Neutral Citation Number: [2026] EWHC 1812 (Admin)

Case Number: AC-2025-LON-002943

**In the HIGH COURT OF JUSTICE**
**ADMINISTRATIVE COURT**
**ROYAL COURTS OF JUSTICE**

Date: 16.07.2026

**Before**:

**MR JUSTICE RITCHIE**

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**In the matter of an application for judicial review**

**THE KING**
**on the application of**

**THE BRITISH ASSOCIATION FOR SHOOTING AND CONSERVATION**

**Claimant**

**And**

**NATURAL ENGLAND**

**Defendant**

**And**

**SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

**Interested Party**

**James Maurici KC** and **Matthew Dale-Harris** of counsel (instructed by **Fieldfisher LLP)** for the **Claimant**.
**Paul Luckhurst** and **Will Bordell** of counsel (instructed by **Natural England** in house legal team) for the **First Defendant**.
The Interested Party did not appear.

Hearing dates: 1, 2 July 2026

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APPROVED JUDGMENT

**Mr Justice Ritchie:**

**The Parties**

1. The Claimant association has 150,000 members who are landowners, gamekeepers and occupiers of land who organise gamebird (GBs) shoots and also manage their estates. The First Defendant (NE) is delegated by the Second Defendant (DEFRA) to exercise many powers to regulate land in England for conservation purposes.

**Bundles**

2. For the hearing of this judicial review claim I was provided with three skeleton arguments (one from the Interested Party), a list of issues, a chronology, a core bundle, two supplementary bundles and two authorities bundles. Some additional cases and documents were handed up in the hearing and put into the bundles.

**Brief summary of the claim**

3. Pheasants and Partridges have been resident in England for a long time, Pheasants since the 1100s and Partridges since the 1700s. They are resident and established in the wild. There was no regulation by licensing or criminalisation of the release of GBs into the wild, whether for shoots or otherwise, before 2021. The shooting season for Partridges starts on 1st September and for Pheasants on 1st October and runs to early February the next year, so lasting 4 months or 5 months. Recently, NE has imposed conditions on licences to release GBs in certain sensitive areas of the country where protected wild birds fly in to breed or live. In the Claim Form the Claimant seeks judicial review of NE's emerging practice of granting licences to release GBs into the wild, subject to certain conditions which, they say, make organising shoots uneconomic or difficult and, they assert, are:

   (1) ultra vires their powers, unlawful and irrational; and/or

   (2) restrict the release of GBs into areas where regulation of release is not permitted by the relevant Statute.

4. The Claimant seeks declarations:

   (1) that NE's imposition of conditions preventing the *keeping* of GBs within specified protected sites is ultra vires, unlawful or irrational;

   (2) that NE's imposition of conditions in licences banning *releases outside of the licensable areas* (where some part of the pens in question fall within the licensable area) is unlawful.

   These are the "Disputed Conditions".

**Chronology**

5. I set out this chronology from the evidence, the statements of facts, the documents and the authorities bundle. I will summarise the witness evidence later.

**The Act**

6. Wildlife in England is protected under the *Wildlife and Countryside Act 1981* (the *"WCA 1981"*). S.1 states that the *WCA 1981* was passed to protect wild birds, their

eggs and nests and created offences for damaging, injuring or killing wild birds, their nests and eggs.

**The relevant criminal offence – release of various species into the wild**

7. S. 14(1)(b) of the *WCA 1981* made it a criminal offence if any person "releases … or allows … to escape into the wild" non-native birds or listed resident birds set out in Sched 9. A defence was created in S.14(3) of taking all reasonable steps and due diligence to avoid committing the offences. The penalties on conviction are up to two years in prison or an unlimited fine. For 40 years that offence did not affect GB releases because Partridges and Pheasants were not listed in Sched. 9. They were so listed in 2021. I was told that NE prosecutes alleged licence breaches. The CPS prosecutes alleged crimes without a licence.

**The licences to disapply the specified crimes**

8. S.16 of the WCA 1981 created the power to grant licences which, if adhered to, expressly disapplied the criminal offences created by the Act. Thus:

- Under S.16(1), a licence would disapply the offences in S.s 1, 5, 6(3), 7 and 8;
- Under S.16(3) a licence would disapply the offences in S.s 9(1)(2)(4)(4A), 11(1)(2) and 13(1);
- and under S.16(4) a licence would disapply the offences in S.s 6(1), 9(5), 13(2) and 14 thus:

> "16(4) The following provisions, namely—
> (a) section 6(1) and (2);
> (b) sections 9(5) and 13(2); and
> (c) sections 14 and 14ZA,
> do not apply to anything done under and in accordance with the terms of a licence granted by the appropriate authority."

Just to make matters in relation to S.16(4) clearer, S.6 deals with sale of live or dead birds; S.9 with protection of wild animals, and S.13 with the protection of wild plants from direct picking or damage by humans. The offences relevant to this judicial review are those in S.14(1).

9. S.16(5) (omitting irrelevant words) set out the details of the licences which could be granted to disapply the Statutory offences, thus:

> "(5) … a licence under the foregoing provisions of this section—
> (a) may be, to any degree, general or specific;
> (b) may be granted either to persons of a class or to a particular person;
> (c) **may be subject to compliance with any specified conditions;**
> (d) may be modified or revoked at any time by the appropriate authority; and
> (e) subject to paragraph (d), shall be valid for the period stated in the licence;

and the appropriate authority may charge therefor such reasonable sum (if any) as they may determine.” (I have highlighted the relevant words in bold).

**The 2011 Guidance on S.14**

10. In 2011 DEFRA issued guidance on S.14 of the *WCA 1981*, “the 2011 Guidance”. The contents are worth setting out at some length. Both parties accept that this 2011 Guidance is directly relevant to the issues in the claim. Under the heading “Background” the Guidance stated:

> “the purpose of section 14 ... is to prevent the release into the wild of certain … animals which may cause ecological, environmental, or socioeconomic harm.”

Under the heading “in the wild” the Guidance stated:

> “a key premise for the prohibitions within section 14 is that it is only introductions into “the wild” that are regulated. In principle, we would define “the wild” as being: “the diverse range of natural and semi natural habitats and their associated wild native flora and fauna in the rural and urban environments in general. This can also be broadly described as the general open environment.”

Under the heading “Release into the wild” the Guidance stated:

> “9. ... we consider “release into the wild” to be the active letting go of an animal, from a condition of captivity, such that it has the freedom to go where it will. In essence, we consider that the deliberate introduction of an animal into an area considered to be “the wild” would be an act of release.
> 10. As outlined in previous DEFRA/ NE government guidance however, even a release into an enclosure may constitute a breach of section 14 in circumstances. The question of whether the offence applies or not in any case is one requiring careful consideration and judgement concerning the nature of the enclosure into which the release is made and whether it contains an area that could be considered to be “the wild”. For guidance on circumstances in which a release into an enclosure might be considered a release into the wild, see Annex A.”

In “Annex A: animals released into enclosures” the Guidance stated it was the policy approach for determining whether S.14 of the Act is engaged when animals are released into enclosures. Under the heading “key points and conclusions” the Guidance stated:

> “1. The principal purpose of section 14 is to prevent the occurrence of harmful impacts on natural habitats and their associated wild native flora and fauna arising from the introduction of non-native or schedule 9 listed species.
> 2. The fact that an area of natural habitat has been enclosed should not automatically preclude the application of section 14.

> 3. The release into an enclosure does not automatically disapply section 14's controls. The question of whether it applies or not in anyone case is one requiring careful consideration and judgement concerning the nature of the enclosure and whether it contains an area that could be considered to be "the wild".
> 4. "the wild" in section 14 describes the nature of the environment or area into which the release or escape occurs and "the wild" is taken to mean the diverse range of natural habitats and their associated wild native flora and fauna in the rural and urban environments in general. This can also be broadly described as the general countryside/ open environment."

Under the heading "discussion" the Guidance stated:

> "2. For section 14 to be engaged at all, there must be a "release or escape into the wild". This phrase is not defined in the legislation but is concerned with identifying the nature of the environment into which the release or escape occurs .... In other words the general countryside/open environment including areas where the influence of man is more apparent, such as in agricultural and forestry landscapes, because of the habitats they provide for wildlife, and also urban wildlife habitats. In general we consider it to exclude secure enclosures containing artificial environments.
> 3. With regards to protecting our native biodiversity we consider that it is not tenable to simply conclude that once an animal is within any form of enclosure, it can no longer be in the "wild" and cannot adversely on our biodiversities. Enclosures might vary from small pens to very much larger areas of land. In this regard therefore, there is no simple rule given the wide variety of circumstances under which releases or escapes might occur within some form of "enclosure". We therefore consider that it will be for Natural England to form a judgement in each case using the test set out in annex B."

Under the heading "enclosures" the Guidance states:

> "6. There will be several means of achieving containment in order to create an "enclosure" and whilst it will be important that any enclosure for non-native species is secure as regards their containment, of equal relevance to determining whether a release into the enclosure would be a release "into the wild" will be consideration of whether the enclosed land comprises natural habitats and associated native flora and fauna living in a wild state that may be impacted in the manner that section 14 is meant to prevent.
> 7. Animals in secure enclosures comprising artificial environments that are isolated from the general countryside, and from which escape into the general countryside is highly unlikely, (for example, artificial animal enclosures in zoos), would not be considered to be "in the wild"....

8. However, substantial enclosures in the general countryside are more likely to be of concern given the greater scope for adverse impacts on natural habitats and their associated fauna or flora. It would create rather perverse outcomes if significant areas of natural habitats containing wild native flora or fauna could be put at risk of being adversely affected by introduced species with regulation precluded merely because of the existence of perimeter fencing or some other boundary feature ultimately confining the introduced spaces.

9. In these circumstances, and again bearing in mind the legal obligations under the European directives, and the purpose of section 14; a considered judgement will therefore be required by Natural England as the licensing authority as to whether the enclosure encompasses an area that could be considered to be "wild", and whether the size and nature of the enclosure creates scope for appreciable prejudice to natural habitats, flora and fauna. If it does, the application for a section 16 licence is like (sic) to then be required for any releases of non-native species into the enclosure."

**Annex B**

11. Under the heading "Annex B: enclosure test" the Guidance stated that this Annex set out the test and evidential criteria for determining whether the release of an animal into an enclosure would or would not be "into the wild". The Guidance was as follows:

"**Principal test:**

If an animal of a species not ordinarily resident in GB is to be introduced into an enclosure, two crucial questions arise, namely: (1) is the release into an area that constitutes "the wild" and (2), if so, is there potential scope for prejudice to natural habitats and wild native flora and fauna.

An animal released into the rural or urban environments and subject to restrictions on its freedom, is considered to be "in the wild" if (a) or (b) below is satisfied:

(a) it is living as if it was a wild creature in a suitable natural habitat.

(b) it is capable of having an impact on natural habitats and wild native flora or fauna.

… In determining whether an animal falls within either of the categories above, the following criteria should be considered:

a) it is living as if it was a wild creature:

1. Freedom of movement: does it have sufficient range to pursue its natural life cycle and is it capable of survival without dependency on human intervention, (notwithstanding that human intervention or influence may be proffered). The additional factors below could provide additional assistance in determining the answer to this question.

2. Human control or influence:

- is the animal clearly under the "ownership" of someone or is it abandoned/ free to fend for itself

- if it is “owned”, is it living under conditions such that it can readily be brought under direct human control. For example, could a person relatively simply take possession of the animal or would seizing the animal require the use of techniques like those that would be necessary to seize a free living animal from the wild, for example, trapping, tranquillizing by dart
- is veterinary care or other welfare attention administered - if such attention is necessary, the animal is less likely to be in a natural environment suitable for it's survival...

4. Nutrition: can the animal sustain itself within its current habitat or is supplementary feeding necessary rather than merely desirable or provided in any case (if supplementary feeding is not strictly necessary for the animal to have a reasonable chance of survival, it is more likely to be living in a wild state and to be in suitable natural habitat for its purposes).

b) Is it capable of having an impact on natural habitats and wild native flora or fauna:

1. Nature and scale of enclosed area: does the enclosed include an area of natural habitats with associated native flora and fauna on which the animal could have an impact.

2. Wider interaction/ potential impacts: are any impacts that might arise from the presence of the animal adequately isolated from the general countryside or is it capable of impacting on or interacting with natural habitats and/ or wild native species dash for example, while the enclosure may contain the animal, or other wild animals capable of entering and leaving; Or bearing in mind the statutory defence (paragraph 5), is the risk of escape into the countryside adequately addressed.

