OUTER HOUSE, COURT OF SESSION

[2021] CSOH 108

P1102/20

OPINION OF LADY CARMICHAEL

In the petition

TREES FOR LIFE

Petitioner

For

JUDICIAL REVIEW

Petitioner: O'Neill QC, Blair; Burness Paull
First Respondent (NatureScot): Crawford QC, Welsh; Harper McLeod
Third and Fourth Respondents (NFU Scotland and Scottish Land Estates Ltd): J Findlay QC, Colquhoun; DAC Beachcroft LLP

21 October 2021

Introduction

[1] Beavers became extinct in Scotland some centuries ago. A planned release of beavers in Knapdale began in 2009. Another population of beavers in Tayside has grown from accidental or illegal releases. Following various studies and reports, the Scottish Ministers decided that both of these populations should remain, and beavers should be a European protected species ("EPS") with effect from 1 May 2019: the Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716) ("the 1994 Regulations") as amended by Conservation (Natural Habitats, etc) Regulations 2019 (SSI 2019/64).

[2] The activities of the beavers in Tayside have come into conflict with agricultural interests there. Beavers build dams in waterways and burrow into river banks adjacent to and on agricultural land. The 1994 Regulations contain provision for licensing actions which are otherwise prohibited, including the killing of beavers. NatureScot, the first respondent, is responsible for the licensing decisions.

[3] The petitioner is an environmental charity. It asserts that the first respondent grants licences for the lethal control of beavers to all and any applicants who report beaver activity on or near to what the first respondent classifies as prime agricultural land ("PAL"). The petitioner submits that EU law requires that lethal control must always be treated as a last resort, and that to issue licences in this way is unlawful.

[4] The third and fourth respondents have entered the process to represent the interests of those who hold such licences, the great majority of whom are members of one of the two organisations.

[5] The petitioner claims that the first respondent has a de facto policy or practice of granting licences for the lethal control of the population of Eurasian beavers in Scotland without due and proper consideration of the necessity and proportionality of issuing a licence in each individual case. The claim is based on the contents of internal guidance and published policies of the first respondents, and on the content of call logs, emails, and site reports relating to 21 licences. The petitioner lists the numbers of 49 licences granted for lethal control since May 2019, and seeks reduction of all those licences. The petitioner also seeks nine declarators. They reflect complaints that the first respondent:

(a) failed to interpret and apply the 1994 Regulations correctly, and in accordance with the requirements of EU law;

(b) was not entitled to take into account a document entitled *Beaver Licence Assessments – Prime Agricultural Land* ("the *PAL Assessment*");

(c) failed to give reasons for granting licences;

(d) had a blanket policy of granting licences for lethal control where applications related to PAL, and failed to consider the individual circumstances of each application; and

(e) should have reviewed and revoked the licences that it had granted authorising lethal control.

Only one of these complaints is well-founded, for the reasons explained more fully below. The first respondent failed to give reasons for granting licences. It is a requirement of EU law that reasons be given when licences of this sort are granted.

The 1994 Regulations

[6] The first respondent is the "appropriate nature conservation body" for Scotland, in terms of Regulation 4(1) of the 1994 Regulations. Regulation 39(1) of the 1994 Regulations makes it an offence:

(a) deliberately to capture or kill a wild animal of a European protected species;

(b) deliberately to disturb any such animal;

(c) deliberately to take or destroy the eggs of such an animal; or

(d) to damage or destroy a breeding site or resting place of such an animal.

[7] Regulation 44 allows for those activities to be carried out for specified purposes, including preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries: regulation 44(2)(g). Before granting a licence, the first respondent must be satisfied that there is no satisfactory

alternative, and that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range: regulation 44(3)(a) and (b).

[8] The 1994 Regulations are the enactment in domestic law of Council Directive 92/43/EEC ("the Habitats Directive"). Article 12 prohibits various activities, and Article 16 allows for derogations from the prohibition in Article 12, provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. There is no suggestion that the Habitats Directive has been incorrectly transposed.

[9] Article 16(2) and (3) provides that member states are to report to the Commission every two years, specifying

> (a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;
>
> (b) the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;
>
> (c) the circumstances of when and where such derogations are granted;
>
> (d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task;
>
> (e) the supervisory measures used and the results obtained.

