Neutral Citation Number: [2019] EWHC 585 (Admin)

Case Nos: CO/1673/2018 & CO/1683/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

CO/1673/2018

THE QUEEN
on the application of

ROYAL SOCIETY FOR THE PROTECTION OF BIRDS — **Claimant**

- and -

NATURAL ENGLAND — **Defendant**

CO/1683/2018

THE QUEEN
on the application of

MARK AVERY — **Claimant**

- and -

NATURAL ENGLAND — **Defendant**

(1) JEMIMA PARRY-JONES
(2) SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS — **Interested Parties**

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- -

David Forsdick QC (instructed by **RSPB Legal Services**) for the **Claimant in CO/1673/2018**
David Wolfe QC and Zoe Leventhal (instructed by **Leigh Day**) for the **Claimant in CO/1683/2018**
Paul Luckhurst (instructed by **Natural England Legal Services**) for the **Defendant in CO/1673/2018 and CO/1683/2018**
The **Interested Parties in CO/1683/2018** did not appear and were not represented

Hearing dates: 5 & 6 December 2018, 17 January 2019

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Approved Judgment

MRS JUSTICE LANG :

1. Both these claims for judicial review challenge the lawfulness of the grant by Natural England ("NE"), on 16 January 2018, of a licence to conduct a trial into the brood management of hen harriers, pursuant to section 16(1)(a) of the Wildlife and Countryside Act 1981 ("WCA 1981").

2. The Royal Society for the Protection of Birds ("RSPB") is a registered charity which promotes the conservation and protection of birds and the wider environment.

3. Dr Avery is a scientist who worked for the RSPB for 25 years, until 2011. He writes and campaigns on nature conservation and the protection of birds.

4. NE is an executive non-departmental public body sponsored by the Department for Environment, Food and Rural Affairs ("DEFRA"). It has responsibility for, amongst other things, promoting nature conservation and managing wildlife.

5. The hen harrier species in England, and elsewhere, is in severe decline, and on the brink of extinction. Hen harriers nest on the ground among the heather of moorlands, which is the habitat prevalent on grouse moors. Adult hen harriers feed grouse chicks to their young during the breeding season. The loss of grouse chicks is damaging to the grouse shooting industry and in consequence, hen harriers have been illegally killed, and their nests destroyed, on grouse moors, despite their legally protected status. The proposed brood management scheme seeks to manage the conflict between the conservation of hen harriers and the grouse shooting industry by removing hen harrier eggs and chicks from their parents in their nests, rearing them in captivity, and releasing them when they are fledged, into a suitable habitat, away from grouse moors.

6. Both the RSPB and Dr Avery contend that the brood management scheme is unlawful because of the unnecessary disturbance and harm it will cause to hen harriers in their habitat, and the existence of alternative and less invasive ways in which to conserve and protect the species.

7. The two claims were linked by the Court for hearing, following the grant of permission to apply for judicial review.

Facts

8. Hen harriers enjoy the highest level of statutory protection because of their rarity and vulnerability:

    i) they are listed in annex 1 of the Birds Directive (2009/147/EC) as a species which is particularly threatened in Europe. As a result, member states are required by article 4 to take "special conservation measures" in order to ensure its survival and reproduction, and designate suitable special protection areas ("SPA") for their conservation;

ii) they are a species of principal importance for biodiversity conservation in England, under s.41 of the Natural Environment and Rural Communities Act 2006;

iii) they are protected under schedule 1 to the WCA 1981;

iv) the species is classified as "red" (denoting the highest level of concern) in the *Birds of Conservation Concern 4* list, drawn up by bird conservation organisations.

9. There are two relevant SPAs in England: Bowland Fells and North Pennines Moors. Their conservation objectives are to restore or maintain the population, and to maintain or restore the extent and distribution of the habitats of the qualifying features and the structure and function of the habitats of the qualifying features.

10. The RSPB estimates that some 80% of all hen harrier nesting activity in England has been on grouse moors, and 57% has been on grouse moors in SPAs designated for hen harriers. By the time of the hearing, these figures were not challenged by NE.

11. Bowland Fells SPA is underpinned by a single Site of Special Scientific Interest ("SSSI") for *inter alia* hen harriers and most of the SSSIs underpinning the North Pennines Moor SPA are for *inter alia* hen harriers.

12. It was common ground at the hearing before me that the main threat to the conservation of hen harriers is unlawful persecution by those associated with the grouse moor industry. Although the killing of birds and the destruction of nests is a criminal offence, there have not been sufficient successful prosecutions to prevent or deter the unlawful persecution. Dr Avery criticised the lack of resources and energy directed towards active enforcement, and pointed to the more effective enforcement of the law in Scotland, which has made those in control of grouse moors vicariously liable for the illegal activities of their employees and contractors.

13. Amanda Craig, NE Operations Director, North, confirmed NE's strong support for effective enforcement of the criminal law, at paragraph 30 of her witness statement, and summarised the role which NE plays in investigation and enforcement. This was supplemented by Mr Luckhurst's Note provided at the adjourned hearing.

14. The *Hen harrier fieldwork protocol: joint working arrangements between the Moorland Association, Natural England and Raptor Study Groups* requires gamekeepers and estate owners to notify NE of the existence of a nesting attempt. Once a nesting site is identified, it is monitored to protect the nest from persecution. *The Hen harrier fieldwork protocol* also requires estates to inform the police if they believe that a wildlife crime has been committed and to ensure that any evidence is only removed by the police.

15. Investigation and prosecution of offences under section 1 of the WCA 1981 (i.e. killing or disturbing hen harriers or their nests) is handled by the police and the Crown Prosecution Service ("CPS"). This is the longstanding position under successive Memoranda of Understanding between the National Police Chiefs Council, the CPS and NE, and reflects the seriousness of the offence. NE provides expert evidence and factual evidence for the prosecution.

16. NE assists with investigation and prosecution in the following respects:

i) It undertakes the satellite tagging of hen harriers. Between 2002 and 2017, 158 hen harriers were tagged. It immediately informs the police if it is aware that a satellite tagged hen harrier has stopped transmitting. Satellite tagging data is collated and analysed by NE, and provides intelligence for the Raptor Persecution Priority Delivery Group.

ii) NE officers assist police officers with searches of areas of moorland where a satellite tagged bird was last identified. Unfortunately, such searches often produce no results because the evidence has been removed and the areas are so large.

iii) NE is a member of the Partnership Against Wildlife Crime (along with DEFRA, the Home Office, the CPS, and many other public-sector bodies and Non-Governmental Organisations ("NGOs")). The secretariat is provided by DEFRA. Aspects of this work include the Forensics Working Group, which supports the application of forensic technologies to assist law enforcers, including advice on the use of wildlife forensic science and funding to support forensic analysis.

iv) NE has an information sharing agreement with the National Wildlife Crime Unit which is a police-led unit which gathers intelligence on wildlife crime and provides analytical and investigative support to the police, statutory nature conservation organisations and NGOs. One of its six priorities is raptor persecution.

v) NE attends meetings of the Raptor Persecution Priority Delivery Group.