None of these criteria is likely to be determinative on its own in any particular case. A considered opinion will have to be formed, taking into account the sum of the assessments, as to whether section 14 applies to the individual case and if so, whether a licence with or without conditions should be granted or licence refused.”

None of the 2011 Guidance had any relevance to GB shoots until 2021, as we shall see below.

**The EU Directives leading to the Habitats Regulations**

12. *The Birds Directive*, 2009/147/EC, required, at Article 2, that proper consideration be given to economic and recreational requirements, which includes game bird release and shooting. Publications at EU level have consistently recognised the benefits of such activities: see *The Birds Directive:* “40 years conserving our shared natural heritage (2019)” at pgs. 19 and 23 and “Hunting” under *the Birds Directive* in the Foreword and at paras. 2.4.20 – 2.4.22. The latter publication explains that some of the most important wildlife sites in Europe have survived the pressures of development and destruction due

to the interests of game management and that this activity brings "significant social, cultural, economic and environmental benefits".

**SPAs, European Sites, Controlled Zones and the Habitats Regulations**

13. Some sites in England are designated as Special Protection Areas "SPAs" or Special Areas of Conservation "SACs" and are collectively referred to as "European Sites". I was provided with a rough map of SPAs. Many of these sites are offshore (for instance the Wash). Some are on land. This is because indigenous or migratory birds live or breed at the sites, which are internationally significant, rare and/or vulnerable. Some migratory birds use the SPAs for at least part of the year and other birds live there for all the year. SACs have been designated to protect important natural habitats ("SAC habitats"). These are carved out under the *Conservation of Habitats and Species Regulations 2017,* ("*Habitats Regulations*"). Below I shall also refer to Buffer Zones around SPAs (BZs). These are 500 metres wide. I shall use the term "Controlled Zone" for an SPA with its Buffer Zone, because the parties did.

14. The *Habitats Regulations* are assimilated EU law pursuant to Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and the *Birds Directive*. Under Reg. 9(1) of the *Habitats Regulation*s, NE "must exercise their functions which are relevant to nature conservation … so as to secure compliance with the requirements of [those two] Directives". Reg. 10(3) of *the Habitats Regulation* states:

> "The objective is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive (measures to maintain the population of bird species)."

Reg. 10(7) of the *Habitat Regulations* states that:

> "In considering which measures may be appropriate for the purpose of securing or contributing to the objective in paragraph (3), appropriate account must be taken of economic and recreational requirements.".

**The Reg. 63, HR risk assessment**

15. Under Reg.63 of the *Habitats Regulations* it is necessary for a competent authority (the Defendant) to conduct an "appropriate assessment" of the implications of a "plan or project" which:

> "(1)(a) is likely to have a **significant effect** on a European site […] and (b) is not directly connected with or necessary to the management of that site" (I have emboldened the words).
>
> …

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent
authority may agree to the plan or project only after having ascertained that it will **not adversely affect** the integrity of the European site [] …
(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."
(My emboldening)

McBride J considered that this Regulation imposed a required to carry out an initial screening to determine whether a significant effect would be likely and only if so, to go on to do the assessment: see *R (Derry City) v DFE* [2024] NIKB 84, [122], albeit that decision related to similar wording in Reg 43. An assessment must be done before a "plan or project" can be undertaken in a Controlled Zone or "any consent, permission or other authorisation" can be given. A licence can only be granted for a "plan or project" if the Defendant is satisfied it "will not" adversely affect protected features of European Sites such as SPA species or SAC habitats, see Reg.63(5)). In assessing whether a "plan or project" will adversely affect the "integrity" of the site, the Defendant "must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given", see Reg.63(6). Both parties agreed that Reg.63 applied, that it required the Defendant to make an assessment before granting a licence disapplying S.14 for seasonal shoots and that a shoot or season of shooting GBs was a plan or project.

16. Sir Keith Lindblom SPT, in the Court of Appeal, in *R (Wyatt) v Fareham Borough Council* [2023] PTSR 1952 (CA), at [9] stated that the under duty imposed by Reg.63 the competent authority must be satisfied that there is "no reasonable doubt" as to the absence of adverse effects on the integrity of the protected site in question, because this is what the precautionary principle requires [9(7)]. It may be useful to this end for a competent authority to consider a "reasonable worst-case scenario", but whether there are grounds for reasonable doubt will always be a matter of judgment in the particular case [9(8)]. Finally, a case-specific assessment is required in which "the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned", such that there are no lacunae and the findings are capable of removing all reasonable scientific doubt about the effects of the plan or project on the protected site. Sir Keith ruled as follows at [9]:

"9. …
(1) The duty imposed by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site under regulation 63(5) is always a matter of judgment for the

competent authority itself (see the judgment of the CJEU in *Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054, at para 44). That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself (see the judgment of Lord Carnwath JSC in *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, at para 41, and the judgment of Sales LJ, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, at para 83). In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only. This has been emphasised often in the domestic cases (see, for example, the recent first instance judgment in *Compton Parish Council v Guildford Borough Council* [2020] JPL 661, at para 207).
(2) In *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 ("Dutch Nitrogen"), the CJEU said that it is "for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' …" (para 101 of the judgment), which "makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain" (para 104). The force of these statements is that the court, for its part, must be wholly satisfied in the exercise of its supervisory jurisdiction that the competent authority's performance of its obligations under article 6(3) was lawful. It must satisfy itself of the lawfulness of the authority's consideration of the scientific soundness of the appropriate assessment. But there is nothing in the CJEU's judgment to suggest that it intended to transform the respective roles of the competent authorities and the domestic courts by giving the court the job of undertaking an alternative appropriate assessment of its own.
(3) When reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty (see the judgment of Sales LJ in Smyth, at para 80, and the judgment of this court in *Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446, at paras 68 and 75 to 79, which were not doubted by the Supreme Court in the same proceedings (sub nom *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190)). When exercising its supervisory function, the court will apply the normal *Wednesbury* standard, not a heightened standard such as "anxious scrutiny" (cf *R v Ministry of Defence, Ex p Smith* [1996] QB 517, and *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840). It is well established that such a heightened standard will apply only where fundamental rights or constitutional principles

are at stake (see the judgment of Lord Carnwath JSC in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at para 245, and the first instance judgment in *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin); [2016] PTSR 750, at paras 204 and 205). Given the demanding requirement inherent in regulation 63(5)—for the competent authority to ascertain that the project "will not adversely affect the integrity of the European site"—the court's examination of the authority's performance of its duty will be suitably exacting within the bounds of its jurisdiction. But it should be remembered that the autonomous approach of the domestic courts in judging the lawfulness of such action has been explicitly approved by the CJEU (see the judgment of this court in *Plan B Earth*, at paras 74, 75 and 137, discussing the CJEU's decision in *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [2020] Env LR 4).

(4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation, such as Natural England (see the judgment of Sales LJ in Smyth, at para 84, and the first instance judgment in *R (Preston) v Cumbria County Council* [2019] EWHC 1362 (Admin); [2020] Env LR 3, at para 69). The authority may lawfully disagree with, and depart from, such advice. But if it does, it must have cogent reasons for doing so (see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, at para 45, the judgment of Sales LJ in *Smyth*, at para 85, and the first instance judgment *in R (Prideaux) v Buckinghamshire County Council* [2013] PTSR D39; [2013] Env LR 32, at para 116). And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Beatson LJ in *R (Mott) v Environment Agency* [2016] 1 WLR 4338, at paras 69 to 77).

(5) When provided with expert evidence in a claim for judicial review, the court will not substitute its own opinion for that of the expert. As this court emphasised in *R (BACI Bedfordshire) v Environment Agency* [2020] Env LR 16, at para 87, "[unless] there is clear evidence revealing a failure of … expertise—for example, some conspicuous factual or scientific error —the court is entitled to conclude there was no such failure". Experts may be expected to provide enough explanation to enable the court to decide whether the views they have stated are based on a conspicuous error (see the judgment of Sales LJ in *Smyth*, at para 83). But the court will bear in mind that decisions which entail "scientific, technical and predictive assessments by those with appropriate expertise" and which are "highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament)" should be accorded a substantial margin of appreciation (see the judgment of this court in Plan B Earth, at para 68, and, at first instance in the same case, *Spurrier v Secretary of State for Transport* [2020] PTSR 240, at paras 176 to 180).

(6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered (see the judgment of the CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353 ("*Waddenzee*"), at para 58). The "precautionary principle" requires a high standard of investigation (see the judgment in *Waddenzee,* at paras 44, 58, 59 and 61).

(7) The duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site, but that conclusion does not need to be established to the standard of "absolute certainty". Rather, the competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" (paras 44, 58, 59, and 61 of the CJEU's judgment and paras 107 and 108 of the Advocate General's opinion in *Waddenzee,* and the judgment in *Holohan,* at paras 33 to 37). In *Waddenzee* (at para 59), the CJEU emphasised the responsibility of the competent authority, having taken account of the conclusions of the appropriate assessment, to authorise the proposed development "only if [it] has made certain that it will not adversely affect the integrity of that site". That, it said, "is the case where no reasonable scientific doubt remains as to the absence of such effects". But as Advocate General Kokott explained in *Waddenzee* (in paras 102 to 106 of her opinion), a requirement of "absolute certainty" would be "disproportionate". As she said (at para 107), "the necessary certainty cannot be construed as meaning absolute certainty …", the conclusion of an appropriate assessment is, "of necessity, subjective in nature", and "competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty". Similar observations appear in the judgment itself (in paras 44, 58, 59 and 61). As the Supreme Court acknowledged in Champion, adopting the approach in *Waddenzee,* "while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority" (see the judgment of Lord Carnwath JSC, at para 41). This approach is, in essence, what the "precautionary principle" requires in the context of article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations.

(8) The requirement that there be "no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned" does not mean that the "reasonable worst-case scenario" must always be assessed. In the Commission guidance document entitled "Communication on the precautionary principle" (2000) it is stated in Annex III that "[when] the available data are inadequate or non-conclusive, a prudent and cautious approach to environmental protection, health or safety could be to opt for the worst-case hypothesis". That guidance, however, is not law (see *Heard v Broadland District Council* [2012] PTSR D25;

> [2012] Env LR 23, at para 69, and *Prideaux*, at para 112), nor is it in mandatory terms. What is required in law is a sufficient degree of certainty to ensure that there is "no reasonable doubt" on the relevant question. It may sometimes be useful to consider a "reasonable worst-case scenario" when assessing whether the necessary degree of certainty has been achieved. But whether there are grounds for "reasonable doubt" will always be a matter of judgment in the particular case.
>
> (9) An appropriate assessment must be based on the "best scientific knowledge in the field" (see *Holohan*, at para 33). Such knowledge must be both up-to-date and not merely an expert's bare assertion (see the judgment of Sales LJ in *Smyth*, at para 83). And the concept of "best scientific knowledge" is not a wholly free-standing requirement, separate from the precautionary principle itself. It is inherent in the precautionary principle, and in the concept of "no reasonable doubt".
>
> (10) What is required of the competent authority, therefore, is a case specific assessment in which the applicable science is brought to bear with sufficient rigour on the implications of the project for the protected site concerned. If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092, at para 44, and its judgment in *People Over Wind v Coillte Teoranta* (Case C-323/17) [2018] PTSR 1668, at para 38)."

**Shadow HR Assessment 2021**

17. In January 2021 NE completed what they called a "Shadow" assessment of plans or projects under S.63 of the *Habitats Regulations* relating to SPA with "bird features "Shadow" meant NE were doing it for DEFRA. It focussed on the grant of general GB licences to avoid S.14 release offences on land. It identified release into (1) enclosures (pens) and (2) release into the general countryside (p3). NE recorded that:

> "By stating, "Subject to provisions of this Part [1]…", Section 14 allows for those actions that would otherwise constitute offences to be permitted, and this is made possible through licensing provisions in Section 16." …
>
> "Section 16(4)(c) disapplies offences under Section 14 'if done under and in accordance with the terms of a licence granted by the appropriate authority'. Unlike other sub-sections of Section 16, there are no stated licensable purpose (sic) in Section 16(4) and the precise 'purpose' of the GBGL that is subject to this assessment is unrestricted." (p4).

