

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2014

Before :

THE HONOURABLE MR JUSTICE KENNETH PARKER

Between :

The QUEEN (on the application of BADGER TRUST)	<u>Claimant</u>
- and -	
THE SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS	<u>Defendant</u>
-and-	
NATURAL ENGLAND	<u>Interested Party</u>

David Wolfe QC (instructed by **Bindmans LLP**) for the **Claimant**
James Eadie QC and Kate Grange (instructed by **The Treasury Solicitor**) for the **Defendant**
John Howell QC (instructed by **The Head of Legal Services, Natural England**) for the **Interested Party**

Hearing dates: 21 August 2014

Judgment

The Honourable Mr Justice Kenneth Parker :

Introduction

1. The Claimant, the Badger Trust, promotes the conservation and welfare of badgers, their setts and habitat. In this claim the Badger Trust challenges the decision taken on or about 3 April 2014 by the Defendant, the Secretary of State for The Environment, Food and Rural Affairs, to continue, for a second season, the culling of badgers by controlled shooting in two pilot areas.
2. The single ground of challenge is that the Defendant had given an unqualified and unequivocal assurance that, as long as she had in real contemplation the 'rolling out' (that is, the extension) of culling to other geographical areas, she would keep in place an Independent Expert Panel ('the IEP'), and would not extend culling beyond the two pilot areas unless (a) the IEP had concluded that culling by controlled shooting was safe, effective and humane; or (b) the Defendant had at least taken into account an evaluation made by the IEP (at the end of the second or any subsequent season in

the two pilot areas) as to the safety, effectiveness and humaneness of culling by controlled shooting.

3. The Defendant indisputably does have in real contemplation the 'rolling out' of culling by controlled shooting beyond the two pilot areas, but does not intend to keep in place an IEP for the second and subsequent seasons in the two pilot areas. The Defendant, therefore, it is contended, does not intend to comply with the unqualified and unequivocal assurance that she gave. The Badger Trust has in law a legitimate expectation that she would comply, and accordingly the decision to proceed with further culling by controlled shooting in the two pilot areas is unlawful.
4. The Badger Trust acknowledges that no decision has yet been made to roll out culling beyond the two pilot areas, and that the Badger Trust could seek to challenge any such future decision (if it were in fact taken). However, on that scenario it might be objected that, having putatively allowed culling to continue in the two pilot areas for some further period without legal challenge, the Badger Trust could no longer attack such a future decision; and in any event it is just, convenient and conducive to good public administration that the issue raised by this claim be determined before culling is continued in the pilot areas. I see good sense in the position taken in that respect by the Badger Trust.

Factual Background

5. In June 2012 the Badger Trust challenged the decision of the Defendant taken on 14 December 2011 to adopt a policy on Bovine TB ('bTB'), and badger control in England that would authorise Natural England (the Interested Party in the present claim) to license groups of farmers and land owners to cull badgers. On 12 July 2012 Mr Justice Ouseley dismissed the challenge: *R (on the application of the Badger Trust) v The Secretary of State for The Environment, Food and Rural Affairs v Natural England, Royal Society for the Prevention of Cruelty to Animals* [2012] EWHC 1904 (Admin) 2012 WL 2500501. At paragraphs 4-17 of the judgment Ouseley J helpfully sets out the background to the decision, to which I would respectfully direct any interested reader of this judgment, but for convenience and in the light of subsequent developments I should also provide my own summary of events.
6. The incidence of bTB in cattle herds has increased significantly since the 1980s and in 2013 over 26,000 cattle were slaughtered for the purposes of bTB control. The annual public cost of bTB is about £100 million, with estimated multi-million pound annual costs to farmers. bTB has spread extensively northwards and eastwards from infected pockets in the south-west of England and Wales. The incidence of new herd breakdowns is now doubling every 9 years. This incidence of bTB is the highest in Europe.
7. In response to this serious and growing problem, on 14 December 2011 the Secretary of State announced that the Government would be proceeding with a policy of allowing culling of badgers by farmers and landowners. The policy was introduced following extensive consultations. The detail of the policy was set out in a Policy Statement ('the Policy') together with Guidance to Natural England under section

15(2) of the Natural Environment and Rural Communities Act 2006 (NERCA) ('the Guidance').