17. Ms Craig's evidence confirmed the limited effectiveness of criminal enforcement at paragraphs 31 and 32 of her witness statement:

> "31. However, as I have highlighted at paragraph 6 above, enforcement is documented in the relevant literature as being of limited effectiveness as a hen harrier conservation technique. The difficulties lie in finding any evidence that a crime has been committed or, if there is any evidence of a crime, identifying any perpetrator. The disappearance of an adult hen harrier often goes undetected. If it is detected, it will not necessarily be clear whether it is due to natural causes. If there is evidence of unnatural causes, it will not necessarily be clear which landowner or individuals are implicated, particularly given the range of this species. Nesting attempts thwarted by illegal disruption of the nest may not be detected at all. Natural England has some staff carrying out surveillance of hen harrier nesting attempts but given the very large area of the country over which hen harriers could nest it is simply impossible for Natural England or any police forces to offer comprehensive coverage.

> 32. Without expressing any views on the desirability of Dr Avery's proposals to introduce vicarious liability for wildlife crimes, I would caution against the assumption that this would be a complete and satisfactory solution in the context of hen harrier conservation. The concern would be that if there is no case against a primary perpetrator then there is no case of vicarious liability to be brought against an employer…."

18. Diversionary feeding, in which hen harriers are provided with food supplies as an alternative to grouse chicks, has had considerable success in Scotland (e.g. the Langholm Moor Demonstration Project) but it has not been implemented to any great extent in England. NE has issued class licences to permit diversionary feeding of hen harriers on grouse moors in specified counties in northern England, and has worked with the Moorland Association to make registration as swift and easy as possible. It has published *A practical guide to diversionary feeding of hen harriers on grouse moors in northern England* and NE officers have visited grouse moor sites to provide practical advice and assistance. However, take-up has been minimal. Possible reasons for landowners' reluctance to undertake diversionary feeding are the cost and inconvenience, as well as a documented concern that the presence of the food attracts other predators (see paragraph 6 of Ms Craig's witness statement below).

19. The RSPB criticised NE's failure to use its statutory powers to require the use of diversionary feeding on SSSIs designated for hen harriers, or to encourage participation by landowners by offering to fund it, or to commission studies of its efficacy in England, and the way it is perceived by the grouse moor industry.

20. NE pointed out that its powers to impose management schemes under section 28J WCA 1981, and to require diversionary feeding, were limited to SSSIs where hen harriers were among the features of special interest and where there was keepered grouse moor. There would be practical difficulties in identifying when and where hen harriers were nesting, and issuing an enforcement notice in time if diversionary feeding was not taking place.

21. Brood management has been identified in scientific research papers as a potential means of conserving hen harrier populations. The papers were summarised by Ms Craig in her witness statement, at paragraph 6:

> "a. In 2008, Natural England noted, in *A future for the Hen Harrier in England?* …, that persecution was limiting the success of hen harrier nesting attempts in England and incidents of persecution appeared to be highest around grouse moors (page 11). The number of birds disappearing whilst foraging away from nests was high (page 13). There was no proof linking incidents to particular individuals and there had been a lack of successful prosecutions (page 18).
>
> b. In S. Redpath et al, 'People and nature in conflict: can we reconcile hen harrier conservation and game management? (2010) …., the authors explained that high densities of hen harriers can limit red grouse populations and concern amongst grouse moor managers has led to continued illegal

killing (paragraph 18.2). Hen harrier conservation efforts focussing on attempting to catch gamekeepers involved in illegal activity have had little success (paragraph 18.3.1). "Diversionary feeding" of hen harriers to reduce grouse predation was a potentially promising conservation technique but raised a number of issues (including whether grouse predation was consistently reduced, the effect on the abundance of other scavengers/predators, the effect on other moorland bird species, and whether it was a desirable technique for large scale, long-term management). Brood management was a further potential option but, as with diversionary feeding, questions remained over the practicalities of the technique (paragraph 18.3.5). These techniques were not mutually exclusive (paragraph 18.4). Diversionary feeding and brood management would only be compatible with grouse shooting if they are effective at reducing hen harrier predation rates (paragraph 18.4) and progress would be dependent on effective dialogue between the main stakeholder groups (paragraph 18.4).

c. In A. Fielding et al, *A Conservation Framework for Hen Harriers in the United Kingdom: Joint Nature Conservation Committee Report No.411* (2011), the authors noted that "*illegal persecution of hen harriers is difficult to prove, for example because evidence (shot birds, trampled nests, broken eggs, dead chicks, cartridge shells) can be easily removed by perpetrators who may be increasingly aware of modern forensic techniques*" …..

d. In D. Elston et al, 'Working with stakeholder to reduce conflict – modelling the impact of varying hen harrier *Circus cyaneus* densities on red grouse *Lagopus lagopus* populations', *Journal of Applied Ecology* 2014, 51, 1236-1245 …., the authors noted that resolution of wildlife conflicts is notoriously difficult to achieve but there is evidence that stakeholder engagement reduces conflict provided that the arguments and trade-offs are explicitly considered (pages 1236-7). High densities of hen harriers can make grouse shooting uneconomic (page 1237) and continued efforts at enforcement have been unsuccessful (page 1237). A potential technique is brood management (referred to by the authors as a "quota scheme"), which would use a mechanism of moving broods to be reared in captivity before being released to rejoin the wild population (page 1237). A brood management quota system offers a potential solution to a conflict where there is currently a stalemate (pages 1242-3), recognising the role played by stakeholder discussion and agreement in searching for a lasting solution. Diversionary feeding could be used in combination with a quota. However, concerns about the

> long-term impact of diversionary feeding on hen harrier numbers and the numbers of other generalist predators have prevented the technique from being widely taken up (page 1243).
>
> e. In S. Redpath et al, 'Finding a way out of conservation conflicts' (2015) …. the authors suggest that dialogue and collaboration lead to better relationships, reduce conflict, and improved outcomes and that long-term benefits to conservation will be enhanced through collaborative approaches. However, they acknowledge that there is little available evidence to test this hypothesis (page 291)."

22. In the light of this research, in October 2015 NE's Science Advisory Committee ("NESAC") advised the NE Board that there should be a scientific trial of brood management as a conservation technique. In summary, its advice was (1) there was evidence that brood management works for raptors but such evidence did not exist from areas where there may continue to be post-release persecution; (2) broader evidence from human-wildlife conflicts suggested that the most robust solutions take account of all interested parties through dialogue rather than coercion; (3) no evidence had yet been gathered as to whether brood management for hen harriers would reduce conflict or persecution; and (4) there should be a trial of a brood management scheme to strengthen the evidence for a future decision as to whether there should be widespread roll-out of brood management for hen harriers.

23. The NE Board accepted NESAC's advice and agreed to communicate it to the Secretary of State for the Environment, Food and Rural Affairs.

24. In 2016, DEFRA established a group to consider issues concerning hen harriers in England. The group published a *Joint Action Plan* in January 2016 which included six proposals: (1) monitoring of the populations in England and the UK; (2) diversionary feeding; (3) work with the Raptor Persecution Priority Delivery Group to analyse monitoring information and build intelligence; (4) nest and winter root protection; (5) southern reintroduction; and (6) a trial of brood management, licensed under section 16(1)(a) of the WCA 1981, "to assess whether Brood Management as an intervention, is likely to improve the number of harriers present in the uplands while protecting the economic viability of the moor".