Whether that statement about purpose was correct will be considered below. NE proposed conditions on general licences and stated:

> "For the purposes of the licence releasing into 'the wild' includes:
> - Releases into enclosures or pens from which birds can exit or from which birds will be released at a later point in time[4], and
> - Releases into the general countryside, including rural and urban areas."
>
> Footnote 4 stated: "The definition encompasses pens that are kept closed for a period before birds are released (a common practice for redlegged Partridges)"

Thus, NE was already clearly deciding that, as a general policy, "release into the wild" included putting Pheasants into open topped pens in Controlled Zones and putting Partridges into closed topped pens in corn fields for later actual release. NE found no evidence that Pheasants or Partridges attacked wild birds' nests or injured or disturbed wild birds directly. They found that pens created an insignificant damage to habitats and no increase in parasite transmission. However, NE found evidence of damage to the structure, chemistry and soil of pens (eutrophication), and reduced ground vegetation, especially with higher density. The mitigation suggested on general licences focussed on density in pens in Controlled Zones. Their conclusion was:

> "Natural England's advice is that this shadow assessment can ascertain that this project (the proposed GBGL) will not have an adverse effect on the integrity of SPAs and Ramsar site(s), either alone or in combination with other plans and projects, taking into account its limited duration and subject to the incorporation of the measures outlined above in section D3 as general restrictions and/or conditions to be attached to the project."

**Bird Flu**

18. There was a nasty HPAI, bird Flu outbreak in 2021. Pheasants and Partridges were therefore added to Sched. 9 of the WCA 1981 by the *Wildlife and Countryside Act 1981 (Variation of Schedule 9) Order 2021 No 548*. As a result, since 2021, the release of GBs for the shooting season, into the wild in "European protected sites" has been a crime under S.14(1)(b) unless the releaser had a licence granted under S.s 16(4) and (5) of the *WCA 1981*, the former of which disapplies S.14(1). The objective of this legislation was recorded in the DEFRA Post Implementation Review published in September 2024, which highlighted that it was introduced due to bird Flu, and stated:

> "**Objectives intended to be achieved by the Order**
>
> The objective of the interim licensing regime is to provide an additional, precautionary layer of protection *by limiting the density* and therefore the ecological impact of gamebird release, whilst we improve our understanding of the impacts of releases and consider the wider regulatory framework for avoiding detrimental impacts to European sites.

The licensing regime objectives are to remain appropriate until such time as Defra can conclude that either unregulated gamebird release will not have a significant effect on the conservation objectives of a European site or until a satisfactory long-term mechanism is in place that meets the legal obligations in the 2017 Regulations." (I have added the highlighting in italics)

**DEFRA 2022 HR Assessment**

19. In 2022 DEFRA carried out a HR Assessment of SPAs with bird features for the grant of general licences for shoots. This took into account NE's 2021 Shadow Assessment. The general licence conditions proposed were density limits and for pens in BZs a requirement not to encourage GBs to move towards SPAs. The rationale was in Annex B (which the parties agree was NE's advice to DEFRA):

> "ii. Negative effects tend to be localised and studies indicate minimal or no effects beyond 500m (on a precautionary basis) from the point of release. Most studies tend to be within 300m of the point of release or within pens thus there is no direct evidence of the effects at or beyond this distance. However, Natural England have concluded that negative effects beyond 500m are likely to be minimal because studies also show that dispersal of birds tends to be less than 500m from the release sites and the negative effects in consideration are linked to the presence of birds.
> iii. There is strong evidence of associated benefits for biodiversity from general woodland management associated with shooting but a limited evidence base on the positive effects of general habitat management associated with gamebird management which may benefit native biodiversity."

It therefore appears that the Defendant took into account the benefits of estate management through GB shoots and noted that release of GBs created minimal risk beyond 500m from the point of release. If effects are minimal after actual release from Partridge enclosures beyond 500 m that is relevant to risks assessment of GBs whilst they are in enclosures.

**General licensing**

20. Thus, between 2021 and 2023, the primary mechanism for the licensing of GB releases for the shooting season on Controlled Zones was through the grant of a "General Licence" by DEFRA. The licensing system was introduced, to begin with, on a temporary basis, see the *Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England) (No. 2) Order 2021/548.* It was later made permanent: *the Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England) (No. 2) (Amendment) Order 2024/1342* art. 2(2). This licensing requirement in Controlled Zones was said in evidence to affect less than 1% of the tens of millions of GBs released annually for recreational shooting. The overwhelming majority of GBs are released in the countryside without this regulatory oversight. The General Licences contained conditions which regulated the way GBs were kept or released into Controlled Zones.

Prior to the GBs being pushed out of pens for the shoot, there were caps on the density of the birds in the pens. Also, red-legged Partridge pens were not to be sited in semi-natural or unimproved habitats.

**DEFRA 2023 HR Assessment**

21. In 2023 DEFRA did another Reg.63 assessment to consider general conditions for licences to release GBs in SPAs. They considered various options including: no releasing in SPAs; no releasing in SPAs save with licensing in SPAs or BZs. The conclusion which DEFRA came to was that general licences were not sufficient to mitigate the risks so individual licences would be required.

22. In May 2023 SPAs were removed from the general licence called GL43. In 2023 individual licences were introduced so as better to regulate locally the GB releases, due to the bird Flu risk being high. DEFRA imposed conditions on some licences which were similar to the ones in issue, but not the same. They imposed conditions on "keeping" GBs in pens in SPAs, but not in pens in buffer Zones. A majority of the pens are in buffer Zones according to the evidence before me. Certainly, for the four example licence applications in the claim, most of the pens were in buffer Zones not SPAs. In 2024 a new general licence called a GL45 was issued for the year to February 2025. From 2025 the general licences for SPAs were stopped.

**The 2025 Strategic Habitats Regulations Assessment**

23. Before the 2025 Guidance was issued, the Defendant carried out a "Strategic" Reg. 63 (and Reg. 24) Habitats Regulations Assessment (HRA). This was dated 7.4.2025 and was 117 pages long. It recited that it was to assess the licensing regime under S.16(4) of the *WCA 1981* and was restricted to considering "release of" GBs in Controlled Zones – see the Summary – in the light of the bird Flu outbreak by the HPAI variant. Part B listed the 88 Controlled Zones which were SPAs.

24. NE looked at the risk of GBs being put in pens inside Controlled Zones (uninfected), then being infected with bird Flu (by wild birds), then passing it onto other wild birds (p19). The conclusion was that mitigation could not rule out the adverse impact of GB shooting practices on wild birds in Controlled Zones. There was evidential uncertainty about the risks to wild birds from infection by Partridges, therefore they assumed the same as the risk from Pheasants. They considered general mitigation measures such as density control in pens, and by fences around open topped pens and the removal of dead carcasses. Then they moved on to bespoke mitigation. Pages 61-64 covered the rationale for the Disputed Conditions. NE stated that the high abundance of "released" GBs coincided with the end of the wild birds' breeding seasons (p62). NE then went on to report that open topped Pheasant enclosures would allow Pheasants to fly out and wild birds to fly in and feed together and come into contact with each other's droppings, so cross Flu transmission risks could arise. NE advised themselves that:

> "To reduce risk of contact with 'summer' breeding bird features, the release of gamebird poults from pens could be delayed until after these migratory birds have largely dispersed (typically mid-Aug or early Sep). This temporal separation between breeding bird features and gamebird release would mitigate the disease transmission risk from gamebirds. This mitigation would not be appropriate for sites that also support nonbreeding bird features where these could interact with gamebirds or bridging species. Sites identified with only breeding bird features, such as little tern, whereby this mitigation may be appropriate are detailed in Appendix A and Appendix C. However, the necessary timing to achieve temporal separation is dependent on the ecology of the specific breeding bird features of each site. Some species can finish breeding activities earlier in the year, and therefore release timing could reflect this. However, we must apply the precautionary principle to suitably high regard and ensure that the risk is appropriately mitigated; and ornithologist advice on a site-by-site basis is required to inform decisions."

25. I should say here that I was shown no ornithologists' written advice on the four example licences so I do not know the breeding cycles of the protected birds on the four SPAs, or how far from the ones the nests were. In any event, NE advised that GBs should not be "kept" in pens in Controlled Zones prior to "the release date" and "delayed release" was decided as a suitable mitigation measure, which appears to have been taken as the start date of the shooting season. As we shall see below, that meant banning GBs in pens in Controlled Zones before 1st September or 1st October depending on the individual licence. As I shall explain later the word "release" may be used in a general way, or a specific statutory way - under S. 14(1), tied to "into the wild". NE considered the business effect of this was to cause delayed purchase of GBs and discussed the birds being reared elsewhere on farms and only brought up to the Controlled Zone on the delayed release day.

26. Three categories of Controlled Zone GB shoots were constructed. Category 1a: Controlled Zones which needed no additional mitigation so, for which, individual licences would be granted. Category 1b: Controlled Zones which needed licence conditions preventing the GBs being released into the Controlled Zone before the "delayed date" – which, as I understand it, meant the start of the shooting season. Category 2: Controlled Zones which were highly unlikely to get licences because the risks could not be mitigated.

27. The 2025 HRA stated at p8 that the proposal did not affect releasing GBs outside Controlled Zones. At p45 NE stated:

> "Gamebird release is a unique form of licensing wherein it is **beyond our regulatory powers to impose restrictions once birds are classified as 'wild birds' (rather than livestock) - as we are only licensing the release element, not the on-going management.** Also, if circumstances justify such an action,

> another limitation is that once birds are released it is not practicable to catch up all gamebirds that have already been released (although some 'catching-up' of gamebirds does happen and is generally permissible up to 1 February). **Mitigation options are therefore focussed on the period when gamebirds are still classified as 'livestock'**. (My emboldening).

I have highlighted these sentences because they are indicative of NE's understanding of an underlying principle behind the *WCA 1981* and the licensing framework in the Act. NE consider they can regulate livestock under S.16(4). NE consider that this section enfranchises livestock control and organisation by way of imposing conditions on release licences.

28. A recent relevant general licence for SPAs (known as GL45) was valid from 7 June 2024 until 1 February 2025. On 21 March 2025, DEFRA announced that no general licence would be granted in relation to English Controlled Zones due to the potential risk of a specific type of bird Flu transmission to the bird species for which the SPAs were designated. DEFRA stated that an individual licensing scheme would be introduced instead, and administered by NE, which would require GB shoots to apply for licences on a case-by-case basis.

29. On 14 April 2025 NE issued a bulletin which included a warning that owners ordering young GBs for release into Controlled Zones before getting a licence were "doing so at their own risk". The Claimant asserted that this was obviously unhelpful, considering that NE knew that their orders were put in for chicks in February each year. The scheme was opened by NE on 22 April 2025 and on the same day NE published another bulletin and Supplementary Guidance on how the scheme was to run (the 2025 Guidance). The words in that Guidance, which the Claimant is concerned about, are in the Glossary:

> "'**Release'** • DEFRA defines gamebirds as released when gamebirds can range freely in the landscape. If gamebirds are kept in an open top release pen they are considered released as soon as they are placed inside of the pen. If gamebirds are kept in a closed top release pen they are considered released as soon as the pop holes are first opened to allow them to range freely outside of the pen."

That definition of release means that when Partridges are put into closed pens they are not released. Partridges cannot roam freely on the land in a closed pen. The Claimant asserts that GBs are not "released" when they are put into: (1) open topped woodland pens for Pheasants, or (2) closed topped pens around grain for Partridges.

**The examples of individual licences with conditions: Keeping GBs on SPAs and in buffer Zones**

30. For the claim the Claimant relied on four applications for licences in Controlled Zones. There was an application form to be filled in. It required a lot of details including: the name of the shoot; how the released birds will be discouraged from entering the SPA;

the type of GB; the type of release (hard or soft); whether the release will be in the BZ; additional measures to protect the native birds (for example: Golden Plovers and Curlews); supplementary information about when they put the birds in pens on Controlled Zones and how long before the start of the shooting season; the size of each pen; the density or number of birds in each pen; the location of each pen. The applications were then assessed by NE. I do have the assessments in the Supplementary Bundles. Each application states the application is for "permission to release" Sched. 9 GBs into the wild. NE's standard definition of "the wild" was referred to in each licence as a Note, as follows:

> "'The wild' is defined in government policy *as "The diverse range of natural and semi-natural habitats and their associated wild native flora and fauna in the rural and urban environments in general. This can also be broadly described as the general open environment.*"1 In broad terms, the release specimens need to be capable of interacting with native habitats and species." The footnote 1 referred to the 2011 Guidance on S.14.

Standard wording in the individual licence assessments referred to the relevance of the Government's policy requiring measures to prevent the risk of adverse impact on native species and natural habitats and S.40 of the *Natural Environment and Rural Communities Act 2006*. That section was not in the Authorities Bundle. It is entitled "duty to conserve and enhance biodiversity" and states:

> "(A1) For the purposes of this section "the general biodiversity objective" is the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England.
>
> (1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.
>
> (1A) After that consideration the authority must (unless it concludes there is no new action it can properly take)—
>
> (a) determine such policies and specific objectives as it considers appropriate for taking action to further the general biodiversity objective, and
>
> (b) take such action as it considers appropriate, in the light of those policies and objectives, to further that objective."

