiny. The true issue about the level of evidence required for raptor applications compared to others was never resolved; the same practice continued. In reality NE continues its pre-2012 and very different and more demanding approach to the grant of a licence to kill birds of one species than another and continues it for the same reasons as underlay "political and cultural" considerations, that is public opinion is in part hostile to the grant. In reality this involves taking public opinion into account as before. Whatever

it is called, the standard of proof required for a grant is different, and so therefore is the outcome, because account is taken of public opinion.

167. Public opinion was unlawfully taken into account. I would also quash the decision on that ground.

Inconsistency in the application of policy

168. Mr Maurici next contended that NE was inconsistent in its application of DEFRA's general policy, whether in pursuance of an undisclosed policy or not, and whether or not NE unlawfully took public opinion into account. The inconsistency lacked a lawful justification and so was random, arbitrary and irrational. The legal framework was in each instance the same.

169. Mr Maurici submitted that this unlawful approach was demonstrated by (1) the grant to the Claimant of licences in 2013 to shoot herring gull (a red listed species and so with a considerably more troubling conservation status than the green listed common buzzard), and great black backed gull, (amber listed), all with the same legal protection, but in respect of which NE did not require the exhaustive use of non-lethal methods; (2) the less exacting cormorant policy, (cormorants are also green listed), which does not require the exhaustive use of non-lethal methods, permits shooting where serious damage "is likely to be caused", and accepts that direct evidence alone of cormorant damage may be extremely difficult to obtain and so inference from indirect or circumstantial evidence is accepted; there is no requirement for individual predators to be identified and killed, rather it is taken as reasonable to assume that shooting them will reduce the level of damage; (3) the various internal documents and exchanges with DEFRA set out above, in particular explaining NE's concerns about the different evidential standards it deployed as between raptors and other species, which was difficult to justify without an explicit policy justification; no policy was forthcoming but NE's practice, and DEFRA's outlook did not alter; the different approach or policy was institutional or systemic within NE; the quality of the evidence on the Claimant's applications was often acknowledged as higher than would be necessary for the grant of a licence to shoot species of an equal or higher conservation status; (4) the sequence of decisions and conclusions on the Claimant's applications, and the high level at which they usually had been taken, with recommendations in Technical Assessments being overruled on three occasions, the only three occasions when that had happened.

170. Mr Maurici also developed this last point as part of the related contention that the different decisions on the Claimant's five applications themselves showed an unlawful inconsistency. I deal with that as part of ground 4.

171. Mr Tromans submitted that NE applied the same general management policy to all applications for licences. No substantively different test or criteria were applied, notwithstanding its different approach to buzzard applications. All Mr Cooke's reasoning, and that of the reviewer related to the application of the published policy tests. The application was unusual. Therefore NE applied "particularly careful scrutiny" to its assessment of whether DEFRA's policy criteria were met. It was lawful for the level of scrutiny of an application to vary with its routine or unusual features.

172. Mr Tromans pointed out that this particular part of the WCA was concerned primarily to protect, not species, but individual birds. That justified careful scrutiny in relation to individual birds, as here. Species differ in their life span, breeding habits, including ease of breeding, feeding habits, and responsiveness to various deterrents. Differences in the circumstances of species, and the reasons and evidence supporting the general licences and individual applications, justified the difference in approach. There were already general licences for some species and specific policies for others, such as cormorants. For buzzards there was no specific policy, no detailed research and no long-established practice of shooting them. Despite comprehensive protection, the common buzzard was only recently re-establishing itself in parts of England; it was not routinely controlled and NE's knowledge base was incomplete.

173. Decisions on applications to shoot herring and great black backed gulls were made with the benefit of a "well-established and long-standing practice" permitting the management of common species, which, until the WCA, had not been subject to control. They were then subject to a general licence because of the general consensus that they could cause serious damage justifying controls, and because of knowledge as to their resilience. Despite the shooting, their numbers recovered. The specific cormorant guidance was based on a "very significant body of scientific research on the impact of cormorant predation on fisheries."

174. I accept that there are differences between species, circumstances, and NE's knowledge and the level of research available to inform NE's decisions on particular species. I accept that unusual applications, which these five were, warrant greater scrutiny or care. I accept that NE was entitled to consider these applications at Director level, and to disagree with Technical Assessments. Those facts cannot of themselves show any unlawful inconsistency. But the difference in approach to the grant of general licences or pursuant to the cormorant policy or individual applications in respect of birds of equivalent or higher conservation status is very marked, and itself warrants some careful scrutiny, in the light of the preceding policy debate with DEFRA, the application of a power which transposes the balanced approach of the Birds Directive, which includes balancing leisure pursuits with wildlife conservation, and its possible impact on the Claimant's business**.** I regard that as consistent with *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, Beatson LJ at [37] on how *Wednesbury* principles can accommodate a more intensive review in Aarhus Convention case, which this is, as I explain later. But Aarhus case or not, the lawfulness of the decision in this case warrants careful scrutiny.

175. First, whilst Mr Tromans is right that the WCA is primarily concerned with the protection of individual birds, that cannot justify any difference in approach to the grant of licences. Precisely the same legal framework applies to those birds in respect of which no individual consideration is given at all, under the general licences, or under more permissive approaches, as in the cormorant policy, or so far as I can tell in the grant of licences to the Claimant other than for raptors. Indeed this contention highlights the difference in approach without showing it to be justified. Second, if the birds are considered from the point of view of their species, NE's distinction between species is not based on their conservation status. That is the obvious basis however for a distinction between species for the purposes of this Directive and Act.

176. Third, whilst species obviously differ in a number of ways as NE states, NE has not shown what differences underlie its different approach to buzzards, or other raptors, from other species, save for the difficulty of diversionary feeding for cormorants, and perhaps other fish eating birds. No other relevant difference specific to buzzards or raptors, in relation to life span, breeding, or mortality has been relied on. Whether seen as individual birds or species, the contrast between the grant to the Claimant of licences to shoot herring and greater black-blacked gull and the refusal of the buzzard applications lacks lawful and rational justification. Indeed, to hark back to the previous ground, it is only explicable on the basis of public opinion, as the 2011-2012 debate suggested. A similar approach to applications for any other species was a rarity, (swans might be similarly treated), Board level decisions (including on non-avian species) were rare, and the overturning of Technical Assessments show this to be an uniquely, or all but uniquely, a buzzard or raptor approach.