8. The policy was considered to be carefully managed and science-led. The Secretary of State was, and remains, confident, on the basis of the current scientific evidence, that badger culling can make a significant contribution to combating the increasing problem of bTB.
9. The Secretary of State, however, decided to proceed on a precautionary basis. It was recognised that the policy should be tested before making a decision whether to roll out the policy more widely. Accordingly, the policy was piloted in two areas, Somerset and Gloucestershire, to test assumptions which had been made about the effectiveness, humaneness and safety of the proposed primary method of culling i.e. controlled shooting. The term controlled shooting refers to the shooting of unrestrained badgers. The other method of culling is by cage trapping and shooting. That alternative method is significantly more expensive than controlled shooting. The policy was not piloted to test contribution to disease control of badger culling per se. These pilots lasted 6 weeks and were overseen by an IEP.
10. In accordance with the Policy, the culls in Somerset and Gloucestershire were licensed for a four-year period and commenced in 2013. The Policy expressly stated that these culls should continue for a period of not less than four consecutive years. The need for at least four years of culling was based on expert scientific advice and evidence that culling should be done over a sustained period of at least four years in order to achieve a net reduction in the number of new confirmed TB herd incidents.
11. As part of the decision to proceed cautiously, the Secretary of State indicated in the Policy that the piloting of controlled shooting, with oversight by independent experts at that stage, would take place in year one, i.e. in the first cull period of six weeks within the Open Season.
12. In the Policy, published in December 2011, it was stated:

"5.4. Initially in the first year, culling will be piloted in two areas, to test our assumptions about the effectiveness, humaneness and safety of controlled shooting, overseen by an independent panel of experts. If monitoring on the humaneness, effectiveness and safety indicates that controlled shooting is an acceptable culling technique, then and only then would this policy be rolled out more widely. ...

5.42. We are confident that controlled shooting will be an effective and humane shooting method given its widespread use in other species. However, in response to concerns about the lack of evidence on this, we propose to take

a precautionary approach by piloting the policy in two areas initially. The pilot will test our assumptions about the effectiveness (in terms of removing 70% of badgers from the cull area over six weeks) and humaneness of controlled shooting. The design and evaluation of the pilots will be overseen by a panel of independent experts, whose role will include overseeing the design of the data collection, its analysis and interpretation. A decision on further roll-out of a policy that allows controlled shooting will be made following evaluation of results from the six weeks of culling.” (emphasis added)

13. Under the heading ‘Monitoring and Policy Evaluation’ the following was stated:

6.1 ...controlled shooting will be piloted in two areas initially in the first year in order to test our assumptions about the humaneness, effectiveness and safety of this control method. Culling will be closely monitored in these two areas. The monitoring will be overseen by a panel of independent experts, who will advise on the appropriate methods for monitoring effectiveness and humaneness. The panel will also use feedback from those undertaking field observations to confirm that controlled shooting is safe and consider whether any amendments to the training and best practice are necessary. (emphasis added)

14. At §20 of the Guidance it was stated:

“... Should the results of the pilot highlight an issue with controlled shooting (whether its effectiveness, humaneness or safety), Defra will consider how this should be addressed (for example, by amending or tightening the requirements in the Best Practice Guidance or training). If necessary, Defra will advise Natural England that the licence conditions for the pilot areas should be amended to permit only cage-trapping and shooting and will review whether controlled shooting should continue to be an approved culling method.”

