Case Name: *Langton, R (On the Application Of) v Secretary Of State For Environment, Food And Rural Affairs & Anor* 2018 EWHC 2190 (Admin) (15 August 2018)

Full case: Click Here

Commentary: This is not a planning court case but is of relevance.

The first challenge was to quash the decisions of the Secretary of State to issue guidance in 2017 relating to the licensing of supplementary badger culling on the basis that that the guidance was issued following an unlawful consultation and was contrary to the requirements of the Protection of Badgers Act 1992. The lawfulness of the consultation was challenged on the basis that the Secretary of State had failed to consult when the proposal was at a formative stage; in conducting the consultation, he had provided information misleading as to the policy's rationale and insufficient to enable consultees to provide intelligent and informed responses; and having received the responses, he unlawfully failed to take them into account (the "Sedley" requirements).

Although it was in some respects an unimpressive consultation document it did not meet the high threshold of being so clearly and radically wrong as to render it procedurally unfair and thus unlawful. A consultation has to be considered in its statutory context, since statutory duties to consult vary depending on the provision in question, the particular context, and the purpose for which the consultation is carried out. In this case under section 15(3) of the Natural Environment and Rural Communities Act 2006 the Secretary of State has a duty to consult in relation to guidance to be given to Natural England, in other words when matters are at a fairly advanced stage, and not on wider issues of policy. The scope of the statutory duty is also limited because, beyond Natural England and the Environment Agency, it is up to the Secretary of State to decide who to consult. The Court accepted the Secretary of State's submission that he was entitled to decide upon the specific matters on which he wished to consult in relation to this proposed guidance on supplementary culling, and that he could decide that the consultation should proceed on the basis that he was already satisfied about the principles of supplementary culling. As to how the Secretary of State addressed the consultation responses, for unlawfulness the claimant must establish that a matter was such that no reasonable decision-maker would have failed in the circumstances to take it into account as a relevant consideration. None of the matters the claimant raises fell into that category.

The second challenge was to decisions of Natural England to grant licences for badger culling on the basis that they were granted in breach of the assessment requirements of the Conservation of Habitats and Species Regulations 2010, 2010 SI No 490 ("the Habitats Regulations"). Natural England was said to have issued the licences in breach of the Habitats Regulations by failing to carry out appropriate assessments (HRAs), either through not carrying out a screening exercise at all, or through concluding that the proposals would not be likely to have significant effects on the relevant features of the sites in question.

Where HRAs had been carried out, the claimant attacked these as formulaic responses, which did not account for the evidence it advanced on the risk posed by a potential increase in the fox population, and which were not geared to the special conditions of each site. The precautionary principle in this context is fundamental, but "[i]t is for a third party who asserts that there is a risk which cannot be excluded on the basis of objective information to produce credible evidence to the court that the risk is a real one…" In light of the evidence, the claimant had not established as irrational or otherwise unlawful Natural England's assessment of fox predation risk in the three areas.

In some cases, Natural England had not completed templates for sites near the licence cull areas. Natural England's failures, even if only to record that no consideration of the risk was necessary with these close-by sites to cull areas, was a breach of its duty under the Habitats Regulations. However, relief was refused under section 31(2A) of the Senior Courts Act 1981 as Natural England had established through its evidence that it is highly likely that the outcome would not have been substantially different if it had considered whether fox predation risk arising from granting culling licences would have an adverse effect on the integrity of the sites at issue.

The claimant submitted that the conditions which Natural England had attached to the cull licences, following advice to applicants, fell within the People Over Wind ruling and should not have been taken into account at the screening stage. These were that no culling activity would take place in certain locations (e.g., Severn Estuary SPA) or at certain times of the year. The licence conditions which Natural England attached to the licences in Areas 16 and 17 were not the mitigating or protective measures which featured in the People Over Wind ruling. They are properly characterised as integral features of the project which Natural England needed to assess under the Habitats Regulations. The Judge accepted Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so.

The Judge also commented on the difficulties caused by the voluminous evidence, compounded with new issues being raised and un-pleaded complaints being advanced to hearing and stated that this underlined the need for parties to comply with the rules and the Administrative Court Guide when taking judicial review proceedings

For further discussion please see Simonicity

Case summary prepared by Town Legal LLP