177. NE says that buzzards, persecuted in the past, had recovered after decades of care to the population levels and geographical spread they now enjoy. I do not see how the fact of past persecution, and recovery to the levels now attained, with its spread across the UK, can warrant an approach different from that adopted towards licence applications for the control of other common birds with the same conservation status. I see in that comment more a reflection of NE's awareness of the fact that some public opinion would be strongly adverse to any shooting of buzzards to protect game birds. The application was for the shooting of a small number of birds, and no one has suggested that that could harm the species, even very locally. Of course, it would harm individual birds, but NE licences that on a considerable scale already, consistently with the WCA and Directive, and without specific application or justification. NE's argument does not relate to or justify the distinction it draws to refuse the licence here.

178. NE's various observations in the papers show that it considered buzzards to be intelligent, adaptable, partly territorial birds, which became readily accustomed to changes in deterrence, and were obviously likely to predate on nearby food sources, such as pheasant poults, which were of prey size for the maturing young in July, August and September to learn and practise predation. There is nothing in those points said by NE to warrant its different approach.

179. Fourth, I did not find NE's reliance on its lack of knowledge about buzzard predation on poults to be a rational justification. I accept that NE knows little about this topic; but it cannot therefore claim any real expertise on the point. I accept that it has, by contrast, a significant body of research or experience in relation to other species the control of which it readily licensed, and to which Mr Maurici drew attention. But, as Mr Maurici pointed out this argument is circular: NE's attitude in effect requires the Claimant to prove without licensed disturbance or control of buzzards what the effect of licensed control or disturbance would be. The Claimant, the NGO, NE and DEFRA had all been prepared to co-operate in research on the effect of buzzard predation and counter-measures, research which it appears would have involved some licensed disturbance of the birds. DEFRA changed its mind, shrinking from some RSPB-led public opposition to the grant of licences. DEFRA research, with licensed disturbance or control, could have informed or resolved the debate, but that route is closed. It covered its appeasement by promising to come up with some alternative research; it did not pursue the project it later proposed for want of stakeholder

funding. But neither DEFRA nor NE was prepared to fund the research. I find it difficult to see how NE rationally can still positively rely on its own want of knowledge to refuse applications. Neither DEFRA nor NE actually say that the Claimant, or an applicant for a licence to control buzzards, should do all that research, nor has NE suggested how that could be done or done with a reasonable use of the Claimant's resources, nor why some form of general research should be carried out to prove that buzzards predate on poults when that appears not to be at issue as a generality.

180. In the upshot, the effect of NE's overall approach means that it should refuse all buzzard licence applications, until research has been carried out on the effect of granting licences which it will refuse because it does not know the effect. If it is extensive knowledge of the effect of shooting cormorants which permits the much more relaxed cormorant policy, it is irrational to refuse licences which could enable knowledge to be acquired. It is not reasonable to require the Claimant to undertake research on the general level of buzzard predation on poults or on what constitutes serious harm in the context of other shoots; his applications have to be judged on their own material. Some shoots may not suffer from buzzard predation because buzzards are killed without a licence, which would not be easy to research and quantify anyway. The justification for the inconsistency based on a want of research is illogical and unreasonable.

181. The cormorant policy, less exacting in relation to exhaustion of non-lethal methods, non-identification of specific birds since killing a large number annually would reduce predation, and in the absence of need for direct evidence of cormorant predation is said to be based on research and consensus. Non-lethal methods, such as diversionary feeding, may be impracticable for fish eaters rather than more general predators. The acceptance that cormorants kill and eat fish, does not appear to be matched by a consistent acceptance in NE that buzzards do more than just scavenge dead poults, but kill them or scare them to death. NE appears to accept that buzzards killed or scared poults, saying that that was only to be expected, although at other times it appears to doubt that. There was no explanation of why the general approach to the inference of cormorant damage from indirect and circumstantial evidence should not also apply to buzzards; its acceptance at least in early decisions, that the Claimant's control of other causes of poult mortality showed that the increase in poult deaths could only be due to the increase in the number of buzzards in the vicinity of the release sites, would put buzzards into the same category as cormorants for that aspect of the policy.. There was no explanation, by reference to resilience or breeding difficulties and cycle, of why cormorants could be killed in large numbers annually, yet a licence to control a small number of buzzards would be refused if it had to be repeated with larger numbers locally, provided that its local conservation status were not put at risk- if that local status is the right test. However, if this point stood by itself, I would be reluctant on the state of the evidence to hold that NE was acting inconsistently and unlawfully. But it does not stand by itself. The cormorant policy offers a marked contrast, unexplained apart from a general comment or two, and adds grist to the mill of Mr Maurici's argument.

182. NE's reliance on a "general consensus" about certain species and the harm they do, is either a reference to actual knowledge or is to a reference to public objection and controversy, in reality taking into account public opinion about the desirability of

protecting a particular species. The general consensus, if based on knowledge, is reached as a result of experience in controlling those species. I have dealt with actual knowledge and experience in dealing with research. What is left of the absence of a general consensus for buzzard control is the element of hostile public opinion, which contrasts with other species the control of which no one seems to mind about much.

183. NE argued that greater scrutiny was required because the grant of a licence would set a precedent. There is force in that point, to the extent that the issues which arose, the nature of the evidence available and required all had to be considered for the first time on the first application. That greater care is what was avowedly given to the first application. The concern of NE however was not with precedent as such because that would arise whichever way the decision went. Its concern was with the grant setting precedent not with a refusal setting precedent; it uses the absence of grant and experience gained or of a practice of granting as a reason supporting continued refusals. NE does not know what would happen if it granted any of the Claimant's applications: would they be repeated in later years and even enlarged in numbers to be controlled, and would others, not currently making such applications do so? NE will never know unless it grants one or more. Its argument becomes circular, but always directed against a grant. It is irrational, out of a concern to avoid setting a precedent, to apply a test so demanding that applications cannot meet it, and must all be decided one way, which also actually sets a precedent. There was no evidence of gamekeepers queuing up to seek licences; after all it is the rarity of these applications which NE relies on to justify its approach. It may be that, as hinted at by the Claimant, some gamekeepers find it easier to take lethal measures without a licence. It may not be a general problem but is one which a small business finds very difficult to manage. If so many application were made that their grant would put the conservation status of buzzards at risk, the applications could be refused on that account conformably with the Directive and Act. The precedent argument operated only one way and went beyond the care to be applied, instead directly affecting the outcome, and in an irrational manner.