15. The precise role of the IEP was set out in its Terms of Reference. Those Terms of Reference made clear that its role was to provide advice on the effectiveness, humaneness and safety of controlled shooting; and to make recommendations to the Secretary of State as to future options for monitoring any roll-out of the policy (if appropriate), together with changes and improvements to the licence criteria and/or guidance. The Terms of Reference stated:

“To help Ministers evaluate the effectiveness (in terms of badger removal) and humaneness of controlled shooting the independent expert panel will:

- a. oversee the development of scientifically robust and policy-relevant monitoring protocols;*
- b. advise on appropriate auditing of data collection and analysis (either by panel members or by the independent auditor);*

c. On completion of the cull and where appropriate:

i. provide advice to Ministers comprising their view of the robustness of the data collection and analysis conducted by the research teams, and a discussion of factors that may have influenced the results obtained;

ii. advise on other factors of scientific relevance that are material to the monitoring of effectiveness (in terms of badger removal) and humaneness of controlled shooting, and recommend (if appropriate) options for monitoring if the policy is rolled out more widely;

iii. consider the report on the public safety of controlled shooting following the pilots and other information that may arise regarding operator safety, and

iv. recommend any changes or improvements to the licence criteria, training course content, or Best Practice Guidance."

16. The IEP was not involved in the day to day monitoring of the culls. The IEP's primary roles were to (i) guide the development of scientifically and statistically sound protocols and (ii) assess the robustness of the data collection and their analysis. As stated by the IEP in its final report "[t]he IEP was not involved in either the implementation or the day to day monitoring of the pilots during the six week period set aside for culling". That day to day monitoring was carried out by the Animal Health and Veterinary Laboratories Agency ('AHVLA'), together with Natural England who were responsible for monitoring compliance with the licence conditions. There was also an independent audit of the protocols and the data collection (i.e. an independent audit separate from the scrutiny of the IEP), as recorded at §3.7 of the IEP's Report.
17. On 5 March 2014 the IEP presented its Report on the 'Pilot Badger Culls in Somerset and Gloucestershire' to the Secretary of State. In that report the IEP concluded that:
- a. **Effectiveness** – controlled shooting failed to remove the target of at least 70% of the pre-cull badger population; it was extremely likely that controlled shooting removed less than 24.8% in Somerset and less than 37.1% in Gloucestershire.
 - b. **Humaneness** – It was extremely likely that between 7.4% and 22.8% of badgers that were shot at were still alive after 5min and therefore at risk of experiencing marked pain. The Panel was concerned at the potential for suffering that these figures implied.
 - c. **Safety** – The Panel was confident that controlled shooting, when carried out in accordance with Best Practice Guidance, posed no threat to public safety even in the presence of local protest.
18. In the light of the Panel's concerns over the effectiveness and humaneness of controlled shooting and in accordance with their terms of reference, the IEP made a number of recommendations as to how changes could be made to improve standards of effectiveness and humaneness. At §10.6.3 the panel stated:

“If culling is continued in the pilot areas, or in the event of roll-out to additional areas, standards of effectiveness and humaneness must be improved. Continuation of monitoring, of both effectiveness and humaneness, is necessary to demonstrate that improvements have been achieved. In addition, such monitoring should be independently audited.”

19. The Secretary of State made a statement to the House of Commons on bTB and published the Government’s Strategy for achieving TB-free status for England.
20. The Strategy summarised in one document a variety of measures designed and necessary to tackle bTB, including cattle measures, addressing the reservoir of disease in wildlife (including the use of both vaccination and culling of badgers), and the development of new techniques.
21. As to culling, the Secretary of State stated that:
 - a. there would be no wider roll-out of the policy this year to new areas;
 - b. but, as envisaged, planned and announced from the outset, there would be continuation of the Licensed Culls in Somerset and Gloucestershire for the remaining three years of the four-year period;
 - c. however, the Licensed Culls would continue with improvements in place as had been recommended by the IEP in their report dated 5 March 2014.
22. As is evident from Defra’s formal written Response to the IEP report, the Secretary of State accepted all but one of the IEP’s recommendations as to how any future culling should be carried out in order to improve standards of effectiveness and humaneness. Evidence filed in these proceedings explains in detail why a particular recommendation was not adopted. In responding to the IEP report the Secretary of State stated:

“We have set out our response to each of the Panel’s recommendations. In implementing these recommendations we have to balance the need to continue monitoring the effectiveness of the culls and accuracy of the shooting with the costs of carrying out detailed fieldwork and post-mortem examinations.