25. On 13 February 2017 an application was submitted for a licence under section 16(1)(a) of the WCA 1981. The identity of the applicant has been withheld by NE.

26. NE completed a *Technical Assessment* and a *Habitats Regulations Assessment* (*"HRA"*) under regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("Habitats Regulations 2017"). NE's Chief Operating Officer approved the issue of a licence on 10 January 2018, for reasons summarised in a document entitled *Summary of Licensing Decision*.

27. According to the *Technical Assessment*, the application was for a trial to obtain evidence about the effectiveness of brood management of hen harriers affected by illegal persecution. Such evidence did not currently exist, and so the application could be considered under the licensing purpose for science, research and education

under section 16(1)(a) of the WCA 1981. The main aims of the trial were to: (1) investigate the effect of brood management on the perceptions and behaviour of the moorland community (the social science aspect); and (2) to test the practicalities of brood management to investigate whether it can rear hen harriers in captivity and then release them to become successful breeding adults in the English uplands (the practicality aspect).

28. The *Technical Assessment* acknowledged that the proposed scheme was high risk as the population was so small and vulnerable. Stringent conditions to the licence would be required, as set out in its Final Recommendations. A strategy was in place to ensure that the trial would be stopped at any stage (incubation, rearing, transport, release pens and post-release) if it was not meeting its aim or was putting the conservation status of hen harriers at risk.

29. According to the *HRA*, the hypothesis being tested was that by reducing the conflict between harriers and grouse moor management during the chick provisioning period, breeding productivity would increase and non-breeding mortality would decrease as a consequence of a cessation in illegal persecution.

30. The *HRA* identified as a principal risk that hen harrier breeding would decrease because of decreased adult and juvenile site philopatry; decreased juvenile fitness/survival through to breeding; and capping of hen harrier nest density at a level below that necessary to achieve population-based site conservation objectives. It identified mitigation measures to address these risks. It accepted that it was "reasonable to assume that the number of birds reared to fledged will, on average, be greater than the number that would have fledged naturally due to removal of health risks such as predation and poor food provision" (p.27). It concluded that overall mitigation was provided by the operation of an exit strategy and the time-restricted nature of the trial.

31. According to the *Summary of Licensing Decision*, evidence was needed to increase knowledge of brood management and inform a decision on its possible future use. There was no satisfactory alternative to undertaking a scientific trial of brood management as there was no evidence to indicate that hen harrier numbers would recover without further intervention. The scientific purpose of the trial and its time limited nature meant that the proposed activities were proportionate. The risks identified in the *Technical Assessment* and the *HRA* could and should be addressed by stringent conditions attached to the licence.

32. NE granted the licence on 16 January 2018, permitting brood management to be trialled in the uplands of North England above the Moorland Line if the trial intervention threshold of two hen harrier nests within 10km is met (Additional Condition 4), together with all other licence conditions.

33. The trial would be subject to a restriction that pairs of hen harriers would not be subject to brood management on successive nesting attempts to manage the risk of abandonment of any particular breeding site (Additional Condition 13).

34. As to the wellbeing of chicks upon release: (1) NE will require arrangements for the security of release sites to ensure no elevated risk of illegal persecution while the juvenile harriers are held within the release pens (Additional Condition 5); (2) satellite

tagging of chicks will be implemented to assist monitoring of welfare (Additional Condition 9); and (3) NE will agree and oversee other release-site protocols (Additional Conditions 6, 7, and 8).

Statutory framework

The Birds Directive and the Wildlife and Countryside Act 1981

35. The Birds Directive (2009/147/EC) provides, so far as is material:

> "Article 1
>
> 1. This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.
>
> 2. It shall apply to birds, their eggs, nests and habitats.
>
> Article 2
>
> Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.
>
> …
>
> Article 4
>
> 1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.
>
> In this connection, account shall be taken of:
>
> (a) species in danger of extinction;
>
> (b) species vulnerable to specific changes in their habitat;
>
> (c) species considered rare because of small populations or restricted local distribution;
>
> (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

…

Article 5

Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and keeping these eggs even if empty;

(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;

(e) keeping birds of species the hunting and capture of which is prohibited.

…

Article 9

1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,

— in the interests of air safety,

— to prevent serious damage to crops, livestock, forests, fisheries and water,

— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;

> (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.
>
> 2. The derogations referred to in paragraph 1 must specify:
>
> (a) the species which are subject to the derogations;
>
> (b) the means, arrangements or methods authorised for capture or killing;
>
> (c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;
>
> (d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;
>
> (e) the controls which will be carried out.
>
> …
>
> Article 10
>
> 1. Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. Particular attention shall be paid to research and work on the subjects listed in Annex V.
>
> …
>
> Article 13
>
> Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1."

36. Annex 1 lists the species which are to be protected by the special conservation measures in article 4. Hen harriers are included in annex 1.

37. Articles 5 and 9 of the Birds Directive were given effect in domestic law by sections 1 and 16 of the WCA 1981. Section 1 makes it an offence to kill or take a wild bird, to damage or destroy its nest when it is being built or in use or to take or destroy its eggs. Part 1 of schedule 1 sets out the wild bird species, including the hen harrier, which are protected by special penalties at all times, corresponding annex 1 of the Directive. This includes the hen harrier.

38. Section 16 of the WCA 1981 provides for the power to grant licences for such actions in certain circumstances, and thus to derogate from section 1. NE has been authorised by DEFRA to grant licences under section 16. Section 16 provides, so far as is material:

"16. Power to grant licences.

(1) Sections 1, 5, 6(3), 7 and 8 and orders under section 3 do not apply to anything done -

(a) for scientific, research or educational purposes;

(b) for the purpose of ringing or marking, or examining any ring or mark on, wild birds;

(c) for the purpose of conserving wild birds;

(ca) for the purposes of the re-population of an area with, or the re-introduction into an area of, wild birds, including any breeding necessary for those purposes;

(cb) for the purpose of conserving flora or fauna;

(d) for the purpose of protecting any collection of wild birds;

(e) for the purposes of falconry or aviculture;

(f) for the purposes of any public exhibition or competition;

(g) for the purposes of taxidermy;

(h) for the purpose of photography;

(i) for the purposes of preserving public health or public or air safety;

(j) for the purpose of preventing the spread of disease; or

(k) for the purposes of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters,

if it is done under and in accordance with the terms of a licence granted by the appropriate authority.

(1A) The appropriate authority -

(a) shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution; and

….