184. All this has to be set in the context of the DEFRA/NE 2012 debate. This debate may have been concluded but the real problem was not resolved. The differing evidential standards continued to be applied, and without policy justification for what that would have been worth. The differing evidential standards were never disavowed; they were still applied. Buzzard applications were acknowledged to be supported by evidence of better quality than for species of similar or higher conservation status, but were still refused.

185. In my judgment, although there are differences between buzzards and other species, and careful scrutiny of the applications was justified, the difference in the application of policy was so inconsistent as to be unlawful. The justifications, as expressed by Mr Tromans and Ms Ward, do not amount to a rational justification, and individually are illogical or unsupported by evidence. They do not amount to a rational basis for the nature and extent of the differences in approach. These are essentially like situations, where the same legal and policy tests apply, where the conservation status of the species is the same or better, where there is no question of the grant putting that at risk, and the evidence is of a quality which would for other species lead to the grant of a licence. The substantial reason for the difference in approach was some hostile public opinion, as NE recognised long ago, to which DEFRA shut its eyes.

186. The inconsistencies between the refusal of the Claimant's applications in relation to buzzards and their grant on his applications in relation to other species supports this conclusion. It is also reflected in ground 4 and whether NE's approach has unlawfully made the application of the derogation nigh–on impossible, undermining its purpose, and failing to use it for the purpose for which it was intended.

187. Inconsistency, if any, between the way in which buzzard or raptor applications were dealt with in relation to air safety and for the removal of buzzards predating on chickens at one farm, is not significant. Air safety raises quite different risk issues, and the importance of the chicken farm application is more that it demonstrates that a very strict approach is applied to buzzard applications.

Ground 4: inconsistency in the decisions on the Claimant's application.

188. I see this really as an aspect of the arguments about the specific decision, which fit better under this head, along with unreasonableness and rendering the derogation nugatory. The theme of Mr Maurici's contention on inconsistency between decisions was that issues which appeared not to be at issue or to have been resolved in earlier decisions were opened up in later ones.

189. Mr Tromans' contention was that there was a constant theme that the alternative measures had not been tried properly or adequately. There had been no inconsistency in the decisions made on the Claimant's applications: only once had the Technical Assessment recommended shooting and that was only at one site, (April 2013). The decision and review gave clear reasons for departing from the recommendation. All decisions were that no licence to kill should be granted. The requirement that all practical non-lethal alternatives be shown to have failed was common to all the decisions. There had been no legal challenge to any of the earlier decisions. The only difference between the Technical Assessment in 2014 and the decision had been over licensing the capture of buzzards. The differences had not been over primary facts but over the inferences to be drawn.

190. Inconsistency between decisions is not of itself unlawful. It may however show that a material consideration, in the form of an earlier decision and its reasoning, has been ignored. The absence of a reasoned distinction, even if only that the decision-maker changed his mind, may mean that no rational basis for the difference has been shown, leading to the inference that the later decision is irrational. The principle that like cases should be treated alike unless they can be shown or readily inferred to be different cases or similar cases treated differently for good reason, is an established principle of lawful public decision-making. The more readily it can be seen that decisions are turned on their own facts, the easier it is to show that a close scrutiny of cases for similarities and differences is not warranted since it could not show that they were arbitrary. Where the decisions are made in response to the same essential applications by the same Claimant on the same locations for the same reasons, different decisions may require specific justification by reference to the earlier decisions if the outcome is not to be seen as arbitrary. Arbitrary decision-making is not confined to the difference in actual outcome, but also extends to the way in which conclusions on ingredients of the decision may differ arbitrarily as between one decision and another, with the earlier conclusion ignored, or with the difference unexplained.

191. I view the changes in NE's positions this way**.** The 2011 decision was reached after a "much more detailed assessment of this application" based on the draft and final Assessments than would be the case for routine applications. This was because of the novelty of the application and the controversial issues raised. NE appears to have refused the licences for one reason only: there were a handful of additional techniques the Claimant should try, in addition to the wide range he had already put in place. The decision did not appear to take issue with any other factor, including that serious damage was caused by buzzards local to the release sites. All issues save the fullness of the use of alternative methods seem to have been resolved positively for the grant of a licence. The review before decision suggested that nest destruction at the release sites would be considered if those alternative measures did not work; but the case was strong and had come close to meeting NE's criteria. The final Assessment had raised trapping for removal during the breeding period and nest destruction as likely to have a beneficial effect on predation. Shooting a single buzzard at each site would not have much effect on predation levels, but targeting a few persistent individuals would be likely to limit predation to acceptable levels.

192. On the 2012 application, the decision was primarily based on the need for further alternative measures which did not require licensed control: but it now referred to more than just diversionary feeding, adding improvements to ground cover and woodland structure, with detailed recommendations for each site. Although those aspects were being looked at more strictly, neither assessment or decision took issue with the quality of the evidence in support of the basis for the application, that buzzard predation, from buzzards in nest sites associated with each release site, was causing the significant damage, rather than other predators or causes of morality. There was no more than a question over whether the damage was serious; but NE accepted that returns were still well below the norm, and that there was a high level of evidence that buzzards were doing the damage. Chiefly, the basis of refusal was that a different reflective tape should have been used, and diversionary feeding had not been tried in the manner and time recommended; ground cover should be improved and at certain sites woodland management should be undertaken, following detailed recommendations at each site. NE held out the prospect of a licence for the removal of buzzards at two sites if the situation did not improve. There are differences but nothing which could be called an unlawful inconsistency.