The wording in the individual licence assessments also referred to NE's guidance "permitting the release and management of non-native game birds within and adjacent to Protect Sites" NE 2022. NE also referred to their S.63 HR Assessment and recorded that reduced density mitigated the direct effects of released GBs on fauna and flora. NE's shadow assessment 2021 was also referred to and the advice to DEFRA that any licence granted "must" secure mitigation measures in respect of habitats for damage to soil, micro-habitats and vegetation.

31. Since 19 May 2025, all successful applicants for gamebird release licences have received a licence from NE which contains conditions: (i) preventing the *release* of gamebirds before a specified date and (ii) preventing the *keeping* of gamebirds within the Controlled Zone, for instance:

> "[Gamebirds] must not be released on [the Controlled Zone] before [date]. Gamebirds must not be kept on, or within 500m of, the SPA prior to this date. NE have adopted a policy of requiring a licence for releases to locations which are outside of a Buffer Zone where that location is within a pen/area which extends partially into the Buffer Zone".

So, for instance, the 6.6.2025 licence was "to release" GBs in a European Site. This had a warning of the risk or criminality under the *WCA 1981*, which clearly related to S.14, although did not expressly name that section. It named the SPA. Conditions 4, 6, 13 referred to: the overall density of release in the SPA and in the BZ; the required vet certifications; the release locations and a release density for each pen. The Disputed Condition was that Pheasant and Partridge "must not be released on the SPA" nor BZ "before 1.10.2025" and gamebirds must not be "kept on or within 500m of the SPA" prior to that date. Condition 13 required vet inspection and certification within 24 hours before release. Likewise, the licence granted on 23.5.2025. I note from the plans of the four example licences that most of the pens were within BZs not SPAs but some were within SPAs. For one of the licences (6.6.2025) all the pens were within the SPA. I have carefully looked at the photos of Pheasant woodland pens and open field Partridge pens which surround and cover crops.

**The complaints**

32. Various complaint correspondence was set out in the bundles. So, one gamekeeper/owner complained that he normally released 9 week old Pheasant poults into pens in mid-July, which then matured and were fed and watered and contained until mid-October when they became mature and ready to be shot. Delaying release into pens to 1.10.2025 would mean that no such maturation could take place. Thus, the whole season would be pushed back by 2 months, cutting it in half and making the business unviable. This would lead to gamekeepers/owners stopping their conservation work, vermin control and the feeding of Pheasants assisting wild birds with supplementary food. Other owners referred to the *Code of Good Shooting Practice* which gave advice on GB husbandry and advised that GBs should be released before the start of the season, fully mature and adapted to the wild, a minimum of one month before the season starts. Thus, release from pens should be by 1st September for Pheasants and 1st August for Partridges. This was not achievable under NE's "no keeping" and "no release" conditions with trigger dates of 1.10.2025 or 1.9.2025.

33. Seven shoots wrote to the Chief Executive of BASC on 23.7.2025. They all operated in SPAs. They stressed the compensation which they provided to the natural habitats through predator control, habitat management and conservations work, and the benefits to society through employment of locals. They complained that:

> "i. The definition of 'release' adopted in the licence appears to treat any movement of birds from rearing pens to release pens as a regulated release, even where the birds remain enclosed or under management. This extends far beyond the ordinary understanding of a release as birds being introduced into the wild.
> ii. The definition of 'licensable area' on page 2 of the Supplementary Guidance Document produced by Natural England includes release pens that lie partially outside the buffer Zone. This extends the licensable area beyond that which is provided by the law.
> iii. A prohibition against the use of lead shot is imposed even though this is a licence to release gamebirds, not a licence to shoot. We are concerned this extends restrictions beyond the existing regulations for the use of lead shot.
> iv. The imposition of the licensing regime necessarily curtails shooting operations on our SPAs. In practical terms, uncertainty over licence conditions, the additional administrative burden, and late release dates mean planned shoot days may be reduced or cancelled altogether. A reduction in shoot activity directly affects the income on which our land management depends. Predator control, the sowing of cover crops and other conservation measures work are all funded by the proceeds of shooting. If shoot activity declines, so too does our ability to invest in these measures, even though they provide clear and ongoing benefit to the very species and habitats for which the SPA was designated. In this way the licensing regime undermines, rather than supports, the conservation objectives it is meant to serve"

34. NE is not blind to the benefits to SPAs and wild birds, of estate management. This was recorded for instance in a letter from the CE of NE dated 9.5.2025 to the CE of the Claimant. However, she stated that these benefits are "not possible" to consider as part of the S.63 HR Assessments because they do not represent mitigation of Flu risks, they represent compensation which flows from shooting carried out in Controlled Zones.

35. I was informed during the hearing that of the four shoots in the example licences, one did not operate, three did operate and all of those used up all of their GB allowance, save for one which was 268 birds short of their 2768 GB total.

**The challenge to the conditions**

36. On 29.7.2025 the Claimant sent NE a pre-action letter. As a result of the aforementioned concerns, the Claimant, on behalf of its many members, challenged the conditions imposed by the Defendant in release licences issued under S.16(4) which are made to disapply S.14(1) criminality for release of GBs in Controlled Zones. The Claimant challenged the administration decision of adding conditions to the individual licenses

for GB releases under the 2025 Guidance on the basis that “keeping” is not the same as “releasing”, rather it is the opposite and keeping is not criminalised under S.14 and hence is not a licensable activity under S.16 and hence should not be made subject to any conditions. The words used were:

> “The proposed challenge concerns the approach taken by Natural England (“NE”) to the exercise of its powers to grant individual licences for the release of common Pheasants Phasianus colchicus and red-legged Partridge Alectoris rufa within 500 metres of and within Special Protection Areas (“SPAs”) (“the Controlled Area”). In particular, BASC proposes to challenge NE’s emerging practice of: (i) applying conditions which purport to exceed the scope of the licensing regime created by restricting activities which would not otherwise require a licence under sections 14 and 16 of the Wildlife & Countryside Act 1981 ("the 1981 Act"), (ii) including notes on the licences which purport to extend the scope of the Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations 1999 (“the Lead Shot Regulations 1999”), (iii) requiring licences for release outside of the Controlled Area where that release is to pens which include land within the Controlled Area.”

**The Lead Shot note in the licences**

37. The ultra vires issue raised by the Claimant in relation to notes on the licences prohibiting lead shot has been conceded and NE have confirmed their intention to modify the note and agreed to email all affected licensees to clarify the position.

**Pens straddling a BZ**

38. NE informed the Court, at the end of the hearing, that they had withdrawn their guidance on pens straddling BZs, but they maintained that their 2025 guidance and conditions were still intra vires and legal. The 2026 Guidance evidences this.

**Witness Evidence**

39. Written evidence was provided by **Ms Lovejoy.** She is the deputy director of the conservation department of the Claimant. She summarised the Defendant’s April 2025 bulletins as stating that all individual licences were likely to be refused save for 2 SPAs with standard mitigation and 17 SPAs with very late releases in September to October 2025. Her members had questions about the conditions concerning release of GBs and veterinary inspections. They had concerns about secure pens, pens straddling buffer Zones and hatching in buffer Zones and they were worried that the conditions would reduce their ability to run shoots and the funding for their environmental work. Ms Lovejoy asserted the licences had conditions that were wider than the scope of the prohibitions in section 14(1) of the *WCA 1981*. She complained that the HRA assessment of 2025 had not been published to the Claimant and asked for a copy. The strategic HRA was released in mid-May 2025. She described how GBs are released between June and September from pens within Controlled Zones. That release is carefully planned for shooting calendars. The season starts on the 1st of September for

Partridges and the 1st of October for Pheasants. She stated that game birds were predominantly released into large open topped pens in woods at 7 to 8 weeks old surrounded by high fences, with predator control and feed points. At night the birds return home to roost. Some are given wing clipping. Density is Controlled. After a month they get out more but they are managed back into grain areas. Partridges, in contrast, are kept in covered pens in crop areas and released slowly. The 2025 conditions banned releases into pens which were wholly or partly within Controlled Zones. She asserted this was ridiculous when owners and gamekeepers could release one metre outside Controlled Zones but not into pens which were situated in Controlled Zones. As to the restriction on keeping GBs in pens, Ms Lovejoy asserted that gamekeepers and owners could not operate without pens containing game birds before the actual release dates from the pens. This condition prevents shooting in Controlled Zones because owners cannot rear in Controlled Zones and therefore cannot properly release. Generally, chicks are reared or brought onto Controlled Zones from about May. If they cannot be situated in pens in the Controlled Zones then owners would have to move the pens outside the Controlled Zones which would be very expensive. She complained that NE had provided no warning of this ban on keeping GBs in pens in Controlled Zones. As for status Ms Lovejoy asserted the Claimant could and did advocate for members. She asked for redactions to protect her members from harassment, disruption and sabotage.

40. In her second witness statement Ms Lovejoy highlighted the criminal consequences of a breach of section 14(1) of the *WCA 1981* and the consequences of a conviction. This would prohibit gamekeepers and owners from gaining any GB licence or other wildlife licences or firearms licences due to lack of good character. Turning to the science behind the conditions, the Claimant disagreed with the D's scientific judgment that GBs in pens in Controlled Zones pose a significant risk but the judicial review was not based on a challenge to the scientific evidence. She asserted that DEFRA had said, in February 2022, that their assessment was only a snapshot and would not be used in future policy decisions. They did not follow that assertion and later relied upon it. She asserted there was no evidence that GBs were particularly susceptible to Flu and research showed that Partridges had low susceptibility, so it was wrong to assert that they created a risk of transmission. As to the assertion of mass wild bird fatalities, Ms Lovejoy stated these related to seabirds in 2022 and 2023 and they had no connection to GBs. She pointed out that during the season the number of released GBs reduces in accordance with the number being shot. She complained that NE were focusing overly on Flu to the exclusion of other relevant factors that should be taken into account when drafting conditions on licences. She stated that withdrawing licences meant withdrawal of the allied predator control and supplementary feeding and management benefits generally. She raised that NE had breached regulations 9 and 10 of the *Habitat Regulations* by failing to consider the overall benefits of estate management which come alongside the income from shooting and she submitted NE ignored the conservation value of estate management when imposing these conditions. Ms Lovejoy pointed out the contradiction in DEFRA's 2023 frequently asked questions publication which defined

"release into the wild" as escape from open top pens, whereas the April 2025 bulletin described "release into the wild" as putting game birds into open topped pens. She drew a parallel with chickens. The NE was focusing so much on interaction with wild birds that their definition of "release into the wild" would include farmed chickens in fields which could interact with wild birds who flew in and out of the field. Likewise, for covered chicken runs. She asserted there were 40,000 livestock chickens on SPAs. The Claimant asserted that the definition of "release into the wild" had to be clear, additionally, veterinary checks were required by the conditions. These needed to be before release properly into the wild, (so from pens) and if release into the wild truly meant release into an open top pen, then the vet's inspection had to be done the day before the start of the season when the game birds are released into the Controlled Zones irrelevant of pens, under the NE interpretation or when the GBs are placed into open topped pens on those same dates, namely the delayed release dates. Ms Lovejoy repeated her complaints about the condition banning "keeping", which prevented the Claimant's members from self-rearing and maturing Pheasants in Controlled Zones and therefore put the livelihoods of gamekeepers and owners at risk. Ms Lovejoy relied on the Regulator's Code at paragraph 2.2 which required regulators clearly to state what noncompliant activity is and to provide opportunities for dialogue with stakeholders and that regulators must advise on how to address non-compliance. At paragraph 6 of the Code regulators are required to ensure their approach is transparent. That Code was not exhibited to her witness statement and, I regret to say, I could not find it in the bundles. Ms Lovejoy made it clear that the Claimant did not challenge the specific conditions on the four licences, the Claimant challenged the Defendant's general approach. She rejected NE's assertion that the "no keeping" condition had been imposed earlier, in 2023, highlighting that the condition imposed then related only to SPAs, not their BZs. So, the 2025 condition was wider, many pens being in the BZs. As to the condition banning release into pens straddling Controlled Zones, but partly or mainly outside them, Ms Lovejoy accepted that none of the four example licences had such pens but other members did and this concern was raised by Stuart Otway of NE. She asserted that the risk of putting GBs in open topped pens outside the Controlled Zone which stretched into the Controlled Zone was no greater than the risk of releasing GBs outside the Controlled Zone with no such pen.