Monitoring effectiveness and humaneness of the cull will continue in an appropriate and cost-effective way, building on the quality of the research carried out in the pilots. We will work with Natural England to require better data collection by the cull companies to evaluate progress and improve effectiveness, for example by better targeting areas where badgers remain, and take steps to ensure sufficient effort is deployed to cull all the known badger groups in defined areas. Similarly, we will implement monitoring of the accuracy of controlled shooting that will be sufficiently

rigorous to identify issues of concern so that timely interventions can be made if necessary.

The purpose of the pilots was to test our assumptions about safety, efficacy and humaneness of controlled shooting. This has now been completed through the high-quality information generated that will enable us to plan how we proceed in controlling this wildlife reservoir of bovine TB effectively, humanely and safely. We will work with Natural England to put measures in place to address the recommendations made by the Panel."

23. The Secretary of State, therefore, considered that the work of the IEP provided "high-quality information" which could be used to plan the second year of culling. That included a recommendation as to the need for monitoring and an independent audit. Both of these have been accepted by the Secretary of State.
24. Evidence filed in these proceedings explains the nature of the detailed work that is now being undertaken to make changes to the practices and procedures for the second year of the culls in order to address the matters raised by the IEP about effectiveness and humaneness, including establishing detailed monitoring arrangements for the second year of the culls. These monitoring arrangements will include continued data collection by the AVHLA and Natural England, together with monitoring by the AVHLA and Natural England during the culls. In particular:
 - i) On **humaneness**, all of the IEP's recommendations have been adopted and comprehensive measures are being taken to ensure that the accuracy of the shooting improves in the second year. This includes amending the Best Practice Guidance, overhauling the contractor training package and the introduction of live night-time exercises to improve contractor accuracy. In terms of the monitoring of the humaneness of culling, this will include field visits by Natural England (with the aim of observing a minimum of 60 badgers across the two areas being shot), together with post-mortem examinations by AHVLA vets with the aim of examining a random sample of 60 carcasses per area to confirm that injuries are consistent with rapid time to death. The results of this monitoring will be reviewed after the completion of the culls and will also enable feedback to be provided during the culling period to facilitate ongoing assessment. In addition the Defendant is adopting a conservative approach to the assessment of time to death of badgers following shots being taken. Following an IEP recommendation a proportion of missed shots (or un-retrieved badgers) will be associated with a time to death of greater than 5 minutes and thus poor humaneness.
 - ii) On **effectiveness**, all but one of the Panel's recommendations have been accepted and a range of measures are to be adopted to assess the effectiveness

of the culls including population estimates together with information relevant to an assessment of contractor effort.

- iii) In line with the IEP's recommendation an independent audit of the monitoring of effectiveness and humaneness of the culls will take place (as occurred in the first year and as discussed at paragraph 3.7 in the IEP's Report). The role of the independent auditor will be to review the Standard Operating Procedures and to verify that the procedures in the Standard Operating Procedures have been properly implemented. The independent auditor will not be asked to assess the Standard Operating Procedures from the perspective of the type of data to be gathered, or to assess the nature of any analysis or the conclusions drawn from that analysis.

- iv) The monitoring protocols and results for the culling in 2014 will be made publicly available which will allow debate, assessment and evaluation by the public and those with an interest in the policy. However, there will no longer be evaluation of the results of the culling by an IEP.

Legal Principles

- 25. A substantive legitimate expectation requires as a minimum an undertaking which is "clear, unambiguous and devoid of relevant qualification" - see Bingham LJ in *R v Inland Revenue Comrs, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at 1569, affirmed by Lord Hoffman at §60 of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453.

- 26. Whether there is such an undertaking is ascertained by asking how, on a fair reading, the representation or course of conduct would reasonably have been understood by those to whom it was made, see §§44-45 of *R (on the application of Patel) v General Medical Council* [2013] 1 WLR 2801 EWCA Civ 327 and *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 12 at §30, applying *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 at §56.