193. The first 2013 application covered three shoots, and was refused because alternative methods had not been tried consistently or quite as recommended by NE. Again the buzzards were reported to involve one active buzzard nest at each pen with between two and five buzzards at each. The Claimant's estimates of returns were reasonable, the return was low and at one site declining. There was some criticism of the method of diversionary feeding, although the criticism did not answer the problems of diversionary feeding experienced and explained by the Claimant. The Assessment accepted that the evidence provided comprehensive support for the application, with a significant problem at some four sites, with losses there unlikely to be due to a cause other than buzzard predation. The effect of improved implementation of counter-methods was not likely to be great. The Assessment did not take issue with cause, source of the birds, seriousness of damage, quality of information and evidence.

194. But the decision for the first time queried whether there had been proof of serious damage *caused* by buzzards, since here was no body of published evidence or general

acceptance that buzzards caused serious damage to game birds. I note that NE did not suggest that there was contrary evidence, and at times has accepted in dealing with the Claimant's applications that buzzards are general predators who will predate on poults if available for predation. Nor did NE suggest explicitly that the absence of general evidence meant that it was not happening in the light of the actual evidence at the specific sites. However, NE also said, for the first time, that it could not be confident that buzzard predation was the main cause of the decline. There are notable inconsistencies, but I see that as more an evolution of thinking.

195. The second 2013 application was rejected because it was too early to assess the effects of nest destruction and habitat improvement; at another there was no evidence yet of serious damage. This adds nothing in terms of inconsistencies.

196. The most striking feature about the Technical Assessment of the 2014 application is the use of the language that it is a theory, albeit one "largely agreed as plausible" that removal of a small number of buzzards from the area of the pens would significantly reduce buzzard predation. The earlier Assessments and decisions had not described the applications as resting on a "theory" however plausible, but had accepted what the Claimant said especially in the light if what could be seen on site visits. "Plausible" is an unfortunate word since it has two shades of meaning, one of being generally acceptable or commendable, the other closer to seeming sound while tending to speciousness.

197. This language was then very obviously picked up in the decision, whether or not intended by the Assessor to be so apparently dismissive of what to the Claimant and generally to previous Assessors had seemed obvious. This created a significant gap between the evidence provided and now required; proof was now required that specific birds caused the problem which would be the birds licensed for control. The identification of the birds, including when the destruction of the nests was licensed, had never been an issue: the predatory buzzards of significance were or were likely to be the ones nesting in woods adjacent to release sites. This requirement was also accompanied by the statement that if specific birds could not be proved to be the significant predators, with the possible implication that it was a larger number of buzzards which were predating on the poults, shooting a larger number, even if they were causing serious damage could have an effect on local conservation status, for which NE implies, a licence would not be granted.

198. It is also striking how the seriousness of the damage done by buzzards became an issue. A number of factors were said to contribute to the difficulty of running a viable shoot. But the seriousness of the damage caused by buzzards had hitherto been generally accepted by NE, even though not always nor for all of the shoots managed by the Claimant. There was a clear change of stance here too, even though it had never been NE's explicit case that an alternative solution could be satisfactory even if the Claimant could not in reality implement it within the scope of the small business he was operating. Mr Tromans confirmed that NE accepted that what was reasonable for the Claimant to produce by way of evidence or to undertake by way of alternative measures was not being measured against what might be possible on a large shoot. Nor was NE saying that if the Claimant could not afford in time, manpower or cost, what a larger shoot could afford, that was his problem, since the business ought to be run differently so that those measures could be afforded, or ought not to be in business in this way at all. Protection through the licence system was therefore available to

those who took the reasonable non-lethal or non-licensable counter-measures, which they realistically could. Nonetheless, NE had also commented, under the heading of whether there was a genuine need or problem, that a number of problems made it difficult to run a viable shoot, one of which was "poult loss", but also limited time spent at each release pen by the Claimant. This was also clearly raising the question of whether serious damage had occurred and whether its seriousness had been caused by buzzards. This by now is very different from the 2011 and 2012 decisions. They are plainly inconsistent in how crucial factors were determined, although not so markedly different in outcome.

199. For all of this, however, I cannot conclude that there is an unlawful inconsistency in the decisions themselves. NE's thinking is evolving to a point where the inconsistencies are clear. There are clear changes of view and inconsistency of approach on various aspects in the decisions but that is not enough to make the decision challenged unlawful. Mr Tromans' points on where the decisions were consistent have some force. There is some consistency in NE's criticisms of certain aspects of the deterrent measures used. There is also some consistency in the absence of any assessment of the difference which any change it required would make in view of the doubts expressed by NE's Assessors at times over whether the Claimant's omissions were of any significance. There was also consistency in NE's disregard of the counter-arguments put forward by the Claimant in relation to the effect of diversionary feeding attracting buzzards and shooting to scare involving personal risk.

200. The fundamental reason however why I cannot conclude that the inconsistences are unlawful however is because it is not contended that the 2014 decision was reached in bad faith, or to give effect to a pre-determined stance that no buzzard control licence to protect game birds would be granted. The decision was made therefore in good faith in the conscientious exercise of NE's powers, whatever else may be wrong with it. The decision-maker should decide like cases alike absent a rational justification for deciding them differently. There is no principle of public law which prevents a public body from changing its mind or developing its thinking about the same evidence, and so answering applications differently, unless the basis for doing so is simply arbitrary. It is entitled to decide each application on the merits and evidence as it judges them to be. Indeed, that is what a public body is supposed to do, even if it means changing or developing its thinking, however deeply frustrating and damaging to others that may turn out to be. The Court deals with the law and not with maladministration.

201. It seems to me sufficient here for the 2014 decision to have been a decision the good faith of which on its merits, such as they appeared to be, is not challenged, differing though it does quite strikingly, in some respects from earlier decisions, and most notably from the 2011 decision to which such careful assessment was avowedly given by NE.

202. It is not said that there was an unlawful failure to consider the earlier decisions, or a failure in a duty to give reasons for not following the same lines on various relevant factors, or a breach of procedural fairness, not alerting the Claimant to the issues which were now arising, or in some legitimate expectation that all that the Claimant needed to was to put right the failings in the previous applications. The new issues are not irrelevant; the questions asked in relation to the evidence and what it shows are not of themselves irrational. In those circumstances I cannot conclude that the decision was arbitrary or random.