41. The Defendant's evidence was provided by **Phil Bowater**. He is a principal officer at NE and has been since July 2022. He stated that the bird Flu epidemic caused DEFRA to withdraw general licences. He relied on Reg. 63 of the *Habitat Regulations,* stating that NE could only grant permission for a plan or project after an assessment of its impact. Conditions could be imposed under Reg. 63(6). Stopping here, that Regulations states:

> "(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."

At the hearing, counsel for NE did not assert that Reg. 63(6) created such a power. Reading that subsection objectively I consider that it creates a requirement to have regard to conditions not a power to impose them. So, I reject Mr Bowater's evidence on that point.

42. Mr Bowater went on to state that he carried out the strategic HR assessment with colleagues who were scientists. They concluded that for SPAs where protected local birds lived all year round it was unsafe to licence GBs to be released. For SPAs used by protected birds for breeding it was satisfactory to permit the release of game birds after the protected birds had left, therefore that would occur in September or October each year. At the hearing I asked both parties to provide a joint note as to whether, at the four example licenced sites, the protected breeding season birds had left before the delayed release dates. That note states that at the 4 example sites: "These dates were intended to coincide with approximately when the protected bird species would have left the SPA after breeding." It did not state that the dates did coincide. This is an important omission.

43. Mr Bowater pointed out the catastrophic risk of mass casualties relying on such events in 2022 and 2023 amongst Terns at Roseate and Sandwich. He asserted that GBs are highly susceptible and that NE's conservation objectives were to protect local birds even from single bird to bird infections. He set out the risk pathways for Flu infection including: feeding, foraging, carcasses, environmental contamination, soil contamination and water source contamination. He set out the risk of viral transmission and that pens would not fully protect local birds who could fly in and Pheasants of course could fly out. Runoff of bird droppings and birds of prey eating carcasses were transmission methods. He also stated that birds flying over Partridge pens could defecate and infect Partridges. He concluded that keeping GBs, in pens on Controlled Zones, might reasonably increase the risk to local native birds and could not be considered effectively mitigated and therefore all GBs had to be held outside Control Zones, because exclusion would be the only effective mitigation. Thus, NE imposed the condition of no keeping in Controlled Zones.

44. Mr Bowater went on to consider the individual example licences. He raised concerns about the 23.5.25 licence and the Partridge pens covering crops, because of the transmission risk of Wrens, Tits and other small birds flying into such covered pens. He stated that the 2023 licence for the same site had a condition of no release and no keeping until 30.9.2023, so the applicant moved his release sites to outside the SPA. As to the 28.5.25 licence, Merlins still occupied the area and bridging species could cross infect, so a delayed release date was imposed with a "no keeping" condition. He asserted that the 2023 licence had a "no keeping" condition. As to the 6.6.25 licence, returning to the Disputed Conditions, he stated it was essential to mitigate the risks. There was no scientific doubt, if a plan or project adversely affects the integrity of SPAs it was to be mitigated. The mitigation was not predicated on any interpretation of the

word “release into the wild” under section 14(1). It was predicated on the need to comply with the *Habitat Regulations* pursuant to NE’s HR assessments. He asserted that keeping GBs in Controlled Zones created risks to protected birds whatever “release into the wild” meant. As to the S.14 Guidance Mr Bowater accepted that the definition of “release into the wild” was fact sensitive. The Guidance had been issued due to concerns over Beaver enclosures. He asserted that NE considered that GB release into pens in Controlled Zones was a release into the wild. This was because of five factors. Firstly, such placing of GBs affects the local fauna. Secondly, GBs are known vectors of bird Flu. Thirdly, open topped pens allow gathering of wild protected birds at feeders and drinking stations. Fourthly, netted enclosures for Partridges allow small wild birds to enter, like Wrens, and there is a runoff of Partridge droppings into the exterior environment. Fifthly, in such pens, there is habitat damage including soil eutrophication, vegetation depletion and the like, which are density dependent. As to the suggested mitigations by the Claimant: wing clipping did not adequately mitigate the risk of Flu transmission because wild birds and other animals could enter open topped pens and wing clipping is short term.

45. Mr Bowater avoided giving evidence on GB hatcheries because they did not arise in any of the four example licence applications but asserted individual attention would be given to each. As to pens straddling the Controlled Zones, likewise he asserted none of the example licences straddled, so this concern was hypothetical and he asserted it had never been raised before. Stopping there it had clearly been raised in correspondence, so that assertion was not wholly correct. Mr Bowater dealt with this concern by asserting there were, in any event, some risks from putting game birds into open topped Pheasant pens straddling the Controlled Zones and stated that the only solution which mitigated that risk was to position pens outside the Controlled Zone. Stopping there, that assertion is illogical. Siting pens outside a Controlled Zone by a few metres does not prevent wild birds from the Controlled Zone entering the Pheasants pens and feeding jointly at feeding stations, hence suffering a Flu transmission risk. So, it would appear that Mr Bowater himself ties the type of conditions that can be imposed by NE to the geographical scope of the S.14 *WCA 1981* criminality. Mr Bowater went on to evidence that shoots release 39 to 57 million Pheasants and Partridges per annum which, at their height, make up 25 to 50% of all UK wild bird life. He stated that less than 1% were near Controlled Zones and hence were licenced. He stated that general licences did not sufficiently mitigate the risk of bird Flu and hence NE moved to individual licences in 2023 and 2024. He stated it was hard work for NE to deal with individual licences so they issued bulletins. In 2025 NE received 63 applications to grant individual licences in Controlled Zones and granted 43 of them subject to conditions.

**The Issues**

46. The parties provided this agreed list of issues.

**Ground 1**

1. Are the Disputed Conditions ultra vires/for an improper purpose?
   1.1. Do the Disputed Conditions control the keeping of gamebirds in pens where those gamebirds have not been "released into the wild" for the purposes of s.14 of the Wildlife and Countryside Act 1981?
   1.2. In so doing, have the Disputed Conditions been imposed ultra vires/for an improper purpose?
2. Are the Disputed Conditions otherwise unlawful for uncertainty of the conditions or irrational?

**Ground 1A**

3. Was NE's imposition of the Disputed Conditions predicated on an interpretation of s.14 of the Wildlife and Countryside Act 1981?
4. If so, was that interpretation wrong in law and does that render the Disputed Conditions unlawful?
5. If so, should relief be withheld on this ground pursuant to s.31(2A) of the Senior Courts Act 1981?

**Ground 2**

6. Should the court refuse to consider Ground 2 on the basis that the complaint is 'hypothetical'?
7. Is NE's Supplementary Guidance dated 22 April 2025 unlawful in advising that "a licence is required for any release pen/area that extends partially into the buffer Zone of a SPA and/or SAC."

**The Claimant's Grounds of Claim**

47. **Ground 1, the condition in licenses prohibiting keeping GBs in Controlled Zones before release is ultra vires.** There is no dispute between the parties that NE is entitled to regulate by the imposition of licence conditions to control the release of GBs into the wild in Controlled Zones. That covers for instance the date, the density and any other release matters.

**Control and containment**

48. As a matter of fact, the Claimant submitted there is a clear distinction between releasing GBs into the wild and keeping GBs in the wild, in Controlled Zones. The word "releasing" connotes a loss of containment or control such that the GBs are no longer being contained or Controlled. In contrast "keeping" connotes ongoing containment and control. Such containment may be by fencing, clipping, feeding, watering, predator reduction or other methods.

**Purpose**

49. The Claimant submitted that the stated purpose of S.14, in the 2011 DEFRA Guidance at paragraph 1, is to prevent the release into the wild of plants and animals which may cause ecological, environmental or socio-economic harm. The Claimant submits that,

whilst a number of assertions in the scientific justification used by NE about the risks to native birds and flora are disputed, the claim does not rest upon those disputes. The Claimant asserted that keeping GBs does not give rise to the same risk of harm, although it may involve a risk of harm. The impact of keeping GBs, in terms of Flu transmission, appears to be accepted by the Defendant as lower than when the same number of birds is truly released into the wild without any such captivity or control. The Claimant submits that the following are relevant to the interpretation of the scope of NE's power to impose conditions.

50. The Claimant contends that the keeping condition is unlawful because it goes beyond the clearly stated statutory purpose in section 14 (1) of the *WCA 1981*, which is confined to controlling the release or escape into the wild of GBs. So, release into the wild is the criminal activity and hence the only licensable activity. Keeping is a lawful activity which involves not releasing into the wild and hence the Claimant submits NE is not permitted to prohibit it. The scope of the keeping prohibition covers, for example:

(1) Lawful keeping of GBs within rearing sites, after either the birds hatching on site or being brought in as young chicks. Traditionally chicks are reared in fully enclosed heated sheds. After some weeks they are afforded more space in enclosed shelters. Later they are transferred into larger netted runs, still heated. Still later they are released into open top pens.

(2) Lawful keeping of GBs in secure pens, for instance keeping Partridges in pens with secure tops surrounding crops.

(3) Lawful keeping of GBs in temporary secure holding pens.

So, the Claimant submits, the prohibition covers perfectly lawful activities which are not made unlawful under section 14(1) and for which no licence is required.

51. The Claimant submits that the starting point for interpreting the scope of the power to grant a licence under S.16(4), which disapplies S.14(1), is to interpret S.14(1) itself. Although the wording of section 16(5) is broad, the power to grant restrictive conditions is and should be constrained to the matters and activities criminalised in the *WCA 1981*. Being a criminal offence section, it is subject to a well-established principle of interpretation of criminal statutes, summarised in *R v Dowds* [2012] 1 WLR 2576 per Hughes LJ, who ruled thus:

> "36 Having sought the assistance of counsel on the topic, we have also given consideration to whether Ms O'Neill's reading of the statute is required by the canon of statutory construction usually labelled the principle against doubtful criminality or doubtful penalisation. This is generally stated to mean that, in the words of Lord Reid in *Sweet v Parsley* [1970] AC 132, 149: "it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted." The rationale of that principle has often been stated. It is justified by the requirement to give fair warning to citizens of which conduct may attract punishment. Individuals ought not to be left to guess at what they can or cannot

> do without infringing the criminal law and subjecting themselves to punishment: see for example *Sweet v Parsley*. p 163C, per Lord Diplock, where he referred to it being contrary to principle to assume that Parliament intended to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law and has taken all proper care to inform himself of any facts which would make his conduct unlawful. The same basis for decision was relied upon in the context of article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms in *Kokkinakis v Greece* (1993) 17 EHRR 397."

I bear in mind that Hughes LJ qualified the strength of that principle by stating that:

> "38 There is no occasion in this case for a definitive analysis of the circumstances in which the principle of strict construction of penal statutes, which is alive and well even if it may often give way to other canons of construction, will or will not be applied."

The editors of *Bennion, on Statutory Interpretation* advise at section 26.4 that it is a principle of legal policy:

> "that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account" and that "[i]n the context of legislation the principle that a person should not be penalised except under clear law gives rise to what is sometimes described as a presumption against doubtful penalisation. The rationale is that the legislature is presumed to intend that a person on whom a hardship is inflicted should be given a fair warning."

52. This reflects the wider constitutional expectation, articulated by Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, at 638, that: "a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it." Lord Bingham also made allied observations in *R v Rimmington* [2006] 1 AC 459 at [33] that: "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it."

53. The Claimant's second limb of attack on the keeping condition arises out of the principle in *Padfield v Minister of Agriculture* [1968] AC 997 - that when the Court is analysing the scope of a Statutory power it must analyse the power by construing the words by which it was conferred in their context. From the words in their context Parliament's purpose in conferring the power can be identified, and the purpose will illumine its scope. Lord Reid, supported by Lord Pearce at p1053 and Lord Upjohn at p1060, reached his decision as follows at p1030:

> “Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [which] must be determined by construing the Act as a whole . . . if the Minister . . . so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”

54. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 the House of Lords applied the principle identified in *Padfield* and Lord Bingham of Cornhill said at p 381:

> “no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question . . . The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31.”

Lord Nicholls of Birkenhead said at p 396:

> “The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) … ? No statutory power is of unlimited scope … Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose … The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event … the exercise is one of statutory interpretation.”

I take into account the guidance by Lord Wilson at [20]-[22] in *R (Palestine Solidarity Campaign Ltd) v SSCLG* [2020] 1 WLR 1774.

55. Additionally, the Claimant relied on the fact that there is no right of appeal. Only judicial review can enable the Claimant to challenge the conditions. Thus, the Claimant asserted, the scope of the power should not be interpreted too widely.