[10] The Habitats Directive provides definitions of "conservation status" and "favourable", at Article 1(i):

> "conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;
>
> The conservation status will be taken as 'favourable' when:
>
> — population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> — the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> — there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis"

[11] There was no dispute that the court should construe the regulations purposively so as to serve the aims of the Habitats Directive. Parties agreed that the precautionary principle was a principle of EU law which was relevant to the meaning and effect of the 1994 Regulations. In construing the 1994 Regulations I could derive assistance not only from the jurisprudence relating to the Habitats Directive, but that relating to Directives 79/409/EEC and 2009/147/EC on the conservation of wild birds ("the Birds Directives").

[12] The 1994 Regulations are retained EU law: European Union (Withdrawal) Act 2018 ("EUWA"), sections 1B(7), 6(7).

Submissions – summary

Petitioner

[13] The first respondent required to consider in relation to every licence authorising lethal control whether there was a satisfactory alternative to lethal control. Killing a beaver was a "final act" with obvious consequences for the conservation status of the species, in that the population would be diminished with each killing. It would also have an impact on the genetic diversity of the pool of beavers available to breed, which, again, would have an adverse effect on the conservation status of the species. The same could not be said for

non-lethal control measures. If beavers were captured and moved that would not have the same consequence for the conservation status of the species. Derogations required to be interpreted strictly, and if domestic jurisprudence suggested otherwise, then it was wrong.

[14] The petitioner claimed that it had evidence which demonstrated that the first respondent granted licences for the lethal control of beavers as a matter of course to "all and any applicants" who reported beaver activity on or near to PAL. It was a policy of first resort. That was unlawful.

[15] The court could not second guess the rationale of the first respondent. The first respondent bore the onus of satisfying the court that the standards and principles of EU law were not breached by its policy or practice of issuing lethal control licences for beavers: Case C-685/15 *Online Games Handels GmbH and others* v *Landespolizeidirektion Oberösterreich* ECLI:EU:C:2017:201, opinion of Advocate General Sharpston, paragraph 53; Joined Cases C-52/16 & C-113/16 *SEGRO Kft* v *Vas Megyei Kormányhivatal Sárvári Járási* EU:C:2018:157 [2018] 2 CMLR 36, paragraph 85.

[16] The court had to be satisfied that the intended aim of the lethal control policy or practice was sufficiently important to justify the killing of beavers; that there was a rational connection between the policy and the aim; that it was the least restrictive alternative – that is, that there was no alternative lawful measure which was at least as effective in achieving the identified aim; and as to proportionality stricto sensu – that there was a fair balance between the importance of the European protected status of beavers and the land rights of those represented by the third and fourth respondents.

[17] The first respondent must substantiate any justification for its policy by evidence, and the court must examine objectively whether it might reasonably be concluded from the evidence that the lethal control policy was appropriate for the attainment of the identified

legitimate objectives pursued, and whether it was possible to attain those objectives by measures that were less destructive of, or disruptive to, beavers: by analogy with Case C-333/14 *The Scotch Whisky Association and others* v *The Lord Advocate* ECLO:EU:C:2015:845 [2016] 1 WLR 2283, paragraphs 54, 56.

[18] The petitioner relied on Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo-Kainuu* Ry v *Risto Mustonen and others* ECLI: EU:C:2019;394, paragraphs 28-30, 41, 44-57, 61, 66-67. The case concerned the lawfulness of permits issued by Finnish authorities for the hunting of wolves. The petitioner derived the following propositions from it.

(1) The first respondent must examine the existing conservation status of the beaver populations before granting any licence: see also *Commission Guidance Document on the Strict Protection of Animal Species of Community Interest under the "Habitats" Directive 92/43/EEC* ("*Commission Guidance"*), page 60 paragraph 43.

(2) The decision to grant a licence under Article 16(1) of the Habitats Directive must be intended to deal with precise requirements and specific situations: see also *Commission Guidance* Document, page 56, paragraph 14.