203. The inconsistencies are however relevant to the reasonableness of the decision in 2014, and to whether the eventual approach, changing as it did, had made the application of the derogation so difficult as to undermine its purpose and to render it largely nugatory in relation to buzzards. Indeed, the effect of the inconsistencies is not so much that the decisions are arbitrary, but instead are quite predictable in outcome, albeit not by the same route or a predictable one.

Ground 4: unreasonableness

204. Mr Maurici accepted that the relevant standard of review for environmental decisions was the *Wednesbury* standard; *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174. But that was because Beatson LJ had recognised [37] that the *Wednesbury* standard permitted variations in the intensity of review to reflect the nature of the interests affected. This was by way of answer to the concerns of the Aarhus Compliance Committee that *Wednesbury* did not meet the required standard of review for substantive and procedural illegality. An intense form of review was required here because, Aarhus claim or not, the decisions of NE affected the Claimant's livelihood directly, without right of appeal, and NE's policy required that licences should not be unreasonably withheld. But Mr Maurici also contended that even on an orthodox *Wednesbury* approach, NE's decision was irrational. Mr Tromans did not accept that this was an Aarhus claim, nor indeed that any EU point was in play.

205. I have concluded that this is an Aarhus claim, and that a more intensive form of scrutiny is justified, for reasons I come to in dealing with costs. But whether it is or is not an Aarhus case, the facts mean that the lawfulness of the decision warrants close examination.

206. Mr Maurici submitted that the conclusions, that serious damage was not proved to be caused by buzzards and that there were non-lethal alternatives which should be pursued, were irrational, in the light of the evidence, NE's observations and its previous acceptance that serious damage was caused by buzzards and that further non-lethal controls would not solve the problem. The only alternative measures which NE criticised in the June 2014 decision were the manner of diversionary feeding and the type of reflective tape. There had been no suggestion in 2011, 2012 and 2013 that those alleged shortcomings warranted refusal of the licence. Moreover, the approach adopted to the grant of a licence was so stringent as to render the application of the derogation from the Birds Directive excessively difficult and unlawful. Mr Maurici relied on the following: buzzards were common and not rare, the licences would not have affected their conservation status; the approach of NE to buzzards was inconsistent with its approach to other species; the supporting evidence was as good as or better than that which would have obtained a licence for a non-raptor species, and if the test applied to other species were applied to buzzards, then a licence would have been granted. Even if the decisions on the Claimant's applications were not unlawfully inconsistent, the inconsistencies nonetheless helped to show that NE had rendered the application of the derogation excessively difficult and unlawful. As the prospect of the grant of a licence grew, on the basis of earlier conclusions, NE "simply moved the goalposts", as Mr Maurici put it. The powers were not being used for the purpose for which they were given but rather were being used in a way which undermined that purpose, which was to give effect to the balance struck by the terms

of the Directive between the protection of wild birds and preventing serious damage to livestock.

207. Mr Tromans' essential submission was that a departure from the recommendation of the Technical Assessment did not make the decision irrational; the Assessment had been considered, and full reasons had been given for the differing conclusions. The decision was carefully considered, and supported on a review. The issue was for NE. No improperly high standard had been applied: the policy set out what the decision maker had to be satisfied about, which included being satisfied that the licensed action "will prevent the damage" and that there was no other satisfactory solution. He suggested, without submitting that this was so, that it would not "be surprising if a high level of assurance was required", albeit that no case law or legislative provision said that the issue had to be resolved beyond reasonable scientific doubt. There were numerous areas in which the Claimant's application of alternative measures had fallen short; NE was entitled to require their application as NE had recommended to him. NE was not suddenly coming up with reasons. Shooting to scare was another reasonable alternative. The Claimant could have succeeded if he had shown that at each site there were identifiable specialised predating buzzards.

208. I consider that NE's decision in 2014 was unlawful because it had made the application of the derogation in the Directive transposed into the WCA excessively difficult, so as to render it nugatory in relation to these applications. NE used its power in a way which undermined the purpose for which they were given, which was to give effect to the balance struck in the Directive and Act between the protection of wild birds and preventing serious damage to livestock. It was thereby beyond the powers given to it. NE assumed a much broader discretion than it had.

209. In my view, as the years went by and the Claimant's situation became more desperate, NE found more and more reasons not to grant the applications, and did so without ever assessing what effect any changes to the management regime would have. The closer the Claimant came to showing that a licence was justified, the more evidence was required, issues were re-opened, and new issues raised. The final review, though not of itself a decision, simply makes this unhappy trend yet clearer. Mr Tromans is right that the Claimant never persuaded any decision-maker that the implementation of alternative measures to counter predation had been wholly satisfactory. But that is far from the full picture.

210. The upshot of the sequence of applications is that no licence has been granted. The business has been finished. The evidence that a licence was necessary and proportionate to prevent serious damage to livestock by buzzard predation would have satisfied NE, as far back as 2011, in any case other than a raptor that the licences should be granted. The refusal was based on a policy, whether or not described as such, which formed the clear and regular basis for decisions on raptor applications in relation to livestock. That policy was unlawful. There are clear inconsistencies in the approach NE adopted to the licence applications on crucial issues. The language of the 2014 decision suggests strongly that NE had ceased in reality to accept the seriousness of the damage or that it was caused by buzzards. The review of the 2014 decision is very clear evidence of the way in which NE changes its mind, always adversely to the Claimant, on various important aspects. No longer was it accepted that the Claimant's control of other predators, notably foxes, was adequate. His control of other causes of poult mortality had been a powerful factor demonstrating

buzzard predation to be the only sensible explanation for the increased and significant level of poult mortality. The reviewer also wanted evidence that the "shooting effort" had not changed, which would have required evidence over a number of years, and had never before featured in any Assessment, decision or review. I find it quite disturbing that, as the problems faced by the Claimant grew, so too did the demands of NE for evidence proving what it had hitherto appeared to accept.