56. Furthermore, the Claimant relied on NE’s own 2025 HR assessment (p45), in which they accept that it is beyond the scope of their regulatory powers to impose conditions once the GBs are classified as wild birds rather than livestock, because “*we are only licensing the release element, not the ongoing management.*” NE also stated on that page that other matters were beyond the scope of the conditions they could grant and hence their licensing remit, for example, conditions controlling the location of game

shoots. Likewise, as more recently admitted, NE cannot prohibit the use of lead shot in shoots, it is beyond their regulatory power under S.16(4).

57. The Claimant also relies on NE's other powers to regulate. They raise the power under the ORNEC relating to game management; the power to issue stop notices; powers under the *Animal Health Act 1981* and the *Avian Influenza Order 2006.*

58. Furthermore, the Claimant submits that NE's duties under the *Habitats Regulations* do not justify an extension of the scope of S.16(4).

59. The Claimant relies on case law when interpreting the scope of S.16(3) and (5). They submit that, by analogy, the rule in planning cases applies. The rule is that planning conditions may be imposed but they must be for a planning purpose (see *R (Wright) v Forest of Dean* [2019] 1 WLR, 6562).

**The Defendant's Grounds of Resistance to Grounds 1 and 1A**

60. In NE's Detailed Grounds of Defence they pleaded that the Disputed Conditions were necessary to prevent GBs being kept in SPAs to prevent the spread of bird Flu, in particular HPAI devastating protected birds. They relied on the lack of challenge to the rationality of the scientific evidence that GBs in pens pose a risk to protected birds or to NE's judgment that the Disputed Conditions are an effective and appropriate means of mitigating the risk. NE asserts that the Disputed Conditions are consistent with the purpose of the *WCA 1981* and their duties under the *Habitats Regulations.* NE contends that the power to impose conditions is broad and so covers not only release conduct but also pre-release and post-release conduct. NE were correct to decide that GBs are "released" into the large Pheasant and Partridge pens when they are put in.

61. NE rely on their scientific evidence in the Strategic HR Assessment and assert that: (1) the Claimant does not challenge the rationality of it, and (2) that release must be "compatible" with Reg. 63 of the *Habitats Regulations* and thus NE can only give permission if it is satisfied that the conditions are sufficient to protect the SPA birds. Thus, NE refused licences for SPAs were protected birds lived all year round and granted licenses, subject to conditions, where protected birds were only present during the breeding season and had left by September/October. Five Flu transmission methods were identified in the Strategic HR Assessment: (i) GBs foraging alongside GBs; (ii) predation of sick GB carcasses; (iii) bridging species, gulls, disseminating GBs' Flu; (iv) infected GBs contaminating feeders and water with faeces; (v) high density of infected GBs could contaminate the environment. As for mitigation, the Defendant pleaded that "housing" GBs would not fully prevent interactions with wild birds, for instance open topped Pheasant pens. On causation and the asserted increased risk of Flu being caught by protected birds, NE relied on the decisions in the Strategic HR Assessment that open topped Pheasant pens allow Pheasants to escape and interact with protected birds and bridging species. As for closed Partridge pens, the causative risk came from bridging species (small wild birds – which I shall call "Jenny Wren" as a

collective term) or environmental transmission, run off and faecal matter. Therefore, NE decided that GBs had to be held outside SPAs to protect the SPA birds.

62. In specific answer to Ground 1, NE submits firstly that the wording of S.16(5) is wide, it says "any specified conditions". NE submits secondly, that the Disputed Conditions were not imposed for an improper purpose. They were imposed to protect SPA birds and wild fauna and that was the purpose of the *WCA 1981*, (see S.1 and Parts 1 and 2). They were also imposed to fulfil NE's obligations under the *Habitats Regulations.* NE submit that licensing "must be exercised so as to secure compliance with the requirements of the Habitats Directive and Wild Birds Directive" (para. 18.3).

63. NE submit that licensing "must take into account the activity that precedes" release and NE could not grant a licence to release if it knew the release was preceded by activity which was going adversely to affect the integrity of the SPA.

64. As to the *Padfield* principle. NE relied upon *R (Khan) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] 1 WLR 2009 (CA), at [92]. The relevant paragraphs are:

> "91 In *Padfield* [1968] AC997, 1030, Lord Reid said that there is no such thing as an unfettered discretion in administrative law. Parliament always confers a discretionary power with the intention that it should be used to promote the policy and objects of the Act concerned; and the policy and objects must be determined by construing the Act as a whole. If a public authority uses its discretion to thwart or run counter to the policy and objects of the Act, then the decision will be unlawful.
> 92 That principle requires that a discretionary power should be exercised so as to further the objects and policy of the legislation which confers it, and not to impede or frustrate that purpose. It is not concerned with whether the exercise of a discretionary power is "likely" to further the statutory purpose. It suffices that a discretionary power has been exercised for that purpose and not for some extraneous purpose (for example to penalise a political opponent). There need not be bad faith: the purpose of the decision may be a benign one but, if it is extraneous to the statute which confers the power, on its correct interpretation, then it will be unlawful."

65. NE assert that the Disputed Conditions were not imposed in reliance on an unlawful understanding of S.14. NE had the power to regulate pre-release activity. The time of release and proper interpretation of when release into the wild occurs was set out in the DEFRA 2011 Guidance. GBs in enclosed pens can damage flora and infect SPA birds. The Claimant's example of chicks in hatches is hypothetical and academic. None of the four example licences had such a complaint.

66. NE states that if such an application was made it would be considered on its merits. NE also rely on S.31(2A) of the *Senior Courts Act 1981* to asserts that even if the Court struck down the Disputed Conditions, they would impose them anyway, relying on Mr Bowater's first witness statement at [53]. In fact, Mr Bowater does not say that. He asserted that the Disputed Conditions would be necessary in any event, he did not say under which power NE would seek to impose them. This is the "other power" point, which was only partially explore in evidence and submissions and upon which I am unable to determine in this claim because the relevant statutes and regulations were not set out in the authorities bundle and were not fully argued.

67. Thus, overall NE states in their Grounds of Defence that the Disputed Conditions were not imposed in reliance on an unlawful understanding of S.14. NE had the power to regulate *pre-release* activity.

68. DEFRA, the Interested Party, asserted in their Grounds of Resistance (GOR) that the Secretary of State had the power to add various birds to Sched. 9 and did so in 2021 and was intrinsically liked to management of the environment and the protection of species. The licensing conditions allowed were "any" conditions. I do not understand para. 15 of the GOR which refers to S.16(8) but that subsection does not contain the words pleaded. Statutory interpretation case law was set out. Examples were given of two cases where conditions were upheld at para. 19. DEFRA accepted that there has to be a rational connection between the condition and the activity authorised. Two previous cases on S.16 were relied upon to evidence a wide margin of appreciation in cases involving scientific assessment. DEFRA stated that the proper interpretation of the *WCA 1981* was set out in DEFRA's 2011 Guidance and submitted that the doubtful penalisation presumption was only that, not a rule; that the Disputed Conditions were certain; proportionate prosecution can resolve any uncertainty concerns; and Ground 1 should be rejected. As to Ground 1A DEFRA adopted NE's submissions and stated that there was no statutory definition of releases into the wild but the Guidance was to assist and should be taken into account. DEFRA accepted that the correct interpretation of the statute takes precedence over the Guidance.

**Analysis of Grounds 1 and 1A**

69. To get to the decision on whether "keeping" in pens is a licensable activity on which conditions can be imposed under S.16, I first need to consider the submissions of the parties on the proper interpretation of S.14, which S.16(4) disapplies.

70. I am only considering GBs covered by Sched. 9 and only activities in Controlled Zones. The criminalised activity is one carried out by any person who released GBs into the wild. It has two statutory parts: (1) the activity of releasing, and (2) the wild nature of the place where the releasing takes place.

71. When interpreting the words in the relevant section I take into account guidance from the Supreme Court, in *R (O) v Secretary of State for the Home Department* [2023] AC 255, [29–31], Per Lord Hodge DPSC:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context"

72. In *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594, [40–44] Lord Sales, ruled as follows:

> "40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
> 41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there *are R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):
>
> > "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
>
> In the second, Lord Mance said (para 10):
>
> > "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."
>
> The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.
> 42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to

> interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."

73. DEFRA relied upon *Wild Justice v NE Wales* [2021] EWHC 35 (Admin), in which HHJ Jarman QC, sitting as a deputy, ruled that:

> "The specifications of precise limitations in the licences, as to seasons or as to where crops or livestock are located, for example, are likely to involve difficult decisions as to just how precisely such limitations should be worded, with the consequence that every situation where the statutory purposes arise might not be covered. By specifying that the action must be for the statutory purposes, amongst the other circumstances summarised above, such difficulties are diminished if not avoided. As shown in *RSPCA v Cundey*, the question of whether the action is for such a purpose is likely to involve evidential issues of the sort which the criminal courts are well experienced in dealing with."

*Wild Justice* had started a judicial review of a decision based on scientific evidence, in which licences were granted to kill wild birds (Crows) under the *WCA 1981*. The Claimant objected and alleged the licence was ultra vires. The case concerned the prohibition on killing wild birds and granting licences for doing so and S.16(1A) which prevented granting a licence unless the defendant was satisfied that there was no other satisfactory solution and involved judgment calls on scientific evidence. The Judge ruled that:

> "30 The proper approach of the courts in Wales and England in reviewing whether the requirements of s.16 have been complied with and whether it is appropriate to grant a licence thereunder was considered by the Court of Appeal in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564. Beatson LJ, giving the lead judgment, observed at [69];
>
> > "The very helpful submissions from both parties showed that it was common ground that in principle the court should afford a decision-maker an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments."

The Judge also accepted what is called the "precautionary principle" for Reg.63 *Habitats Regulations* assessments thus:

> "32 The parties differed somewhat on the application for present purposes of decisions of the CJEU which did not concern the Directive but other directives such as those relating to hunting and habitats. An example of the latter is *Luonnonsuojeluyhdistys Tapioal Pohjois-Savo-Kainuury* (C-674/17) [2020] 2 C.M.L.R. 1, where the court concluded that derogations in the contexts of habitats must be assessed in light of the precautionary principle, saying at [66]:
>
> > "… if, after examining the best scientific data available, significant doubt remains as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation.""

**"Releases"**

74. I start by considering the difference between releases and escapes. Clearly, gamekeepers and owners of shoots do not want to let GBs escape before the shooting season, so do not intend to let them do so and try to prevent such by enclosing Partridges in metal cages and enclosing Pheasants in fenced woodland pens with monitoring, food and water and predator control. They induce Pheasants to live and stay in open topped pens by placing feeding stations and water stations so they will feed there rather than forage, and by placing the fences in woodlands where the Pheasants will be able to roost in the trees at night. I am able to infer that this has been historically effective. As for Partridges, putting them into closed pens is a form of total imprisonment with no escape.

75. When considering the concepts within the word "releases" and when interpreting the word objectively, using the normal ordinary meaning of the word, in my judgment a person "releases" when he/she gives up sufficient control over each GB's life and removes sufficient imprisonment or captivity, so that the GB becomes sufficiently free. The Cambridge Dictionary defines the verb "release" as giving freedom or freedom of movement. The Oxford Dictionary as: letting someone out of a place where they had been kept unable to leave or move. I note that DEFRA expressed their definition similarly in their 2011 Guidance:

> "... we consider "release into the wild" to be the active letting go of an animal, from a condition of captivity, such that it has the freedom to go where it will. In essence, we consider that the deliberate introduction of an animal into an area considered to be "the wild" would be an act of release."

76. Looking at the context of the words, to seek a fuller interpretation, whilst the *WCA 1981* criminalises many different activities to protect the environment and wild birds, S.14(1) seeks only to control releases of GBs into the wild, whereas, for instance, subsection

(2) deals with planting plants and S.1 with the killing of birds. The accepted purpose of S.14 of the Act by DEFRA in their 2011 Guidance was:

> "to prevent the release into the wild of certain plants and animals which may cause ecological, environmental, or socioeconomic harm."

77. The Defendant itself accepts that there are clear limits to the scope of the purpose of S.14(1) and the criminal activities. In my judgment the section is clearly not intended to control livestock management before release and DEFRA/NE accept that it is not intended to control GB management after release in the wild. The criminal activities are focussed on the activity of release. As an example of activities which are not related to release of GBs, I do not consider that S.16(4) and (5) could be used to ban drone flying on SPAs, or quad biking or horse riding, all of which may adversely affect protected birds. Banning such activities would be in the purview of other powers (if so granted).