- 27. In some instances a representation, akin to a contractual promise, is made to an individual or group of individuals who may as a consequence act to his, her or their detriment or at least have a strong expectation of being treated in a certain way. Such cases tend to raise acute issues of individual fairness or justice, going beyond the rationale of promoting consistency in public decision making and respect for promises previously made by public authorities. In other cases the representation relates to a general policy where the element of individual fairness or justice is missing or at least

far weaker. In *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 Laws LJ emphasised the special nature of the promise or practice which was necessary to give rise to a substantive legitimate expectation. At §43 he stated:

“Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in Preston referred (866 – 867) to “conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations”.” (emphasis added)

28. After referring to *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337 and *R v North and East Devon Health Authority, ex parte Coughlan* [2011] QB 213 Laws LJ stated, at §46:

“These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class. As Lord Woolf MR said in Ex p Coughlan (paragraph 71):

“May it be ... that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?”

29. Subsequently in *R (on the application of Patel) v General Medical Council* [2013] EWCA Civ 327 1 WLR 2801 Lloyd Jones LJ (with whom Lord Dyson MR and Lloyd LJ agreed) adopted Laws LJ's analysis as to the need for a “pressing and focussed representation”.

Discussion

30. Mr. David Wolfe QC, on behalf of the Badger Trust, submits that against the background that I have described, and in the light of certain matters that I shall mention later, the Court should find that the Defendant gave the specific assurance set out at paragraph 2 of this judgment, and that the giving of such an assurance was sufficient to create the relevant legitimate expectation.

31. I cannot accept this submission. In my view, it is necessary for this purpose to consider carefully the critical statements in the definitive Policy document, for it is to those statements that an interested party would sensibly look to determine what assurances, if any, were being given to the public. It is clear that at the time of the articulation of the Policy the Defendant was ‘confident’ that controlled shooting would be shown to be an effective, safe and humane method of culling. It was not contemplated as a strong likelihood that testing might well show up significant, if not substantial, problems with such a proposed method of culling. In other words, the prospect of significant failure was not primarily to the fore of the mind of the decision maker. The critical passages in the Policy document (see paragraph 12 above) should be read with that scenario in mind.
32. The more extensive passage is contained in paragraph 5.42 of the Policy: the final sentence of that passage states in clear terms that a decision [on further roll-out] would be made ‘following evaluation of results *from the six weeks culling*’ (my emphasis). This passage does *not* state that the IEP would be kept in place after that first test period of culling. All that is stated is that a decision on further roll-out would be taken following evaluation of results from that initial period of culling. No continuing role for the IEP, referred to in that paragraph, is assured, signposted or even hinted at, beyond the specified evaluation of the results of that initial period.
33. That straightforward reading is simply buttressed by what had already been stated, albeit more briefly, at paragraph 5.4 of the Policy document. That paragraph stated, in unequivocal terms, that ‘*initially, in the first year*’ culling would be overseen by an IEP. The paragraph did *not* state (indeed, it would have been contradictory) that culling would be overseen by an IEP in any subsequent period. Taken with what was set out later more fully in paragraph 5.42, the ‘monitoring’ referred to was plainly the monitoring of the IEP undertaken in respect of the initial period. The final sentence of paragraph 5.4 did imply that a decision would have to be taken in the light of the ‘monitoring’ of the IEP in respect of the initial period. Paragraph 5.42 then makes that implication explicit, by expressly referring to a decision that would be taken after the evaluation of results ‘*from the [first] six weeks of culling*’. No evaluation by the IEP of any later period was mentioned.
34. The interpretation set out above is also supported by paragraph 6.1 of the Policy (see paragraph 13 above). The natural reading in the relevant context of the first sentence of paragraph 6.1 was that *in the first year* the purpose of the pilot in the two areas was to test the Defendant’s assumptions about humaneness, effectiveness and safety of controlled shooting. The oversight and subsequent advice of the IEP was by reference to that initial period. Nothing was said about any subsequent period.
35. Finally, the conclusion of the Policy was in similar clear terms:

“7.5...we are taking a precautionary approach to implementing the policy, initially licensing two pilot areas in the first year to test our assumptions about the effectiveness, humaneness and safety of controlled shooting. *The initial six-week period of culling in these areas will be monitored closely, and overseen by an independent panel of experts.* The policy will only be rolled out more widely if the evaluation of the pilot confirms

that culling using controlled shooting can be carried out effectively, safely and humanely” (emphasis added)

No role for the IEP beyond that initial six week period was envisaged in this conclusionary passage, let alone the making of an unequivocal and unqualified assurance that the IEP would be kept in place if the evaluation of the initial six week period raised significant concerns in the relevant respects.