211. Even if the Claimant had bought what NE thought was the right type of tape, re-aligned the feeders to the specific satisfaction of NE, dressed his mannequins as gamekeepers and not in white overalls, thinned the wood where required, and satisfied every other point raised or to be raised by NE, no licence could ever be granted until he could prove his "theory" that the handful of buzzards nesting in the woods by his release sites were the buzzards primarily responsible for killing his poults rather than random overflying birds. There was no analysis as to how such evidence could ever be provided to NE's satisfaction; this was not something required for other species. Cameras had been used to prove that predation was by buzzards, not to identify particular birds, and the fact that buzzards were preying on the poults had ceased to be an issue. The Claimant's own observations chimed with what was likely to be the case: the buzzards nesting nearby were the likely significant predators. He would have had to do that without killing them or removing them, and without any research programme from elsewhere, as DEFRA had swiftly withdrawn its research proposals in the face of a hostile campaign and not pursued its subsequent proposals for general research on buzzard predation and protective counter-measures. He would also have had to overcome the problem that this was a precedent, and it is difficult to see that that could be done without the grant of some licence.

212. He also had to be able to anticipate what new point NE might come up with to show that its anxious scrutiny of the application had left it unsatisfied, such as showing that the fox population had declined rather than that his shooting of foxes had declined within a static population predating on his poults, and requiring proof of consistency of "shooting effort" over a number of years. The real implication of the decision and the review is not that the Claimant should have applied for some lesser form of control. As the review pointed out the specialised predator theory would apply to live capture as well. The logic of NE's position is that no licence could be granted at all.

213. Mr Tromans said that all the Claimant had to do was to prove his "theory" that there were specialist predators, and prove that he could identifiably control those and no others. I cannot accept that. I am afraid that the approach of NE simply does not support the assumption behind Mr Tromans' contention, that what is said on one application will remain the position on another. The review of the 2014 decision came up with at least two new matters, not part of the decision being reviewed, on which NE would require satisfaction in the future: the level of fox shooting, and of pheasant "shooting effort", which would have to be over a number of years to have any value. The Claimant, if still in business, could not have afforded to ignore the issues raised by that review, which go to the question of whether any buzzard control at all is justified. NE cannot credibly hold out the prospect of its steering a consistent course, albeit that the destination is overwhelmingly likely always to be the same.

214. NE has also not explained how this theory could be proved, or more pertinently proved to its satisfaction and, if proved, then implemented in such a way as to kill the identified birds. Nor had it assessed the resources required for that, in the light of the previous use of cameras, and the acknowledged difficulty in proving predation by a specific bird, not just for cormorants but also for buzzards in the comments on the draft policy by its own staff. All of this has then to be carried out for an application by a single gamekeeper in a small way of business, seeking to protect it from serious damage by a common bird. After all the assumption behind Mr Tromans' contention is that buzzards are causing serious damage to his livestock.

215. All the Claimant could do to protect his business from serious damage by buzzards would be to implement mitigation measures or variations to measures for which no licence was required. NE maintained its stance on the precise mitigation measures required, regardless of any evidence about specialised predators, without support from any research evidence or experience elsewhere, at least none referred to in any decision, or from any attempt at assessment- except for a vague reference to some experience in Scotland on diversionary feeding, where no licences to control buzzards were granted as a matter of policy. NE has put forward no evidential basis for its view that precise compliance with its requirements would make any significant difference to the level of buzzard predation.

216. I also conclude that if the specialised predator theory were not proved, NE would refuse licensed control of larger number of buzzards, even if that would prevent for the year serious damage to livestock- though I am not persuaded that that would necessarily be a lawful approach for NE to adopt. I so conclude from the approach which it implies it would adopt, which would be all of a piece with what it has decided so far. The derogation has been rendered excessively difficult to operate, and the decision is unlawful.

217. The reasons in combination which I have given for holding that the asserted difference in treatment of buzzard applications and those for the control of other species had a rational justification, particularly those concerning the absence of research and the fact that a grant would set a precedent, and for concluding that NE had made the operation of the derogation excessively difficult also persuade me that even on a conventional approach to Wednesbury, this decision was not rational- unless an element of hostile public opinion were legally relevant, but it is not.

218. NE's decision is quashed on this ground as well.

Ground 1: failures in dealing with the possibility of trap and removal of live buzzards

219. The Claimant had not applied for a licence to do other than to shoot buzzards. But he contended that NE had not considered lawfully whether a licence should be granted for the trapping and removal of live buzzards, as recommended by the Technical Assessor in three cases. In my view, the argument is really whether the refusal of such a licence was fair and lawful.

220. Mr Maurici argued that Mr Cooke had failed to take reasonable steps to acquaint himself with relevant information necessary to decide the issue correctly: *Secretary of State for Education v Tameside MBC* [1977] AC 1014, at 1065A-B, Lord Diplock. Mr Cooke had raised questions about the practicalities of live trapping but had not sought

answers either from the Technical Assessor who had recommended it, or any one else, including the Claimant. The decision was also unfair since it led to the refusal of a licence on a basis which the Claimant had had no opportunity to address, including his willingness to fund the cost of trapping and removal, where his livelihood is at stake. Moreover, as the basis of refusal related to the implementation of the licence, the licence should have been granted subject to conditions governing those aspects, which it would have been for the Claimant to comply with if he decided to use the licence. He would not have been obliged to take it up. The review of Mr Cooke's decision dealt with this inadequately.

221. Mr Tromans supported the reasoning of Thirlwall J in refusing permission: the Claimant was challenging a refusal of a licence which he had not even sought. Natural justice did not require NE to give him the opportunity to provide evidence in support of an application he had not made. Allowing the Claimant to deal with this issue would not have led to the grant of a licence to kill. Whether NE considered the licensing of less harmful control measures, was a matter for its discretion. Although he accepted that NE did on occasions grant a licence in a form different from that applied for, that course was not adopted here because NE did not regard the alternative as viable. It would have not been possible to identify the birds to be trapped any more than it was possible to identify the birds to be killed. The time allowed by the NGO for decision would not have permitted the viability of the option to be addressed adequately anyway. It would have been open to the Claimant to make an application for a licence for live capture, addressing the issues which led to the rejection of that option.