78. In my judgment, the *Habitats Regulations* do not affect the proper interpretation of S.14. They both have the same narrow purpose, but the Regulations cannot widen or enhance the scope of criminality under S.14. The EU Directives no longer have any relevance. In addition, there is no duty to interpret domestic law consistently with EU law, the principle of supremacy has been repealed, see *Makeability Ltd v City Doggo* [2025] EWCA Civ. 400 at [38].

79. Looking at the example activities. In my judgement, it is not difficult to determine whether a GB is "released" when it is put into a hatchery as an egg or chick. It is clearly not released, it is fully imprisoned, fed, kept alive and cared for. When poults are let out into either an enclosed hatchery or an enclosed run, when they become larger, the facts change but, whilst they live in an enclosed hatchery or enclosed run. Likewise, whilst Partridges live in an enclosed pen around grain plants, the GBs are still wholly in captivity. They are imprisoned and they are not free. In addition, all such imprisoned GBs are dependent on humans for food, water, predator protection and safe growth to maturity. They are monitored and culled if they catch Flu. So, in my judgment they are not "released" when they are put into such enclosures. They are not living as wild animals, roaming free and self-feeding. They can be seized relatively easily. I agree with the April 2025 Glossary definition of release in relation to Partridge pens. The are not "released" when put in.

80. When considering the issue of whether putting Pheasants into open topped, woodland pens, is releasing them, the decision is more nuanced. NE have determined, as a general policy or decision, that this constitutes "release" in all circumstances involving such pens in Controlled Zones. I do not consider that policy, guidance or decision to be a correct, lawful interpretation of S.14(1) of the *WCA 1981* on the general facts. Subject to the principle that each individual such decision turns on the specific facts of each pen, on the general decision, I consider that the level of control and imprisonment

imposed on Pheasants in open topped, woodland pens, with the provision of sufficient food and water, with monitoring and predator control, vet testing and culling ill birds, means that they are not "released", they are not independent or living freely. I take into account the following general facts arising from the evidence. (1) The Pheasants are surrounded by quite high wire fences to prevent them walking out and to prevent them flying out at low levels. (2) The Pheasants are provided with adequate food and water, so have no need to forage to survive, thus inducing them to remain dependent on humans and to stay in the pens. (3) The Pens are in woodlands which provide tree roosts so that the Pheasants sleep in the trees in the pens near to their food. (4) Predator management helps to keep them alive and safe and carcass management prevents the spread of disease. (5) For generations the gamekeepers have intended to keep their Pheasants in the pens until they are actually released for the shoots and full freedom into the wild. They do so because they want all the GBs to be ready for the shoots, but accustomed to part of the wilderness. I infer that this open woodland pen system has proved effective to achieve the intended imprisonment and so has continually been used. If it did not work, because the GBs flew off and did not return, it would not have been used. Thus, despite the open tops allowing GBs to fly out, in infer that the inducements to return are so strong that the pens are efficient at keeping the Pheasants living in the pens until they are truly released before the shoots. (6) The GBs are monitored and if bird Flu affects the Pheasants they will be culled under bird Flu legislation. (7) Predators are restrained or killed to protect the GBs in the pens. Thus, these GBs are Controlled, kept safe, imprisoned, dependent, culled if infected and are not free to live, self-support and roam.

81. Therefore, I consider that, as a general decision, and subject to particular circumstances and facts, the Claimant is correct in asserting that: (1) Partridges are not "released" when they are put into enclosed cages, surrounding corn and other feedstuff plants; and (2) Pheasants are not "released" when put into woodland pens, with high wire fences, with open tops, feed stations, watering stations and with monitoring and predator control. If GBs are not released when they are put into such pens, that could be the resolution of Grounds 1 and 1A unless the scope of S.16(4) and (5) allows conditions that are wider than the criminality. If it is tied to the criminality, no licensable activity is being done.

**"Into the wild"**

82. If the release threshold is passed, the next requirement of the offence under S.14(1) is "into the wild". The DEFRA Guidance from 2011 is mainly helpful until Annex B (see paragraph 12 above). The two guidance criteria for defining whether a GB is released "into the wild" are stated as follows:

> "(a) it is living as if it was a wild creature in a suitable natural habitat. Or,
> (b) it is capable of having an impact on natural habitats and wild native flora or fauna."

83. The first point to note is that these are disjunctive not conjunctive. The word "and" is not used. Thus, if criteria (a) does not apply, so that the GBs are not free but are dependent on man and imprisoned, criteria (b) can still apply to make the area they are put into "the wild". Thus, GBs would be regarded as "in the wild" if they were kept like farmed chickens, so that criteria (a) did not apply to them, but because criteria (b) applied, due to their interactions with wild birds which could fly into their fields, covered runs, barns or cages.

**Criteria (a): status after release**

84. The details for the test for disjunctive criteria (a) all focus on the status of the GBs themselves and how the GBs will live after release. DEFRA set out factors such as: freedom of movement and freedom from human control or influence. The Guidance also included factors such as: ownership, human feeding, provision of vet care and the like, for the GBs' survival. It seems to me that those factors are hallmarks of the test for the word "release" in S.14(1), rather than the words "into the wild". But, NE consider that these factors, which go to the status of the GBs after the "release", determine whether they live in a wild state. This is illogical. The whole need to define "into the wild" only arises at the point of a S.14(1) release. If there is no release, there is no criminal offence, so there is no need to go on to analyse "into the wild". If the assessment of the criteria (a) factors points toward the person "keeping" Partridges and Pheasants in pens, instead of "releasing" them, that would weigh heavily against them being "in the wild". However, as I understand NE's Grounds of Defence, when imposing the Disputed Conditions, they did not rely on criteria (a) when deciding the Pheasant and Partridge pens were "in the wild". They relied on criteria (b).

85. In relation to the Partridge pens, I do not consider that it was lawful (or rational) to decide that GBs are "in the wild", when put into such pens under criteria (a). I take into account that: (1) the pens are fully enclosed with closed tops; (2) they are generally smaller than the woodland pens; (2) the cages are surrounding man planted corn or grain plants and they are in ploughed fields or ploughed grassland; (4) they are not placed where the protected birds are; (5) the cages keep out all larger birds, mammals and predators; (6) the only natural wild flora are weeds, the rest of the flora are the man grown grain plants; (7) the natural wild fauna are Jenny Wren and small birds, insects, small mammals and the like; (8) protected birds cannot get in; (9) the GBs are fed and watered to survive. Thus, in my judgment, there is very little which is wild about a cage in a man planted corn field. Such conditions do not generally fulfil criteria (a) as to status.

**Criteria (b): interactions with wild species and plants**

86. I remind myself that one only needs to consider criteria (b) if a GB is released. The details of the test under disjunctive criteria (b) for "into the wild" are quite different from (a) and focus on the effects of the GBs interacting with the natural environment of the Controlled Zone when in pens. Factor (1) is the *nature and scale* of the enclosed habitat and the flora and fauna in it. Thus, in this case, the details are the size of the

pens and the nature of the fauna and flora in the pens. Factor (2) is the *impact* of GBs to bird and GBs to plant interactions, the adverse potential consequences of those and the level of risk of escape into the wider area. It was not disputed that the scientific evidence showed that GBs could have a significant adverse impact on plants and wild birds when in open topped pens. However, the scientific evidence showing that Partridges, in closed pens, create any significant adverse impact (the Jenny Wren flying in and out and in again evidence), was thin and was disputed.

87. The trouble with the DEFRA Guidance test in criteria (b) and its disjunctive status, is that GBs in captivity (and hence not released) are regarded as "in the wild" even when they are caged up, imprisoned or in a wooden hutch, hand fed and heated by heaters. This appears to be based on the ability of Jenny Wren to fly into and out of their cages/hutches. This is a very wide interpretation of "in the wild" and I doubt that it is correct. I shall examine this further below under irrationality and the causation risk. It seems to me that, if the interpretation of "in the wild" is so wide under criteria (b), then the interpretation of "releases" needs to be tailored accordingly, otherwise a Pheasant which I might keep in the back garden of the country estate (which I do not have), with its wings clipped, would be "in the wild" and "released" even though it was a pet, fed by me and stayed in the parlour (if I had such a place) overnight, just because Jenny Wren may eat the food which I put out in the unkempt large garden for it.

88. NE specifically decided that, as a general guidance decision, large Pheasant pens in Controlled Zones were "in the wild". Taking into account the 2011 Guidance on interactions with the wild and the scientific HR Assessments, the Pheasants can interact a lot when out of the pens and any wild birds can fly in at will. I do not consider that decision to be wrong, irrational or unlawful. It was a multi factorial judgment decision based on logical scientific evidence and was not seriously challenged. However, the same probably does not apply to Partridges in closed cages.

**Overall – on keeping**

89. I consider that the thrust of Claimant's submissions is generally correct in relation keeping and the proper interpretation of "releases into the wild" of GBs in relation to putting GBs in pens in Controlled Zones and the scope of S.14(1). The activities which are criminalised in S.14(1) are those in which "any person" … "releases or allows [GBs] to escape into the wild".

90. In my judgment, it is clear that keeping GBs in pens in Controlled Zones, for instance rearing them or keeping them as livestock, is not releasing them. In this context, I consider that keeping and releasing into the wild are mutually exclusive activities. So, putting Pheasants into large woodland open topped pens, with wire fencing, feeders, water stations, predator control monitoring is not a "release", albeit the pens are likely to be "the wild". Likewise keeping Partridges in wire closed-topped cages, around grain plants, on ploughed land, with feeders, water stations, predator control and monitoring, is neither "releasing" nor "into the wild".

**The scope of S.s 16(4) and (5) and the power to impose conditions**

91. If I am right in my analysis of S.14, then it is clear that when Parliament intended to criminalise persons releasing GBs into the wild in Controlled Zones, Parliament did not intend to criminalise "keeping" GBs as livestock and/or in captivity, raising chicks and poults and maturing them in pens in Controlled Zones. It did not criminalise caging GBs in fields of corn, in the same way that Parliament did not criminalise releasing GBs outside but near to SPAs. Thus, no licence would be needed for noncriminal activities unless the power to impose conditions on licensing in S.s 16(4) and (5) is far wider than the specified criminal activities to be disapplied.

92. S.s 16(4) and (5) were created with the specific purpose of disapplying S.14(1). I take into account that other sections of S.16 specifically relate to disapplying other specific criminal activities in the Act. These are not general licensing provisions. They are offence specific licensing provisions which disapply specific criminal activity. The Act could have been drafted or amended to criminalise "keeping" but it was not.

93. Whilst the rationale behind S.14(1) was clearly to protect wildlife and the natural environment, it was focussed on releasing not rearing and maturing. The duties imposed on the Defendant in the *Habitats Regulations 2017* cannot, in my judgment, be used retrospectively, to expand the scope of the power to impose conditions in S.s 16(4) and (5), save in so far as the English law permits. I reject NE's assertion that the purposes of the licensing conditions arising from S.s 16(4) and (5), or the relevant context, can be taken wholesale from the *Habitat Regulations.* The wide environmental purposes of the Regulations are parallel, driving objectives for NE but the tools for achieving those objectives are many and varied. This claim deals with one specific tool, under the *WCA 1981* S.s 14(1), 16(4) and (5).

94. NE submit that the words of S.16(5) allow "any conditions" to be attached to the licence. They submit that the definition of the crime of release does not limit this. In effect, they submit that they can control rearing GBs through imposing conditions for the purpose of protecting wild birds, thus making the later "release" illegal, unless the wide conditions on pre-lease activity are satisfied. The effects of the "no keeping" condition are that: (1) gamekeepers could keep and rear birds in Controlled Zones, then move them outside the Zones and release them and would need no licence. But that may well be economically unviable and perhaps barely possible. Or, (2) gamekeepers could rear the GBs outside the Controlled Zones and transport them in, thus complying with the conditions and releasing only on the delayed date. The Claimant asserts that this is economically unviable. That assertion sounds correct but the evidence in support of it was thin. No costs were evidenced by Ms Lovejoy. It was asserted in the complaints made to NE. Only one of the example shoots cancelled shooting. Three others went ahead. However, I do not know how they rearranged their rearing activities. Finally, (3) what gamekeepers cannot do, if they are to comply with the no keeping condition, is

rear the GBs in the Controlled Zones and then release them there. The question for this Court is "is it intra vires for the conditions be so wide?"