(3) Whether a licence in derogation was appropriate and necessary in any specific case depended on the aim or aim it is said that it pursued: see also opinion of Advocate General Kokott in Case C-342/05 *Commission* v *Finland* EU:C:2006:75, paragraph 25; opinion of Advocate General Sharpston in Case C-557/15 *Commission* v *Malta* EU:C:2017:613, paragraph 67.

(4) The requirement of proportionality meant that the licensing decision must define its objectives clearly, precisely and with sufficient and site relevant supporting evidence based on the best available rigorous scientific data: see also eg Case C-243/15 *Lesoochranárske zoskupenie VLK* EU:C:2016:838, paragraph 66.

(5) The first respondent could not define the problem that it sought to address artificially and thereby improperly exclude other potential satisfactory solutions: see also opinion of Advocate General Sharpston in Case C-557/15 *Commission* v *Malta* EU:C:2017:613, paragraph 68.

(6) A derogation could only be granted on the basis of a decision containing a clear and sufficient statement of reasons which referred to the reasons, conditions and requirements laid down in Article 16(1): see also Case C-342/05 *Commission* v *Finland* EU:C:2007:341, paragraphs 25, 30-31, 47.

(7) If significant doubt remained as to whether or not a derogation would be detrimental to the maintenance or restoration of populations of the species concerned at a favourable conservation status, the member state must not grant a licence for the derogation in question: see also C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* EU:C:2004:482, paragraph 44.

(8) If the first respondent produced insufficient evidence to demonstrate the compatibility of its policy on lethal control with EU law, then the court required to draw inferences adverse to the first respondent: see also Case C-3/17 *Sporting Odds* ECLI:EU:C:2018:130 (Sixth Chamber, 28 February 2018) [2018] 3 CMLR 18, paragraph 59.

(9) The conservation status of a species must be assessed at local level, at the level of the whole member state, and sometimes across national boundaries.

[19] The court required to provide an effective remedy: *Anwar* v *Secretary of State for Business Energy and Industrial Strategy* 2020 SC 95, paragraphs 9, 52.

Respondents

[20] There was no hierarchy among the various forms of derogation. The "no satisfactory alternative" test did not apply to the type of the derogation. The respondent had to consider whether there was an option that would meet the objective of preventing serious harm and which did not involve "a derogation". All the cases referred to by parties related to situations in which the court was considering derogation as opposed to no derogation: see eg Case C-10/96 *Ligue Royale Belge pour la Protection des Oiseaux* v *Region Wallonne*, Advocate General Fennelly, paragraph 33; and *Tapiola*, on which the petitioner relied.

[21] The petitioner's emphasis on capture and translocation was misplaced, as that activity was also a derogation, which required a licence. The first respondent had a discretion as to what licence to issue, and exercised it in a manner informed by its experience and expertise. There were significant issues associated with capture and translocation. The public interest required monitoring and controlling particular species to prevent serious damage to various forms of property in accordance with regulation 44. There was no general duty in public law to give reasons for a decision: *R (Doody)* v *Secretary of State for the Home Department* [1994] 1 AC 531 at 564; *Sharp* v *Scottish Ministers* 2020 SLT 1092 at paragraph 32. There was no statutory obligation to give reasons.

[22] *Keir* v *Natural England* [2021] EWHC 1059 (Admin) was a permission decision relating to the equivalent English regulations. It vouched the following propositions. The decision maker was not expected to establish all considerations to absolute certainty, and was expected to consider degrees of likelihood as part of the decision-making process: paragraph 41. When dealing with scientific expert opinion the decision maker had an enhanced margin of appreciation: paragraph 43. There was no duty to give reasons, and no requirement for public involvement in the decision making process: paragraph 47.

[23] The *PAL Assessment* was an internal guidance document. It set out in detail how the first respondent expected the 1994 Regulations to be applied in relation to PAL. PAL was land capable of being used to produce a wide range of crops, within a favourable climate, with slopes of no greater than 7 degrees, and with soil that was at worst imperfectly drained. That description of land was classified as Class 1 to Class 3.1 under the Land Capability for Agriculture in Scotland system produced by the James Hutton Institute.