…

(5) Subject to subsections (5A) and (6), 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.
>
> (5A) A licence under subsection (1) which authorises any action in respect of wild birds—
>
> (a) shall specify the species of wild birds in respect of which, the circumstances in which, and the conditions subject to which, the action may be taken;
>
> (b) shall specify the methods, means or arrangements which are authorised or required for the taking of the action; and
>
> (c) subject to subsection (5)(d), shall be valid for the period, not exceeding two years, stated in the licence.
>
> (6) ….
>
> (7) It shall be a defence in proceedings for an offence under section 8(b) of the Protection of Animals Act 1911 or section 7(b) of the Protection of Animals (Scotland) Act 1912 (which restrict the placing on land of poison and poisonous substances) to show that -
>
> (a) the act alleged to constitute the offence was done under and in accordance with the terms of a licence issued under subsection (1) or (3); and
>
> (b) any conditions specified in the licence were complied with."

39. In *R* (*McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750, Ouseley J. gave guidance on the EU and domestic legislative framework, as follows:

> "135….The Birds Directive permitted but did not require derogations from its general prohibition on killing or capturing wild birds. But where the derogations are adopted, they must be given effect according to their terms. The WCA gives effect to

them, and its powers must be used for the purposes for which they were given. Those terms strike the balance at the general level between the protection of wild birds and the interests which they may threaten, where there is no other satisfactory solution to that conflict…"

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

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

139 The Directive "sought to permit derogations from that provision, only so far as necessary, where hunting opportunities

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

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

141 Mr Tromans submitted that the Directive and WCA required "a strict system of protection" for wild birds, and the derogation for preventing serious damage to livestock had to be "narrowly construed and confined." I disagree, and in its practices, so does NE. The Directive provides a broad and general protection, sufficiently broad to require derogations in a wide variety of interests so as to create the desired balance between wild life and human interests. There is no warrant for requiring the principal derogations to be construed narrowly; they should be construed with proportionality and the balance of the objectives in the Directive in mind. The language of the Malta case supports the view that "strictness" of construction arose from the particular derogation at issue in that case: derogation from a ban at particular vulnerable periods on hunting wild birds, rather than the enunciation of a general

> principle. Still less is there any general or specific principle that derogations should be applied with particular stringency, and NE plainly adopts no such approach — generally. If Mr Troman's general submission is correct, the general licences and the cormorant policy appear unlawful as does its general approach to the grant of licences. It is only to raptors, and perhaps swans, that this strictness is applied."

The Habitats Directive and the Conservation of Habitats and Species Regulations 2017

40. The Directive on the Conservation of National Habitats and of Wild Fauna and Flora (92/43/EEC) ("the Habitats Directive") provides in article 6(2):

> "Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."

41. The obligation in article 6(2) of the Habitats Directive applies to SPAs designated under the Birds Directive, by virtue of article 7 of the Habitats Directive.

42. The Habitats Directive has been implemented into domestic law by the Conservation of Habitats and Species Regulations 2017 ("The Habitats Regulations 2017"). Regulation 9 of the Habitats Regulations 2017 provides that nature conservation bodies must exercise their functions so as to secure compliance with the requirements of the Birds and Habitats Directives.

43. Regulation 63 of the Habitats Regulations 2017 reflects article 6(3) of the Habitats Directive as follows:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

44. If significant and adverse effects cannot be ruled out, the proposal cannot proceed unless there is no alternative solution and the project must be carried out for imperative reasons of overriding public interest (regulation 64) and compensatory measures are taken (regulation 68).

45. The Court of Appeal in *R (on the application of Mynydd v Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231 set out the following principles for appropriate assessments under Article 6(3):

> "(1) The environmental protection mechanism in Article 6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: *Landelijke: Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Case C-127/02)* [2005] All ER (EC) 353 at [42] ("*Waddenzee*").
> (2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: *Waddenzee* at [44].
> (3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority: *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, Lord Carnwath at [41] ("*Champion*").
> (4) The question for the authority carrying out the assessment is: "What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?": *Sweetman v An Bord Pleanàla (Case C-258/11)*; [2014] PTSR 1092, Advocate General at [50].
> (5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: *Waddenzee* at [56-57].
> (6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: *Waddenzee*, Advocate General at [107] and [97], endorsed in Champion at [41] and by Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [78] ("*Smyth*").
> (7) The decision-maker must consider secured mitigation and evidence about its effectiveness: *Commission v Germany (Case C-142/16)* at [38].
> (8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49]. (9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* at [80]."

46. The ECJ has recently given further guidance on the approach to appropriate assessments in *Holohan v An Bord Pleanala* C-461/17 and *Cooperatie Mobilisation v Vereniging Leefmilieu* C293/17 ("Dutch Nitrogen") on 9 November 2018.

47. The approach to the integrity question and its relationship to the conservation objectives for which an SPA was classified was explained by the Court of Appeal in *R (RSPB) v DEFRA and BAE* [2015] EWCA Civ 227, [2015] Env LR 24. It referred to the ECJ case of *Sweetman* at [5] which established that in judging integrity:

> "54 … It is the essential unity of site that is relevant. To put it another way, the notion of "integrity" must be understood as referring to the continued wholeness and soundness of the constative characteristics of the site concerned.
>
> 55 The integrity that is to be preserved must be that "of the site". In the context of a natural habitat site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status….
>
> 56 It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining the whether the integrity of the site is affected the essential question the decision-maker must ask is "why was this particular site designated and what are its conservation objectives?"…"

48. The Court of Appeal went on to rely on the European Commission Guidance and to conclude that conservation objectives were "fundamental" to the integrity question.

49. In *Commission v Italy* [C-304/04] an extremely large SPA was designated *inter alia* for golden eagles. A ski-lift was approved and runs created in a corridor through a forest within the SPA. A main effect of the project was to reduce the forest habitat used for nesting and to split the habitat. It was held that the destruction of nesting habitat was a breach of article 6(2) of the Habitats Directive.

50. In *Bagmoor v Scottish Ministers* [2012] CSIH 93l the reporter into a windfarm application had accepted that the integrity of the SPA would be adversely affected by a wind farm if just one pair of the 19 pairs of golden eagles in the SPA were killed or displaced. The Court considered the evidence and said at [53]:

> "All of this adequately supported the reporter's finding that disturbance and displacement could not be ruled out and that this could lead to abandonment of territory thus producing an adverse effect on the integrity of the SPA in terms of the conservation objectives".

51. In *Briels v Minister van Infrastructuur* C – 521/12 [2014] PTSR 1120 habitat was lost and replaced. The replacement was compensation and not relevant to the question as to whether that loss constituted an adverse effect on the integrity of the site.

Ground 1 (in both claims): conservation of wild birds under section 16(1)(c) WCA 1981

The Claimants' submissions

52. Under Ground 1, the Claimants submitted that NE misapplied section 16 of the WCA 1981 by treating the purpose of the licence solely as research under sub-paragraph (a), and not including the conservation of hen harriers under sub-paragraph (c). However, the ultimate purpose of the licence was to conserve hen harriers; that was its only justification. If the trial was deemed successful, applications for licences for brood management schemes would follow. The trial could not be separated from the roll-out of such schemes. In the *Technical Assessment*, it was accepted that "it is not possible to totally disconnect the two aspects" and acknowledged that the section 16(1)(c) purpose of conserving wild birds had also been considered.