36. I accept that paragraph 5.4 of the Policy (see paragraph 12 above) does contain an assurance that only if the IEP’s monitoring of the initial period indicated that controlled shooting was an acceptable culling technique, would the policy be rolled out more widely. However, that assurance does not entail a further assurance that the IEP would be kept in place beyond the initial period. If, contrary to the Defendant’s strong expectation, the IEP evaluation identified in relevant respects significant shortcomings in controlled shooting as a culling method, the Defendant would plainly have to address the situation generally. At one extreme the Defendant might have to jettison the proposed policy; on the other hand, the evaluation might, as has proved to be the case on the Defendant’s evidence in these proceedings, firmly clear the way forward to implementing the proposed policy, by identifying what specific steps should be taken to ensure, with an appropriate level of confidence, that controlled shooting was in relevant respects an acceptable culling method.
37. In my judgment, therefore, on a careful reading of these critical passages in the definitive Policy document, there is no warrant at all for the alleged assurances that I have set out at paragraph 2 of this judgment.
38. It also seems to me that this is not a case where the Court should be tempted to read into the Policy assurances that which cannot fairly be extracted from the express language used by the policy maker in an important Policy document. I say that for the following reasons.
39. First, the representation (in strong version (a) at paragraph 2 above) would in effect remove ultimate control of policy making from the executive to an outside group, the IEP. Unless and until the IEP concluded, on a putative evaluation of culling in the pilot areas, undertaken at some time after the evaluation of the initial period of culling, that controlled shooting was in relevant respects acceptable, the executive could not proceed with the proposed policy. That would be the case even if the executive, having regard to that evaluation, and to other relevant evidence, believed that the proposed policy would on balance nonetheless promote the public interest. The Defendant believes that the Report of the IEP has shown a clear way forward; steps have been taken to implement the IEP’s recommendations; supervision of the culls will continue; further participation by the IEP is not necessary or proportionate. It has often been observed that the doctrine of substantive legitimate expectation is in tension with another important principle of public law in a democratic society, namely, that the executive charged with safeguarding and advancing the public interest should have the opportunity to change or modify the direction of policy if it is believed that such change or modification would better achieve those objectives. In this case, on strong variant (a), the tension would be acute, and it would be a bold court indeed that would read in the restriction implicit in variant (a) on the executive’s power freely to conduct policy in an important area of public administration. I accept that the much weaker variant (b) in paragraph 2 is less prone to this particular

objection, but, precisely because it is weaker, it then heightens the objections based on proportionality.

40. Secondly, and related to the first point, I note the extreme and absolute terms in which the alleged representation is couched. Even if it had turned out to be the case (contrary to the actual facts) that the IEP had identified no more than a relatively minor failure in the way in which controlled shooting had been carried out in the initial six week period, the Defendant, consistently with the alleged representation, would have been required to maintain the IEP in place, at public expense and with other opportunity costs, in order that the IEP could evaluate the results of the next period of culling. The Defendant would have been so required, even if no reasonable, well informed observer could have objectively identified a sufficient case for further involvement of the IEP. In my view, such an extreme and absolute assurance would be hard to justify as an instrument of rational public policy. I pressed Mr. Wolfe QC at the hearing on whether the representation was said to be absolute. With his usual prescience he foresaw where that might lead, for, once he accepted that the representation might be qualified, it would be necessary, but not straightforward, and probably contentious, to identify the qualification with some precision. He would also then run the risk of a counter case from the Defendant that, on a view of matters rationally open to the Defendant on the evidence, any reasonable qualification had in any event been met, in the light of the findings of the IEP evaluation and the steps taken by the Defendant to address the issues raised by those findings.
41. Thirdly, the only document that addressed head on what might happen if the IEP, on its evaluation of the initial period of six weeks culling, did not find that controlled shooting had proved in relevant respects acceptable, was the statutory Guidance given to Natural England, in the following terms:

“... Should the results of the pilot highlight an issue with controlled shooting (whether its effectiveness, humaneness or safety), Defra will consider how this should be addressed (for example, by amending or tightening the requirements in the Best Practice Guidance or training). If necessary, Defra will advise Natural England that the licence conditions for the pilot areas should be amended to permit only cage-trapping and shooting and will review whether controlled shooting should continue to be an approved culling method.”
42. There was here no mention of further involvement by the IEP. On the contrary, the Guidance simply provided that the Defendant would take appropriate steps to address any matters raised by the evaluation of the pilot. Again, in my view, the Court should not read into the Policy a representation that would, to put it at the lowest, be very hard to reconcile with the one document, being statutory Guidance, that squarely envisaged the contingency that has arisen.
43. Fourthly, there would be an unacceptable degree of imprecision in the alleged representation. The terms of reference of the IEP are capable of alteration, and they have in fact been changed from their initial formulation. It is unclear whether these terms of reference would need to be continued or modified in some way if the IEP were, consistently with the representation, kept in place. That again would be a fruitful area for potential doubt, uncertainty and subsequent contention.

44. Fifthly, in my view, the Court should be slow to read in a representation of the kind alleged in this case, where to do so would be likely to carry significant cost implications for the public purse that the executive believes would be disproportionate to any achievable benefit. On 30 November 2011 the Defendant published an impact assessment in respect of the proposed policy. Paragraph 6.20 of the assessment divided monitoring costs into two elements, namely, monitoring in the two pilot areas in the first culling period, and ongoing monitoring that would occur in all licensed areas. Paragraph 6.21 referred to the close monitoring of the two pilot areas *in the first year*, and the involvement of the IEP. These references are themselves difficult to reconcile with an alleged representation that the IEP would on a certain contingency be involved beyond the first year, particularly as it would appear that the cost assessment for the IEP was limited to the first year. In any event it appears from Paragraph 6.21 that the costs of maintaining the IEP (which is a group of distinguished experts) are significant, putting aside any opportunity costs of retaining the services of such eminent individuals (or any suitable replacements).
45. Finally, it appears to me to be incongruous for the Court to read into the Policy the alleged representation, when the very body that is the central focus of the representation, the IEP, did not proceed on the footing that its remit extended beyond the initial period of culling, and did not envisage for itself any future participation. Taken as a whole, the introduction to the Report from its Chairman, Professor Ranald Munro, bears the hall marks of a valedictory rather than a statement on behalf of a group which thought that, in the light of its evaluation of the initial period, it would be required to remain in place for any relevant purpose. Furthermore, paragraph 3.6 of the Report states in terms:
- “The IEP’s remit was limited to advising on controlled shooting *over a six week period*. We were satisfied that the protocols agreed for the 6-week pilot calls were statistically robust and that the AHVLA had collected, during this period, the data needed to enable the Panel to formulate its advice...”
(emphasis added).
46. In section 6 (‘Implications for Roll-out’) the IEP recommended that monitoring should be continued in the event of roll-out, without at all implying that the IEP would be, or would be likely to be, involved, in respect of the continuing pilots or more generally, in any such monitoring as it had been engaged for the period of its express remit, or indeed without suggesting that the IEP should be involved at all for the future.
47. Mr. Wolfe QC, in his effort to extract the representation that I conclude cannot fairly be found in the definitive December Policy document, drew my attention to other material. It seems to me that if a representation of the kind in question does not feature in a carefully articulated and definitive published policy, the court must be extremely cautious in fabricating the necessary ingredients from other sources. However, in deference to his thorough advocacy, I shall deal relatively briefly with the further material.
48. In July 2011 the Defendant published a document ‘Bovine TB Eradication Program for England’. This document did not state that a final decision had been taken to proceed with a policy of badger control. The Ministerial Forward said:

“Having carefully considered all the evidence and the responses to the public consultation we held last autumn, we are of the view that badger culling could make an important contribution to our fight against TB as part of a comprehensive package of measures. But we have made some changes to the proposed policy in an effort to address the concerns that have been raised, and we want to give key stakeholders an opportunity to comment on detailed Guidance to Natural England before making a final decision to proceed with a policy of badger control. If the decision is to proceed, controlled shooting as a method of badger control would then be piloted in the first year and if this is found to be humane and effective by an independent scientific panel of experts, only then would this policy be rolled out more widely.”