222. In my judgment, this case is not about whether NE had power to grant a licence to trap and remove buzzards on an application for a licence to kill. This is clearly not a matter of jurisdiction. It is not at issue but that NE has power to grant a licence for live capture on an application for a licence to kill, as a lesser alternative, and NE does indeed exercise that power where that fits the circumstances. So the fact that a particular form of control is applied for does not limit the powers of NE to grant a licence for something less. This ground cannot be answered simply by saying that there was no application for a licence for live capture, and so no such licence could be granted. It is not that an application for a licence to kill includes an application for each and every lesser option, but rather that NE has power to grant a licence for the lesser form of control which it is satisfied is warranted, without requiring a further application. This is a sensible use of its powers and I would not want undue legalism to discourage it where it sees fit to use it. This is not a process in which the public are consulted, and could be wrong-footed by the grant of something less than that applied for. As the statutory scheme requires consideration of the effectiveness of alternatives, which could include non-lethal measures, it would be perverse, as Mr Maurici submitted, and without foundation in the statutory wording or scheme, if a conclusion that a lesser form of control was justified meant that NE had to refuse the application and invite a fresh one. I discount for these purposes the obvious risk, if this case is anything to go by, that NE would not approach that further application in the same way.

223. This case is also not about whether NE, having decided to refuse a licence to kill, without considering a licence for a lesser form of control, had breached some public law duty to consider the grant of a licence for a lesser form of control. That is not

what happened. NE did consider whether or not to grant a licence for a lesser form of control than that applied for.

224. So the case is about whether, having lawfully embarked upon the consideration of the licensing of a lesser form of control, it acted fairly and lawfully in refusing such a licence. NE may have had to embark on that consideration because of what its Technical Assessor had recommended, but the Claimant can complain about unlawfulness and unfairness in the overall decision which included the considered refusal of a licence for a lesser form of control, even though that was something for which he had not applied. He might very well have wished to apply for such a licence in the immediate future after refusal of a licence for shooting alone.

225. Accordingly, the points raised by Mr Maurici about a failure to enquire adequately and to act fairly have to be considered on their merits and cannot be dismissed by reference to the nature of the application. I draw attention to four aspects. NE's overall decision-making on the five applications left it well aware that the Claimant's small business was by 2014 in dire straits. NE's decision-making had not followed a consistent path: new requirements and evidential issues had been raised on various occasions and what had previously been regarded as settled and no longer at issue was re-opened, for example in whether serious damage existed and was caused by buzzards, and by buzzards which could usefully be controlled. The Technical Assessor had also concluded that a licence for live capture was justified, and that recommendation was being rejected. Careful scrutiny of the application is what NE said was required. In this respect, that it is not how it was dealt with. Careful scrutiny by NE of the reasons for which it was proposing to refuse was required to see if a yet further refusal of licensed control was justified.

226. In my judgment, the obvious step for NE to take in order to make a rational decision was to enquire of the Assessor, or of those, for example, who had involvement with falconers who had taken the buzzards in the chicken farm licence, or of the NGO or the Claimant, as to whether the practicalities and costs could be met. Instead, Mr Cooke, newly coming to the case, took no steps to ascertain what the costs and practicalities might be and what the Claimant's ability was to fund the relocation costs. Instead he simply relied on the absence of information, and so refused the licence. Had he made obvious enquiries, he might have agreed with the Technical Assessor. He also failed to consider the grant of a conditional licence, which would have avoided delay in the decision, and left resolving the practicalities of satisfying the conditions in the hands of the Claimant and NGO.

227. This point is very closely allied to the issue of fairness. There seem to me to have been a number of occasions on which the NE decision- maker did not ask the Claimant for his comment on a number of issues troubling NE, including some of the other issues raised by Mr Cooke, and the Reviewer, but complaint is made only about this point. Before deciding to refuse a licence application on the basis that no licence could be granted for killing *or* live capture, and where the case for live capture raised issues which would not arise in relation to killing, notably the practicalities and cost of live capture and temporary or permanent relocation, the Claimant ought to have been asked for his comments on those new issues. The decision on the licence was not just that killing would not be licensed, but also that live capture would not be licensed either. Not all of the issues were the same for those two aspects. NE did not know how he would answer them. He could not reasonably anticipate that he needed

to. It was unfair not to ask him for his comments, rather than just assuming that the practicalities could not usefully be resolved in his favour.

228. Force is added to that point by the fact that, because NE's decision included a refusal of something not expressly applied for, the Claimant would be on the back foot facing a considered refusal for what he had yet to apply for, were he to apply for that lesser form of control.

229. It is a poor excuse for unfairness to say that time, laid down by the NGO, would not permit the resolution of those issues, when NE did not even ask the NGO about whether, given the chance of a licence, time could be extended or, given a conditional licence, there was still scope for the resolution of the issues in time for implementation of the licence to provide significant relief to the Claimant. That is also the answer to Mr Tromans' submission that relief should be refused because it would be open to the Claimant to submit a further application in which he could respond to the concerns raised in the June 2014 decision. True it is that a further application could be made, but it would be against the background of an unfair but adverse decision. The rational and consistent approach would be for the decision-maker to start with the previous decision, and indeed the review. It would be unusual for an unfair decision to be left to stand because there was the prospect of a further application which could then be decided fairly. NE also knew the time imperatives for the licensed control to be effective. The requirement was for late July to August and September 2014, not 2015. The imperative was the greater because of the serious damage done by buzzard predation to the Claimant's livestock- as was generally accepted by NE, though not in its final decision and review.

230. What then of the review? The Claimant could have put forward his case on the practicalities in the review, but although he complained of unfairness, he did not put forward what he would have said to show that the practical problems would have been overcome. The review also made the point, but not the decision, that if the birds could not be identified specifically for a licence to kill, they could not be identified for a licence for live removal. Mr Nodder's letter of complaint did not add to the question of specific identification apart from saying that this was a new requirement in relation to killing, not applied to other species.

231. However, I am not prepared to decide this ground on the basis that the application for a review showed that the Claimant in fact had nothing to say about how the practicalities would be handled. I see the logic of the point that, if the identification of specific predatory birds is required before any licence for control is issued that could apply to both killing and capture, but that is to ignore the important distinction between killing and live capture and removal, temporarily or permanently. The latter would or at least could have permitted what Mr Cooke described as an unproven theory to be tested, without killing buzzards. Otherwise it will always remain an unproven theory, and disposed of in that manner. I have to assume that NE would have been open to consideration of an argument along those lines. NE had not generally treated the Claimant's view as theoretical, appearing to accept that the principal predatory birds were the birds nesting in the woods by the release sites. That is an issue which the resolution of the practicalities of live capture could have resolved. NE was prepared to grant a licence for empty nest destruction on less evidence, as it said, than it would require for shooting because the effect on the birds is obviously less severe. It might have been persuaded that live capture and removal

could be warranted on less evidence than killing. After all it is very difficult to see how else its evidential threshold was going to be satisfied. Cameras had not been deployed or suggested for that specific purpose.