53. Under section 16(1A), the licence could only be granted if it was satisfied that "there is no other satisfactory solution", reflecting the words of article 9 of the Birds Directive. In order to give effect to the Birds Directive, NE could not properly grant the licence unless it was satisfied that there was no other satisfactory solution for conserving hen harriers. By limiting its consideration to the research purpose in sub-paragraph (a), it was circumventing the statutory purpose, contrary to the principle established in *Padfield v Minister of Agriculture* [1968] AC 997. Mr Forsdick QC sought to draw analogies with the requirement to consider alternatives in the context of strategic environmental assessments and environmental impact assessments, and with the prohibition on separating what was, in reality, a single project into a number of smaller projects, thus avoiding the requirement for an environmental impact assessment.

54. The RSPB submitted that diversionary feeding was an alternative satisfactory solution, as it was recommended in the *Joint Action Plan*; it demonstrably worked; and it was not a high-risk invasive scheme like brood management.

55. Dr Avery also emphasised that NE should have assessed the alternative of effective enforcement of the criminal sanctions under the WCA 1981. Professor Steve Redpath, a raptor conservation expert who authored some of the research papers relied upon by NE, presented to NESAC a non-exhaustive list of strategies for tackling the problem of criminality, only one of which was a brood management trial. They included (i) licensing grouse shooting, (ii) increasing enforcement, (iii) banning grouse shooting, (iv) financial compensation, (v) increasing grouse numbers. When NE came to consider the licence application, it did not consider any of these alternatives.

Conclusions

56. In my judgment, NE's interpretation of section 16 WCA 1981 and the Birds Directive was correct. It granted the licence under sub-paragraph (a) of subsection (1) "for scientific, research, or educational purposes".

57. Section 16(1A)(a) provides that the appropriate authority "shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution" (emphasis added). This is a reference back to the specific sub-section under which the licence is granted. NE was therefore statutorily required to consider whether there were other satisfactory solutions to the section 16(1)(a) scientific purpose and not with respect to any other purpose. The wording of article 9 is less explicit, but I do not consider that article 9 of the Birds Directive points to any different interpretation. The range of potential purposes in section 16 and article 9 is so diverse (e.g. air safety, protection of crops, re-population) that it is inconceivable that the same solutions could apply in each case.

58. NE was therefore correct to consider: (1) whether the proposed trial was capable of delivering against its scientific purpose, i.e. generating evidence in relation to the two main matters that the trial was intended to investigate; and (2) whether there were any other satisfactory alternative means of obtaining that evidence.

59. On a fair reading of the evidence, it is clear that it was the advice of NESAC and the policy of DEFRA in the *Joint Action Plan* that there should be a scientific trial licensed under section 16(1)(a) of the WCA 1981 to establish evidence. The application was expressly made, assessed and granted under section 16(1)(a) of the WCA 1981. This was confirmed in the *Technical Assessment*. The references to sub-paragraph (c) in the *Technical Assessment* do not detract from that.

60. I accept NE's submission that there is a meaningful distinction between a scientific/research licence and a general licence. The advice from NESAC to the NE Board was that "whilst there is evidence to suggest that brood management can work, the nature and extent of the current uncertainties lead us to advise against the widespread roll-out of brood management". I accept Ms Craig's evidence that, in granting the licence, NE has not concluded that a brood management scheme will be or should be part of the conservation solution: it has licensed a scientific trial to gather evidence. That evidence should assist policymakers in determining whether a brood management scheme could be part of a broader conservation strategy. If the evidence/conclusions from the trial are negative or equivocal, there may never be an application for a section 16(1)(c) licence.

61. There is simply no evidence to support the Claimants' submissions that NE is seeking to circumvent the overall statutory purpose of conservation of an endangered species. The evidence shows that NE has handled this issue conscientiously, in the genuine belief that a trial brood management scheme may be beneficial. This view is supported by researchers and the DEFRA *Joint Action Plan*. There are plainly differences of view between the Claimants and NE on the value of brood management schemes and the effectiveness of diversionary feeding, criminal sanctions, and enforcement through licensing controls, but it is not the Court's role to adjudicate

upon these issues. NE has been entrusted with the task of determining whether a licence should be granted, and the Court will only intervene if NE acts unlawfully.

62. The strategic environmental assessment and environmental impact assessment regimes referred to by Mr Forsdick QC are not analogous because any decision to grant a conservation licence will have to be a further independent and challengeable decision under section 16(1)(c). That step, and the opportunity to challenge, is not being circumvented.

63. For these reasons, the Claimants do not succeed on ground 1.

Ground 2 (RSPB claim): Trial in Scotland, instead of England

The Claimant's submission

64. RSPB submitted that NE erred in law by deciding to run the trial brood management scheme in England, thus running the risk of reducing the hen harrier population in an area where it is already very low, instead of Scotland, where the hen harrier population is higher and less vulnerable. It was common ground that NE and DEFRA had no power to run a trial in Scotland, as this is a devolved responsibility.

Conclusions

65. The *Joint Action Plan* envisaged a brood management trial in the English uplands. The alternative option of testing brood management on the Scottish hen harrier population was considered in the *Technical Assessment* at paragraph 4.2.2:

> "**4.2.2 Undertaking the trial on other (e.g. Scottish) hen harrier populations**
>
> An alternative option to the proposed practicalities of a trial would be to test brood management on Scottish hen harrier populations as the population is larger and more resilient to any possible failures during the trial. Furthermore, the intervention density to trigger the trial is more likely to be reached to allow the trial to be successfully undertaken.
>
> However, the aims of the trial are to test if brood management influences the perception of the species, and thus levels of illegal persecution in the English uplands, and also whether this increases hen harrier numbers in the English uplands. Undertaking a trial in Scotland would not inform us about the effect on human attitudes and behaviour, nor the influences on the harrier population as the population density is already high. The aim of the trial is to assess this in the English uplands due to the threatened status of the population in this specific, and this was the population identified for the trial in the Joint Action Plan.

> A trial undertaken in Scotland would only test the practicalities of captive rearing and release success, which does not address all of the actions necessary to inform the possible use of brood management as a conservation tool or the social science aspect of the trial. Therefore, undertaking the trial on Scottish populations is not considered to be a satisfactory alternative."

66. NE expressly considered this issue when making its decision. The *Summary of Licensing Decision* concluded at paragraph 2:

> "There is no satisfactory alternative to undertaking a scientific trial to investigate the effects of brood management on hen harrier numbers in the English uplands…. The trial must be carried out in the English uplands to be able to determine the effect on human perceptions and behaviour and the impact on the English hen harrier population. There is currently no evidence to indicate that hen harrier numbers will recover to a higher level without further intervention and a continued decline has been recorded by past population surveys. Therefore, it is not considered a satisfactory alternative to wait for population recovery prior to trialling brood management."

67. In my judgment, NE exercised its statutory powers lawfully. It considered the options, and reached a rational conclusion. Whilst it is a conclusion with which the RSPB disagrees, that is not enough to render it unlawful. Therefore the RSPB does not succeed on ground 2.