[24] The first respondent had concluded that the "serious damage" test in regulation 44(2)(g) was likely to be met on PAL because of the nature of the land. The first respondent had reached that conclusion following a review of published studies and expert knowledge, supplemented by field visits by the first respondent's staff and specialist advisers over a period of years. There was no suggestion that the studies available to the first respondent were predicated on any fundamental error. The first respondent did not require to prove matters to a standard of absolute scientific certainty; to impose such a requirement would result in administrative paralysis.

[25] The petitioner had no evidence that the first respondent had a policy of "rubber stamping" applications. The petitioner sought to draw impermissible inferences from various documents it had recovered, including call logs, and licences which had been granted. The call logs were simply a "snapshot" of a particular point in the licensing process. Not all applications for lethal control licences had been granted. The first respondent was entitled to conclude that the serious damage test was likely to be met in relation to PAL. It was not necessary to wait until damage had occurred before issuing a licence authorising a derogation.

[26] Whether the conservation status of beavers was favourable was a multifactorial judgment taking into account whether the species was maintaining itself as a viable

component of its habitat in the long term in its natural range. The first respondent had concluded in the light of the best available scientific information that the conservation status of beavers was improving and that regulated and licensed lethal control would not be detrimental in maintaining that improving situation.

[27] Insofar as the petitioner submitted that the precautionary principle required the first respondent (a) to disprove the petitioner's "spurious" claims and (b) do to so beyond reasonable doubt, the court should reject that. The principle was primarily one for risk management where a process had the potential to have a dangerous effect, but that could not be determined with certainty. The principle was nowhere defined. It was designed to assist decision makers, and not to hinder them: *European Commission Communication* COM (2000) 1: paragraph 5 of summary within the communication; page 7; page 18; page 20; page 21. The principle protected decision makers from accusations that they had acted or failed to act in the absence of absolute scientific certainty. It was for the petitioner to adduce evidence that decisions were made unlawfully or irrationally.

[28] Where decisions in the field of environmental law were taken on the basis of scientific information, the court should not decide between the differing views of experts in a technical area. In the absence of scientific consensus, the court could not substitute its view for that of the decision-maker. The standard of review was "manifest error", or *Wednesbury* unreasonableness: *RSPB* v *Scottish Ministers* 2017 SC 552, paragraph 204; *Abbotskerswell Parish Council* v *Secretary of State for Housing, Communities and Local Government* [2021] EWHC 555 (Admin), paragraph 98. Where expertise was lacking, decision-makers still required to make decisions, and had to do their best with the available knowledge and expertise, and there was no basis for construing the regulations narrowly: *R (McMorn)* v *Natural England and another* [2016] PTSR 750, paragraphs 141, 145. Mere disagreement with

the decision-maker's weighing up of evidence would not suffice: *Wild Justice* v *Natural Resources Wales* [2021] EWHC 35 (Admin), paragraphs 64, 67.

[29] Decided cases relating to what was required by way of an appropriate assessment under domestic legislation implementing the Habitats Directive were relevant. The authority must be satisfied that the project in question will not adversely affect the integrity of the site concerned. A high standard of investigation was required, but the decision rested on the judgment of the authority. Where certainty could not be established, it would be necessary to work with probabilities and estimates, which must be identified and reasoned: *Abbotskerswell*, paragraphs 87-99 and authorities cited there. It was for the first respondent to determine what matters were material: *R (Friends of the Earth Ltd and another)* v *Secretary of State for Transport* [2021] PTSR 190, paragraphs 117-121.

[30] The third and fourth respondents' submissions were largely aligned with those of the first respondent. Senior counsel made additional submissions that the first respondent had no duty to give reasons. One concern on the part of the third and fourth respondent was the risk that individual licence holders might be identified. By contrast with provisions dealing with, for example, environmental impact assessments, the provisions authorising derogation did not require publicity, or the involvement of the public. There was a requirement that member states provide reports to the Commission – there was no requirement that the public generally be informed as to the reasons for derogations. All of that militated against there being a duty to give reasons.

Decision

[31] I deal first with interpretation of the regulations, as it informs my approach to much of the material produced by parties. I then turn to the approach of the first respondent to

licensing on PAL, and translocation, as reflected in its own internal guidance and published policies, and the material on which the first respondent relies as supporting its approach, and my own conclusions about that. Finally I deal with the contentions that the first respondent engaged in various generalised unlawful practices.