49. Paragraph 101 of the document is to similar effect. These passages take the matter no further. As in December 2011, the Defendant contemplated that controlled shooting would prove to be effective, safe and humane. There is specific reference to piloting in the first year. There is no express assurance that, if the independent scientific panel of experts had, contrary to expectation, reservations in relevant respects, such a panel would be retained to evaluate the results of future periods of culling. The only legitimate expectation was that the Defendant would consider the evaluation and would not proceed unless satisfied that any concerns identified by the panel had been thoroughly and properly addressed.
50. The Second Document is the further consultation on guidance to Natural England dated July 2011. Paragraph 27 stated:

“We are confident that controlled shooting is an effective and humane shooting method given its widespread use in other species, and that the further measures outlined above will ensure this. However, in light of the concerns that have been raised, we propose to take a precautionary approach through a pilot of the policy; initially licensing two areas in the first year, which will be closely monitored to ensure that this method is both effective and humane. The results of the monitoring in these areas will be examined by a panel of independent scientific experts. If controlled shooting is found to be effective and humane by this independent panel, then and only then would the policy be rolled out more widely. Monitoring would continue throughout the culling period in all licensed areas to ensure standards are maintained ...”.

This passage is consistent with the other document relied on, but, for the same reason, takes the matter no further. The focus is on the first period, given the expectation to which I have referred, and no assurance is given that the expert panel would be retained beyond that period.

51. Mr. Wolfe QC also referred to the pleadings and skeleton arguments in the judicial review before Ouseley J. For example, the skeleton argument of the Secretary of State dated 22 June 2012 referred to a ‘copper bottomed enforcement and monitoring

regime'. That was not an expression used in any of the policy or consultation documents, but was plainly embracing the IEP and its role. However, it simply begs the question what leading counsel for the Secretary of State had in mind when he used that expression. The Defendant would say that he was doing no more than characterising a system in which the IEP would be formed and would evaluate the results of the initial period of culling, and the Secretary of State would not extend controlled shooting unless he had thoroughly and properly addressed any concerns in relevant respects expressed by the IEP as to the acceptability of that method of culling. Nothing is said in the skeleton argument, or elsewhere in the pleadings, that the IEP would be retained in place on the contingency that has occurred.

52. Ouseley J set out the background to the judicial review, as I have explained. In doing so, he referred to passages in the documents that I have considered at greater length. The issue before him was not whether the representation alleged in these proceedings had been made and his mind was not focussed on any such question. There is nothing in his judgment, or, for completeness, in any correspondence between the Defendant and those representing the Badger Trust to the effect that the Defendant would, on the contingency that has occurred, retain in place the IEP to evaluate the results of culling beyond the initial period.
53. I am, therefore, able to dismiss this claim on the basis that the Badger Trust had no legitimate expectation of the nature alleged. The Defendant submitted that, even if the Badger Trust had such a legitimate expectation, she would be entitled to disregard it for reasons of public interest. The Defendant further maintains that in making that assessment she has, in the light of this claim, given due weight to the existence of a hypothetical legitimate expectation.
54. This, however, strikes me as somewhat unreal. The Defendant has forcefully argued, and has persuaded me, that there are no plausible grounds to support the alleged legitimate expectation. On that basis it would be very difficult to accept that the Defendant could have given proper weight to a factor that has in effect been, on good grounds, dismissed, particularly as the assurance, if it had been given, would touch on a sensitive area of public policy. In other words, had I been satisfied that the Badger Trust had the legitimate expectation that it alleges, I would have given such relief as would have required the Defendant to reconsider whether culling by controlled shooting should be allowed to continue without there being an IEP of some kind.
55. Finally, I note that it is accepted that, even if the Badger Trust had the relevant legitimate expectation, it would not be an expectation created by, or binding on, Natural England. Natural England would have been obliged to perform its duties as required by the applicable legislation and subject to any lawful guidance given by the Defendant.
56. In the event, the claim is dismissed for the reasons stated.