Ground 3 (RSPB claim): Inchoate purpose

The Claimant's submission

68. The RSPB submitted that the licence had been granted at a point where the aims, methods, monitoring and evaluation of the research were inchoate, and therefore the grant of the licence, for the purpose under section 16(1)(a) of the WCA 1981 was not justified. The balancing of risks, aims, benefits, and assessment of alternatives and possible outcomes had to be assessed prior to the grant, not afterwards.

Conclusions

69. I accept NE's submission that the RSPB has not fairly characterised the content of the application or NE's assessment of it. There was a detailed *Project Plan* submitted in support of the application which was carefully assessed.

70. The *Technical Assessment* set out the aims and objectives of the proposed trial at paragraphs 2 and 4.3.1 in the following way:

i) to explore whether brood management could reduce the perceived conflict between hen harriers and grouse management and lead to a cessation in illegal persecution and to investigate the effect of brood management on the

perceptions and behaviour of the moorland community (the social science aspect); and

ii) to assess the effectiveness of brood management as a conservation tool in the English uplands by trialling the rearing of hen harriers in captivity and releasing them to become successful breeding adults in the English uplands (the practicality aspect).

71. The methodology of the social science trial, as set out in the *Project Plan*, was considered. The trial was to be undertaken by the University of Kent in association with Professor Redpath of the University of Aberdeen, and the primary investigators were found to be suitably qualified and experienced. The *Technical Assessment* concluded that "the research aims are underpinned by a coherent explanation of the underpinning social theory that will be used in the approach to the research".

72. The *Technical Assessment* considered the methods to be used in the practicality aspect of the trial, as described in detail in the *Project Plan*. Whilst rearing chicks in captivity and releasing them into the wild, the trial would monitor dispersal, survival and productivity, including by use of satellite tracking data from intervention and non-intervention nests.

73. NE conducted a rigorous assessment of the application. The initial project plan was rejected as it was not sufficiently detailed. Following assessment of the final *Project Plan*, the *Technical Assessment* recommended that further requirements be met, and these were duly incorporated into Additional Condition 2 to the licence which provides that the licensed activity can only take place if:

i) Natural England has approved in writing the membership and terms of reference of a scientific advisory group to oversee the research undertaken as part of the project (Additional Condition 2(a)); and

ii) Natural England has approved in writing a plan of the research aims, methods, monitoring and evaluation of the project (Additional Condition 2(b)).

Annual reports of the scientific advisory group's conclusions must be submitted to NE.

74. The RSPB alleged that the inclusion of Additional Condition 2 demonstrated that the justification for the research study would only be developed after the grant of the licence. In the light of the detailed provision in the *Project Plan* and the analysis in the *Technical Assessment*, which set out the objectives and justification for the trial, I do not consider that allegation can be sustained. The *Technical Assessment* concluded that "the proposals would contribute towards the knowledge of brood management and deliver evidence related to the practicalities and social science aims of the projects". The conditions were imposed as an additional safeguard to address residual concerns and to enhance the research contribution which the trial would make.

75. In conclusion, NE identified and assessed the aims and methods of the research, together with monitoring and evaluation, prior to the grant of the licence, and lawfully concluded that it was justified under section 16(1)(a) of the WCA 1981. Therefore, ground 3 does not succeed.

Ground 4 (RSPB claim): Licence conditions do not achieve the stated purpose

The Claimant's submission

76. The RSPB submitted that the licence conditions did not achieve the stated purpose. Condition 2 requires a scheme to be approved but provides no mechanism for enforcing compliance with its terms.

Conclusions

77. Ms Craig stated in her witness statement at paragraph 19:

> "The licence conditions in place to protect the wellbeing of hen harriers involved in the trial are very stringent. They represent a highly precautionary approach, particularly given the expertise of the licensee in relation to the handling of raptors (Natural England's Senior Ornithologist advised that those involved *"are experts at rearing birds of prey"* ….). I am confident that the licensee will adequately protect any birds involved in the trial and observe all of the relevant conditions. If the licensee did not do so, we would revoke the licence. The planned compliance regime will include visits to the raising facility and to release sites by Natural England staff responsible for ensuring compliance with licences. This licence is a high priority for compliance monitoring under Natural England's Species Licences Compliance Monitoring Strategy because it affects an important protected species, is novel, and has attracted pubic interest (paragraphs 6.1 and 6.3 ….)."

78. I accept Ms Craig's evidence that the scheme of care for the hen harriers is adequately secured.

79. I consider that Additional Condition 2(b), which requires the licensee to submit a plan of the research aims, methods, monitoring and evaluation for approval by NE, is an adequate means of ensuring a methodological approach to the scientific trial which satisfies NE. If the proposed plan is not adequate, it will not be approved by NE. Moreover, it cannot be amended without the written consent of NE.

80. Ms Craig states, in paragraphs 43 of her witness statement, that it is expected that members of the scientific advisory group will have a high level of expertise and will fulfil the terms of the approved plan.

81. I accept that compliance with the plan can be adequately secured by NE's ability to monitor the ongoing project. The scientific advisory group's mandatory annual reports to NE will form part of the monitoring exercise.

82. Under section 16(5)(d) WCA 1981, NE may modify the licence, which could include the imposition of further conditions to secure compliance with the plan. As a last resort, NE also has power to revoke the licence at any time. Both modification and revocation are effective sanctions, in my view.

83. The RSPB has not succeeded in establishing that the licence conditions do not achieve their purpose, and therefore it does not succeed on ground 4.

Ground 5 (RSPB claim): 5 years study

The Claimant's submission

84. The Claimant submitted that the licence was contrary to the purpose of section 16(5A)(c) WCA 1981 because the proposed research requires at least 5 years, whereas a licence under section 16(1)(a) is limited to 2 years. There has been no identification of research objectives within a 2 year period.

Conclusions

85. I agree with NE's submission that there is no basis for reading into section 16 WCA 1981 a restriction of 2 years on the length of any research project. The restriction is on the duration of the licence, not the project. There is no restriction on the award of successive licences, and in practice many licences are renewed by NE. Whilst the 2 year limit on the duration of a licence may be a useful way of achieving close oversight of licensed projects, it is important to bear in mind that the Birds Directive does not restrict the duration of a licence to 2 years. Additional restrictions on the duration and extent of research projects could well be inconsistent with the terms of articles 9 and 10 of the Wild Birds Directive.

86. For these reasons, ground 5 does not succeed.

Ground 6 (RSPB claim): Improper/unlawful purpose in the SPAs

The Claimant's submission

87. The RSPB submitted that the brood management scheme would displace a protected species – hen harriers – from major parts of SPAs designated for their conservation and protection, as grouse moors make up a high proportion of the SPAs. The rationale behind the scheme was that hen harrier predation of grouse chicks had to be managed to protect the economic success of the grouse moors because otherwise the unlawful persecution of hen harriers would continue. This was contrary to the statutory purpose of the SPAs which was to protect and conserve hen harriers, not grouse chicks nor the grouse moor industry. Alternative conservation measures like diversionary feeding would be consistent with the statutory purpose of the SPAs because they do not disturb the hen harriers in their natural habitat.

Conclusions

88. I refer to paragraphs 8 to 12 of my judgment regarding SPAs for hen harriers and the threat of unlawful persecution by those associated in the grouse moor industry who seek to protect grouse chicks from predation by hen harriers in the breeding season.