95. It is trite law that the words of S.s 16(4) and (5) are to be interpreted in the context of the whole of the *WCA 1981*. But the Act created many other criminalised activities which are licensable by other subsections in S.16. I consider that the real context of the words in S16(5) in this case was specifically tied to S.16(4) and thus to the context and purpose of S.14(1). Thus, because the purpose of S.14(1) was the protection of vulnerable native and plants and visiting birds in Controlled Zones by focusing on two matters: "release" and "into the wild", in my judgment the lawful conditions were to be focussed on that licensable activity. This scope was recognised by NE when, in its 2011 Guidance and more recently, it accepted that its lead shot prohibition in a guidance note in licenses was not in scope and when's stating in its Guidance that management of GBs after release was not in scope. I agree.

96. I see nothing in S14(1), or S16(4) or more generally in the Act, which permits conditions governing prerelease livestock management through S.16(4) and (5). If the words "any conditions" were to be interpreted more widely, NE would have the power, through the imposition of conditions, to criminalise release after breach of license conditions banning a huge range of otherwise lawful activities, just on the basis that there was a minimal but foreseeable risk to wild birds in the Reg.63 assessment which could not be mitigated. If "any condition" means that NE can impose any condition at all, their power to impose conditions would be unlimited, so long as it was exercised for the purpose of protecting the endangered wild birds in the Controlled Zone. For instance, a condition requiring the Gamekeeper to spend £1 million pa on environmental projects for the good of birds and plants in the Controlled Zone. Or banning driving diesel Range Rovers in the Controlled Zone because they pollute the environment. I do not consider it necessary to give further examples of unlimited condition types, but some are set out above.

97. In my judgment, lawful conditions are limited: (1) to the purpose of protecting the relevant wild birds present in the relevant Controlled Zone, under a properly evidenced and rational S63 assessment, taking into account S10, and (2) to matters related, in a rational way, to the release of the GBs into the wild.

98. I have therefore come to the conclusion that the Disputed Condition prohibiting "keeping" GBs in Controlled Zones, as analysed above, which is focussed on "managing", is the opposite of "releasing" and occurs in the months and weeks before release, so was therefore out of the scope of S.14(1) and the disapplying function of S.s 16(4) and the power to grant conditions in 16(5), ultra vires and unlawful.

99. I should clarify that I do not make this decision based on the existence of the other regulatory powers raised by the Claimant (see *R (Dolan) v Health Secretary* [2020] EWCA Civ 1605, per Lord Burnett CJ at [77]) or the lack of any right to appeal the decision to impose conditions.

**Ground 1A, Uncertainty, absurdity and irrationality – the keeping condition**

100. No separate document setting out the Grounds was in the trial bundle. In the Claimant's SFG, Ground 1A (which was allowed in by amendment) is contained in paragraphs 55A to 55F but those paragraphs do not set out ground 1A, instead they appear to be answering NE's responses. One has to look back to paragraph 8 of the SFG for 1A which states: "that the imposition of the Disputed Conditions is based on an unlawful interpretation of S.14". Obi J granted permission to rely on Ground 1A on the interpretation of "release into the wild" and the legality of the keeping condition. The Claimant's submissions attack NE's unlawful understanding of S.14(1) and its interpretation of the words "releases" and "into the wild".

101. In the light of my primary decision this issue does not have to be decided. However, because the lives and livelihoods of gamekeepers, some farmers and shoot owners may be at stake in criminal prosecutions, and it was a pleaded claim for judicial review, I should address the issue.

**Uncertainty**

102. I do not consider that the ban on putting or keeping GBs in pens in Controlled Zones before the true release date is too uncertain to be legal. It is clear enough. This is evidenced by the 4 example licences. One did not shoot. The other three did but rearranged their businesses so as to comply. The Claimant's complaint was focussed on how the prohibition damaged the business of shooting, far more than the complaint that gamekeepers did not understand it.

**Rationality**

103. Based on my findings that Partridges are not released into the wild in closed pens around crops in ploughed land and that keeping is not prohibited by S.14(1), in my judgment it was irrational for NE to impose a condition under S.16(5) against keeping Partridges in such pens for the purpose of managing their release into the wild. Likewise, based on my finding that Pheasants are not released, when put into open topped pens in woodlands, it was irrational for NE to impose a condition under S.16(5) against keeping Pheasants in such pens for the purpose of managing their release.

**Scientific justification**

104. In the context of the bird Flu epidemic, sensitivity to the risk to wild birds was logical, necessary and understandable. I understand the logic of the transmission for wild birds flying into open topped Pheasant pens and feeding happily beside infected Pheasants, having contact with droppings, water contamination and bird to bird transmission. This was proven to be and is foreseeable in the Strategic HR Assessment.

105. In relation to purely the scientific rationality, the Claimant does not attack the rationality of the Disputed Conditions in paragraphs 55B to 55F of the SFG. These paragraphs focussed on the interpretation of S.14 by analysing the science of infection and risk and the effect of that on the interpretation of "release" and "in the wild" under criterion (b) – the interactions with other wild birds. If, contrary to my rulings above, but as NE pleaded, they had the power to impose wide ranging conditions on keeping GBs, not tied to S.14(1), but driven by the *Habitats Regulations*, which they considered necessary to mitigate even small or very unlikely risks to protected native and visiting birds, as evidenced by scientific assessments, then the decision to ban putting GBs in pens was a multifactorial judgment call. Such decisions are not easily challenged under the *Wednesbury* tests of rationality, as Sir Keith Lindblom summarised in *R (Wyatt).* It is rightly approached only with sufficiently detailed scientific evidence, using the precautionary principle and apply the "no reasonable doubt test."

106. By the end of verbal submissions, one main and rather expanded basis of the Claimant's claim under this Ground, was that NE only considered one factor: the risk science, and ignored all other relevant factors, including the benefits to the Controlled Zones brought by estate management, predator removal and fauna maintenance. They only considered the risk of bird Flu transmission and damage to flora in pens when interpreting S.s14 and 16. They did not consider gamekeepers' livelihoods and local employment. They did not consider the amenity of those who enjoy shoots. The Defendant admits this to have been so. They admit that, when imposing the Disputed Conditions, they did not carry out a multifactorial assessment in the Strategic HR Assessment. If the wider scope of S.s16(4) and (5), covering keeping, is tied to the purpose of the *Habitats Regulations* then NE should have taken into account Reg. 10(7) which requires NE to take such other matters into account when securing the Reg. 10(3) objectives.

107. NE did not separate out the first stage test under the *Habitats Regulations* from the second stage test. They were required first to decide whether there was a "significant effect" and only then to go on to determine whether there was no "adverse effect". Raising the scientific risk as a mono-factor, to the exclusion of all other factors, may in itself be irrational and becomes less and less rational when applied to GBs which are: (1) chicks in hutches and poults in wholly enclosed runs, which cannot fly. NE base their concerns mainly on Jenny Wren slipping in and out and in again and then infecting protected birds; or in droppings leakage. For imprisoned young birds the quantitative likelihood of that risk was not assessed. (2) Furthermore, as the Claimant submitted, it is difficult to understand the logic of the risk being appreciable or significant, for Partridges in wholly enclosed pens (as distinct from those which had been released and are out of the pens). The Flu infection risks were considered by the NE mainly on the stated "bridging birds" basis. That basis was not that the young or teenage Partridges brought the Flu into the Controlled Zone when they were put into the enclosures, but instead on the express basis that: (1) the wild birds outside the pens had already been infected with bird Flu. Then, (2) whilst the Partridges were in the pen, they caught the

Flu from wilds birds which flew in or did droppings into the cages, despite the evidence in the Strategic HR Assessment, that showed Partridges may be more resistant to Flu than Pheasants. Then, (3) the Partridges developed Flu which despite being monitored was not noticed by the gamekeepers, so they were not culled. Then, (4) the Partridges passed it on to other wild birds who flew in and became infected. Then, (5) those small bridging birds infected the protected birds; and (6) the Jenny Wren which spread it, does so only to protected wild birds outside who have *not* already caught the Flu from the other infected wild birds outside. So, this whole risk analysis relied entirely upon two different trips by Jenny Wren, one into the pen whilst carrying bird Flu and another, later trip into the pen, by a different Jenny Wren, which was not infected and caught the bird Flu from the recently infected Partridges and which then infected a protected bird who did not have bird Flu.

108. There was no scientific quantitative assessment of the likely level of chance for each of the 6 steps to create that end risk. I bear in mind that this would be arising during the approximately 8 week period when Partridges are kept in such pens, at the end of the protected birds' mating seasons, whilst more and more protected birds fly away. For example, if the risk was so high as 50% at each stage that would make the likelihood 1.56% to reach the final ($6^{th}$) stage. If the risk was only 20% for each stage, the end risk would be 0.0064%. The Claimant did not challenge the possibility of that risk arising, but did challenge the level and significance of it. The questions to be asked are: (1) did the bridging birds theory show that there was "no reasonable doubt" that enclosing Partridge pens in corn fields would damage the "integrity" of the protected birds in the SPA site and (2) was that a significant effect? I see nothing in the Strategic HR Assessment which shows that NE determined this to be a significant risk or even a minimal risk. NE appear to have considered that there was no reasonable doubt that this risk existed and that it was enough to affect the "integrity of the site". This decision appears to me potentially to fall squarely into the "worst possible case" approach due to the lack of quantitative assessment. I contrast this with NE's and DEFRA's decisions on some other transmission methods and risks, which, in the Strategic HR Assessment, they determined to be insignificant.

109. I have heard no scientific evidence to respond to the Defendant' assessments. This was no doubt because, despite criticising the scientific analysis, it was not the Claimant's pleaded case that they were seeking to state that the assessments were irrational. At paragraph 55A of the SFG and footnote 16 the Claimant pleaded:

> "C recognises that this court is ill placed to adjudicate on disputes involving scientific, technical and predictive assessments and as such does not seek to challenge by this claim the rationality of the conclusions reached by NE in the sHRA as to the risks posed by keeping and releasing of gamebirds, or the adequacy of mitigation and other regimes such as the Animal Health Act 1981 and Avian Influenza Prevention rules. However, the court should be aware that C does dispute a number of the scientific and technical judgements reached,

which C considers have had the effect of significantly extending the range of restrictions necessary to address the risks posed by HPAI."

The Claimant's skeleton argument did not focus on attacking the scientific evidence. Without a properly pleaded ground and skeleton argument focussing on the scientific evidence and NE's use thereof, it would be improper to make a finding on irrationality on the scientific evidence and NE's approach thereto. Therefore, I make no finding in relation to the rationality of the Disputed Conditions based on the science in the Strategic HR Assessment.

**Ground 2**

110. NE have withdrawn the guidance on straddling pens. I consider this Ground to be too hypothetical for proper consideration in this claim. The Claimant could have provided a relevant licence as an example upon which the facts could bite, if they had one, but they did not. The size and positioning of the pens, the type of protected bird and the mating season length would all be relevant factors. So many factors could affect the lawfulness or rationality of the decision, as was exposed in submissions.

**Conclusions**

111. Dealing with each of the list of issues in turn.

**Ground 1**

1. Are the Disputed Conditions ultra vires/for an improper purpose? The answer is yes.
    1.1. Do the Disputed Conditions control the keeping of gamebirds in pens where those gamebirds have not been "released into the wild" for the purposes of s.14 of the Wildlife and Countryside Act 1981? The answer is yes.
    1.2. In so doing, have the Disputed Conditions been imposed ultra vires/for an improper purpose? The answer is yes.
2. Are the Disputed Conditions otherwise unlawful for uncertainty of the conditions or irrational? I consider that the Disputed Conditions are not too uncertain, but were imposed unlawfully.

**Ground 1A**

3. Was NE's imposition of the Disputed Conditions predicated on an interpretation of s.14 of the Wildlife and Countryside Act 1981? The answer is yes.
4. If so, was that interpretation wrong in law and does that render the Disputed Conditions unlawful? The answer is yes.
5. If so, should relief be withheld on this ground pursuant to s.31(2A) of the Senior Courts Act 1981? The answer is no.

**Ground 2**

6. Should the court refuse to consider Ground 2 on the basis that the complaint is 'hypothetical'? The answer is yes.
7. Is NE's Supplementary Guidance dated 22 April 2025 unlawful in advising that "a licence is required for any release pen/area that extends partially into the

buffer Zone of a SPA and/or SAC."  I consider this question to be too hypothetical.

112. In summary, I consider that the Disputed Condition imposed on BASC members banning the keeping of GBs in SPAs and BZs was ultra vires the power granted by S.s 16(4) and (5) of the *WCA 1981* and was irrational due to the Defendant misinterpreting the scope of their powers in S.s 16(4) and (5) of the *WCA 1981*.

113. I do not consider that the other grounds were made out.

END