232. Finally and importantly, Mr Tromans did not rely upon the review as a basis upon which NE's decision, if Mr Cooke's decision was unlawful and unfair, could have been made fair.

233. Accordingly, the decision will be quashed on ground one.

Is this an Aarhus claim?

234. For the reasons which I now give, I have concluded that this is an Aarhus claim, both for costs purposes and for the intensity of review.

235. CPR Part 45. 41(2) provides for fixed costs to be payable by the unsuccessful Claimant in an Aarhus Convention claim. Such a claim is "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission or part of it, is so subject."

236. The basis of the dispute, at least so far as costs was concerned, was narrow: Mr Tromans accepted that if NE had granted a licence and the RSPB or some other body or person had challenged that grant, that would be an Aarhus claim and the fixed costs regime in CPR45.41 would apply to it, however wealthy they might be. But because the challenge was to the refusal of the licence, it could not be an Aarhus claim. That was because the former challenge would be seeking to protect the environment, and the latter would be seeking to cause harm, albeit one which was permissible under EU and national environmental law. A refusal of a licence would not contravene provisions of national law relating to the environment.

237. The objective of the Convention in Article 1 is stated in this way: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provision of this Convention."

238. The definition of "environmental information" is very broad, and what it means for "environmental matters" is equally broad, and plainly covers decisions on applications for licences to shoot birds for whatever permissible justification.

239. Article 9 (3) provides for access to justice in these terms: "…each Party shall ensure that, where they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." The word "contravene" does not mean that the Article 9 (3) obligation applies only where the claim succeeds in establishing a contravention; it includes a challenge founded on the contention that there has been such a contravention.

240. On the face of CPR Part 45.41, this claim falls within it. It is a claim for judicial review of a decision which is subject to the Aarhus Convention. It is subject to the Convention because the decision was made in respect of powers in national law relating to the environment - the WCA and the Birds Directive which, for the purposes of Article 9(3) of the Aarhus Convention, is also a national law relating to the environment. It is alleged that the decision contravened those powers because the decision on the licence was unlawful, including a contention that it made the available derogation nigh-on impossible to satisfy.

241. There is nothing in the language of CPR 45.41 or in the definition of "environmental matters" which could support the distinction drawn by Mr Tromans. Both sides of the controversy would be seeking access to justice in environmental matters; Article 1. Indeed, the first sentence of Article 1 contradicts Mr Tromans' argument, since the purpose of the provision is to protect the right of *every person* to live in an environment *adequate to his well-being*. That to my mind connotes that a decision striking the balance between the interests of wildlife and of a livestock farmer, whichever way the decision challenged may have gone, is a decision subject to the Aarhus Convention. Article 9(3) is to the like effect: a decision which is said to be an unlawful application of a restriction on a derogation or permissive power, is just as much a contravention of the national law relating to the environment as one which unlawfully fails to apply a restriction as required by the same national law. The Claimant is clearly a member of the public for these purposes, and the contrary was not argued.

242. There is no need for such a distinction to be implied for the CPR to make sense, and for the Aarhus Convention to be given a properly purposive interpretation. Indeed, such a distinction cannot be operated without the Court forming a value judgment, which it is far from best placed to reach, as to whether a decision would advance or harm or be neutral in its effect on environmental interests. Culling wildlife to protect other wildlife, damage to some environmental interest in the interests of renewable energy illustrated the sort of problems which would have to be resolved early on in litigation in order to decide whether a claim was within the Convention or not. That is simply not how the Convention or CPR are intended to operate.

243. Moreover, ground 4 included the contention, relevant under CPR 45.41, that the claim was an Aarhus claim.

244. Mr Tromans put some weight on the reference in *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, at [22] by Elias LJ to "significant public environmental benefits." I accept Mr Maurici's submission that that case was concerned to mark the point at which a private law nuisance claim might relate to national public environmental law sufficiently to fall within Article 9(3); it was not laying down some such test as the measure of whether a clear public law claim in respect of national environmental legislation was within Aarhus. It is conceded that a challenge to the grant of a licence would fall within the Convention. Aarhus does not provide for a further significant public benefit test for those cases which do fall within it. As Mr Maurici pointed out, it is at least one view, that properly managed gamekeeping adds to biodiversity. Raptors without prey would diminish, so a balance is necessary; licensed killing of a few might prevent illegal killing of more. These difficult judgments could not sensibly be reached early on in litigation on a costs capping issue.

245. *Miller Argent* does not suggest that there is some such public interest test generally to be applied to seeing whether public law claims fall within the Convention. Its reasoning simply does not address any such point because it was not concerned with that. Still less does it suggest that the concept of "benefit" means in some vague way that the case must allege that the protection of a particular aspect of the environment was insufficient to be lawful rather than too protective to be lawful. The Convention and CPR would be unworkable if in a clear public law claim, the Court had to decided, and decided early in the litigation whether there was such benefit from an outcome in favour of a claimant. The Court of Appeal in *Garner v Elmbridge BC* [2010] EWCA Civ 1006, [2011] 1 Costs LR 48 rejected the notion that the *Corner House* jurisdiction required a specific general public interest or importance test, and likened it in that respect to Aarhus.

246. Besides, as that decision pointed out, there is a significant public benefit in decisions on national environmental law being lawful, and therefore in their lawfulness being tested readily by individuals. The fact that the individual's livelihood or property value may also be at stake could not disapply the Convention or CPR, and there is nothing in the text of either to suggest that it does. The Convention is not just for the disinterested environmentalist or national body, but must have recognised that many individuals or ad hoc groups of individuals would be concerned with decisions which affected them personally, as it affected their enjoyment of their property, leisure, area or interests.

Conclusion

247. This decision is quashed.