89. In my view, it is abundantly clear from the evidence that NE's purpose in licensing the brood management scheme was to seek to further the conservation of hen harriers through research not to protect grouse chicks or the grouse moor industry. Thus, it was not inconsistent with the purpose of the SPAs.

90. The total area of keepered grouse moor where nests might be managed under the scheme was approximately 538,420 hectares. The total area of the SPAs was 163,248.71 hectares. Thus, the licence area was much wider than the area of the two SPAs.

91. The conservation objectives of North Pennine Moors SPA and Bowland Fells SPA were to support 11 and 12 pairs of hen harrier respectively during the breeding season. However current figures were well below that. There were no recorded nesting attempts in either SPA in 2017. It is therefore possible that there will be no brood management trials in the SPAs.

92. Nonetheless, NE assessed the risks to the conservation objectives of the SPAs when deciding whether to grant the licence, and if so, on what terms. It considered the risk that the loyalty of adult birds to the SPA might be decreased as a result of their nest being subject to brood management. This risk was judged to be adequately mitigated by the licence condition that no hen harrier pair could be subject to brood management on successive nesting attempts (Additional Condition 13).

93. NE also considered the risk that fewer chicks might survive if subject to brood management. However, the assessment was that chicks raised in captivity were likely to have higher survival prospects than chicks in the wild, who would be vulnerable to predation by other creatures and unlawful persecution by humans, as well as adverse weather conditions and insufficient food supplies. The method of release was also carefully considered and risk assessed.

94. It was an essential part of the project proposal, and the grant of the licence, that chicks removed from their nests would be released back to the same SPA. Additional Condition 12 in the licence provided:

> "Hen harriers taken from a Special Protection Area (SPA) must be released back within the boundaries of the same SPA."

95. The recommendation that they should be released near bracken/rush, rather than burnt heather strips, was intended to encourage the birds to locations away from active grouse moors, where unlawful persecution is more likely to occur. It did not mean that they would be released outside the SPA.

96. The density threshold for triggering intervention means that, before a brood can be moved, there must be another nest nearby which will not be moved, which necessarily safeguards the number of chicks in the SPAs (as well as other areas).

97. The primary legal protection for SPAs is provided by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations 2017 which provide that no project can be approved if it would adversely affect the integrity of the SPA, having regard to its conservation objectives. In the light of the *HRA*, NE was entitled to

conclude that this scientific trial would not adversely affect the integrity of the two SPAs. The *HRA* is considered in more detail under ground 7.

98. For these reasons, ground 6 does not succeed.

Ground 7 (RSPB claim): Failure to comply with regulation 63 of the Habitats Regulations

Claimant's submission

99. The RSPB challenged NE's conclusion that there was no adverse effect on the integrity of the two SPAs, arguing that it misdirected itself on the appropriate tests and failed to conduct the requisite assessment. It failed to take account of the displacement of hen harriers from the SPA which, in the light of authorities such as *Sweetman*, *Bagmoor,* and *Commission v Italy*, should have led to the conclusion that there was an adverse effect on the integrity of the sites.

Conclusions

100. In my judgment, the criticisms of the *HRA* fall well short of establishing any breach of regulation 63 of the Habitats Regulations 2017 and article 6(3) of the Directive.

101. The impact on both SPAs was considered in sufficient detail in the *HRA* to meet the statutory requirements. Table D.2.1 assessed risks and possible potentially adverse effects, together with potential mitigation measures. It concluded as follows; (page 53):

> "Some of the mitigations listed above may be incompatible with running an experimental BMS trial in a context where few, if any, nesting hen harriers, are currently present within the SPAs. In particular, those possible mitigations that would decrease the opportunity to commence the BMS trial may not be appropriate in the trial, such as taking only partial broods of older chicks, taking only eggs at an early stage to encourage relaying and not applying BMS to first time breeders. However, with current knowledge, these mitigations are not all necessary to be able to conclude no adverse effect. Furthermore, overall mitigation of any possible adverse effect on integrity is provided by the operation of an exit strategy and the time-restricted nature of the trial. These aspects of the trial will allow for the early identification of any possible unforeseen adverse effects on hen harrier population dynamics and the avoidance of these having a long-term impact on the recovery of the populations of the SPAs.
>
> Similarly, the actions identified to mitigate against capping of the HH population below the conservation objective target might be appropriate in future considerations of a full BMS, but are not necessary for this limited initial trial."

102. I do not accept Mr Forsdick QC's submission that this passage indicated that mitigation was discounted because it would prevent the trial. It was a careful analysis of what mitigation measure "were necessary in order to be able to conclude no adverse effect".

103. The final paragraph of the passage quoted above should not be taken to mean that NE was sanctioning the capping of the SPA hen harrier population below the conservation objective target. The starting point for the assessor was a current SPA population of effectively zero, and a long term failure to meet target population levels. As the *HRA* observed; (page 44):

> "With reference to designated sites, the ambition of the trial is not to deliver a project that would return hen harriers to SPA classification levels… only to test whether it could raise it from effectively extinct to an unfavourable but recovering trajectory… The key question is whether this 5 year temporary trial is likely to hinder, delay, or undermine the long-term achievement of SPA objectives."

104. Under the terms of the licence, no adult birds will be removed, and the improved survival prospects of chicks would be likely to increase the SPA population.

105. The RSPB has not been able to identify any material information which was not available to the assessors, and appears to have misread the conclusions reached in the report. After listing the conditions and restrictions required, the authors of the *HRA* gave a summary of reasons for the decision as follows; (page 59):

> "The licence application as received did not contain enough detail to conclude no adverse impact on integrity of the site involved. However it is recognised that through improved knowledge and identification of successful approach the proposals could, if the trial is successful, contribute towards recovery of hen harrier population on North Pennines Moors SPA and Bowland Fells SPAs. As part of a time-limited trial and with appropriate conditions in place, to reflect Conservation Objectives for the sites, it is concluded that the project can be compatible with the conservation interests of the designated sites and no adverse effect on site integrity can be ascertained."

106. I do not accept that this means that the assessors did not have enough information about the scheme from the *Project Plan* to conduct the assessment. I agree with Mr Luckhurst's submission that this reasoning reflected the staged approach typically adopted under the Habitats Regulations 2017, namely: (1) whether the project as proposed could potentially have an adverse effect; followed by (2) whether the project would adversely affect the integrity of the European site, taking into account any further mitigation measures imposed or agreed by the assessing authority. In this case, the conclusion was that there would be no adverse effect on integrity, provided specific licence conditions were in place.

107. The displacement of hen harriers from SPAs was not assessed because displacement was neither the purpose, nor the effect, of the trial. No adult birds will be removed from the SPAs. There will be restrictions on how many eggs can be removed from the SPA at any time. Chicks reared in captivity will have better survival prospects than they would have in the wild and they will be returned to the SPA as fledglings. Fledglings will be fitted with satellite tags, to monitor dispersal, survival and productivity, and the scheme can be halted at any stage if unforeseen problems arise. This is a temporary trial, not a permanent scheme.

108. In my judgment, these facts were clearly distinguishable from the cases cited by Mr Forsdick QC where the habitat was to be permanently altered by major building developments, resulting in permanent displacement.

109. In conclusion, the *HRA* was an appropriate assessment carried out in accordance with the Habitats Regulations 2017 which reached lawful conclusions. Therefore ground 7 does not succeed.

Ground 2 (Dr Avery claim): Brood management scheme is disproportionate

Claimant's submission

110. Dr Avery's first main submission was that the brood management scheme trial was disproportionate because the licence conditions for the trial were different to those which would apply if the scheme was rolled out more widely after the trial was concluded. This made the trial worthless.

111. The proposed trial will test brood management only where the threshold of two nests within 10 km is met (Additional Condition 4). It is predicted that this density of hen harriers would reduce the local grouse population by 3-5% (*Technical Assessment*, paragraph 4.4.1). But the *Joint Action Plan* stated that the aim of a brood management scheme would be to remove broods once the number of hen harriers had reached a density where they would impact "significantly" on grouse numbers. The *Technical Assessment* advised (at paragraph 4.4.1) that in other licensing applications, the legislation provides for action to be taken when serious damage is occurring, which is usually taken to be an impact of 10% or more. Applying that approach here, a wider roll-out of brood management would not be permitted until the hen harrier population increased to two nests within 7 km or less, which would be the point at which the hen harriers would reduce the local grouse population by 10%. There was no evidence that hen harrier population levels will rise in that way without other successful conservation measures. Therefore the trial was pointless, and thus irrational and disproportionate.

112. Dr Avery also submitted that the trial would not provide any meaningful data about the response of those involved in the grouse moor industry because it would be assessing responses to a low level density of hen harriers. Their response might well be different to a higher level density of hen harriers.

113. Dr Avery's second main submission was that the doubtful benefits of the trial were disproportionate to the risk to the hen harrier population. He cited passages in the *Technical Assessment* to the effect that the risk was high because the population was

so small and vulnerable. Even the loss of a single chick could represent a significant proportion of that season's productivity.

Conclusions

114. It is a requirement of EU law that any licence granted is proportionate (see *McMorn* at [140]). In *R (Lumsdon & Ors) v Legal Services Board* [2016] AC 697, Lord Reed and Lord Toulson, giving the judgment of the court, set out the test of proportionality as follows:

> "33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method…."

115. The member state has a discretion, or margin of appreciation, in the selection of the appropriate measure, and its terms, subject to the overriding requirement of proportionality. It is for the Court to decide whether the measure is proportionate as part of its function in deciding on its legality (see [108]).

116. In its *Summary of Licensing Decision*, NE concluded that the action to be licensed was proportionate to the scale of the problem or the need, for the following reasons:

> "The English hen harrier population has declined considerably with only 4 breeding pairs recorded in England in 2016 and the English population is considered to be of highest conservation priority. Measures have been implemented including through the Hen Harrier Joint Action Plan, but the population has continued to decline. Therefore a brood management trial is considered to be proportionate to the need to gain knowledge to possibly employ the technique as a conservation tool for English hen harriers. The trial is time-limited and will only include the taking of hen harriers to analyse whether brood management could be successful in the English uplands."

117. In my judgment, Dr Avery's first challenge, based on the intervention threshold, was simply too speculative to be relied upon. As the *Technical Assessment* explained, in paragraph 4.4.1, the scientific model correlating densities of nests with a percentage reduction in the number of grouse originated in a paper by *Elston, Redpath et al* (2014). The authors recommended that any trial should start from a low density, to allow for the uncertainties in the modelling, and because grouse managers were more likely to favour building up from low densities of hen harriers. Thus, the proposed intervention level for the trial followed the recommendation arising from the research.

118. The *Technical Assessment* drew an analogy with different licensing contexts, based on different legislation, where "serious damage" has to be occurring before a licence is granted and where impacts of below 5% are not considered to be serious. However, it was far from clear that the same criteria would be appropriate in an application for a

licence in this different context. Although NE quite properly indicated to the Project Board that the intervention density used in the trial could not be taken, in itself, as support for the use of this threshold in any future scheme, NE has not reached any firm conclusions either as to the density of hen harriers or level of damage to grouse which would be required to justify the wider roll-out of a brood management scheme, following a successful trial. That would have to be determined if an application is made for a licence at a later date, in the light of the results of the trial.

119. In the *Summary of Licensing Decision*, NE expressly considered this issue, noting that the trial was taking place at a density that would be less likely to meet licensing tests for a full scheme, which had the disadvantage of lowering the power of the trial, but on the other hand, the lower threshold had the advantage that the trial was more likely to be implemented within the licence period. It concluded that, despite this, the actions were still proportionate to the problem to be solved.

120. Dr Avery's submission that hen harrier populations could not reach the higher intervention threshold without the adoption of alternative measures was also too speculative. Other conservation measures are already in operation. The population level in 5 years time is unknown. As Mr Luckhurst submitted, it was not necessary for the higher intervention threshold to be met nationwide. The density threshold could be met if there were a number of nests clustered in a local area.

121. Dr Avery's allegation that the trial could not meet its research objective with a lower density of hen harriers was not the view of the researchers, who recommended that "it may be advisable initially to take a precautionary approach, as grouse managers are more likely to favour building up from low densities of harriers". Messrs Elston and Redpath are acknowledged experts in this field. The *Technical Assessment* gave detailed consideration to the threshold issue, and concluded that the proposal would contribute towards the knowledge of brood management and deliver evidence relating to the practicalities and social science aims of the project (paragraph 4.3). When deciding to grant the licence, NE was satisfied that the trial would sufficiently contribute to providing the evidence and knowledge required to underpin a future brood management scheme (*Summary of Licensing Decision*, paragraph 3). The weight of evidence and opinion was against Dr Avery's view.

122. Finally, Dr Avery correctly quoted from the *Technical Assessment* where it assessed the high risk to hen harriers, but this was only its initial assessment of the potential risk. It went on to consider the risks in detail and concluded that the actual level of risk would be managed by the proposals in the *Project Plan*, the licence conditions, and its own recommendations. The risks were also fully assessed in the *HRA*, and recommendations made. In its decision, NE made its own assessment and acted on the recommendations for further licence conditions to manage outstanding risks.

123. In considering the question of proportionality, I have taken into account the evidence of the severe decline in the hen harrier population, and the failure of other conservation measures to reverse that decline. I am satisfied, on the basis of the research and the assessments which have been carried out, that NE was correct to conclude that the proposed trial was appropriate to achieve the objective pursued, namely, to contribute to the knowledge needed for a possible brood management scheme, and that this objective could not be achieved other than by a trial of this type. Furthermore, NE was entitled to exercise its discretion as to the terms of the licence,

and the way in which the trial should operate. It did so lawfully – its conclusions were both rational and proportionate.

124. Therefore I do not accept Dr Avery's submission that the proposed trial would be disproportionate, and his ground 2 does not succeed.

Final conclusion

125. For the reasons set out above, the Claimants' claims are dismissed.