Interpretation and application of the regulations

[32] The requirements of proportionality are reflected in the terms and structure of the regulations. There are particular aims which the regulations (and Directive) expressly recognise as being of such a nature as to have the potential to justify derogations including lethal control. There was no dispute that there required to be a rational connection between the derogation and the aim in question.

[33] For a derogation to be lawful, the first respondent must consider whether there is a satisfactory alternative to granting a licence. A licence is required for anything that would constitute a derogation under Article 16 of the Directive. The EU jurisprudence to which parties referred is concerned with the need to justify a derogation by means of scientific evidence, and the need to demonstrate why derogation has been necessary – that is to demonstrate the absence of an alternative option which does not involve derogation. That jurisprudence does not engage with the situation where the authority has reached a conclusion that there is no option but to derogate, but has a range of possible options, all involving derogation.

[34] The petitioner relied on *Tapiola.* The Finnish Wildlife Agency authorised the killing of wolves for population management purposes with the aim of reducing the unlawful killing of wolves, and thereby improving the conservation status of the wolf population. The referring court asked whether and under what conditions Member States could

authorise hunting for population management on the basis of Article 16(1)(e) of the Habitats Directive.

[35] The decision turned first on the circumstance that Finland had not provided evidence that the legal hunting of a protected species reduced poaching to an extent that would have an overall positive effect on the conservation of wolves: paragraphs 45, 46. The following points emerge from it. The national authority must be able to support, on the basis of rigorous scientific data, the proposition that the derogation is capable of achieving the aim in question. The decision authorising derogation must provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative to derogate. That objective is not met when the derogation decision does not contain any reference to the absence of any other satisfactory solution or any reference to relevant technical, legal and scientific reports to that effect: paragraphs 49, 50.

[36] It is clear from the language used in paragraph 47 that the satisfactory alternative must not involve derogation:

> "… such a derogation may only be granted where there is no alternative measure that could achieve the objective pursued in a satisfactory manner, whilst complying with the prohibitions laid down in [the Habitats Directive]."

That is also clear from the emphasis in paragraph 48 on the need to give priority to measures that are not derogations.

[37] So far as the duty to give reasons is concerned, the CJEU was concerned only with reasons for derogating, as opposed to not derogating. The authority must consider first whether the derogation is capable of meeting one of the permitted objectives. It must then consider whether there is a satisfactory alternative which is not a derogation. The following passages also indicate that the "satisfactory alternative" must not involve derogation: Case C-10/96 *Ligue Royale Belge pour la Protection des Oiseaux* v *Region Wallonne*, Advocate

General Fennelly, paragraph 33; Case C-557/15 *Commission* v *Malta*, Advocate General Sharpston, paragraph 68.

[38] Perhaps the strongest potential support for the petitioner's construction of "no satisfactory alternative" came from footnote 32 in the opinion of Advocate General Øe in *Tapiola*:

> " … the Federal Republic of Germany and the Kingdom of Sweden, have granted derogations under art 16(1)(e) of the Habitats Directive intended to prevent poaching without killing wolves. To my mind, the fact that other Member States have been able to resolve an identical problem without resorting to a derogation permit, if that is the case, whilst not of itself conclusive, is strong circumstantial evidence that there is an alternative solution to the derogation envisaged."

The Advocate General states initially that the measures adopted by Germany and Sweden are derogations, but goes on to say that they have not had to resort to a derogation permit. On the assumption that the Advocate General means that the member states in question did not have to resort to a derogation in the form of authorising lethal control, I make the following observations. The Advocate General is looking at the potential evidential significance of the circumstance that derogations short of lethal control have been adopted in some territories. He does not say that the national authority requires to justify choosing one derogation rather than another, or that the "satisfactory alternative" can itself involve a derogation. The passage is not adopted or developed in the reasoning of the court.

[39] The authority must ask itself first whether it is seeking to serve one of the purposes recognised in the regulations. It must ask itself whether the measure which is proposed is capable of meeting that purpose.

[40] If it is, then it must ask itself whether there is a measure which is not a derogation which would serve the purpose satisfactorily. If there is such a measure, then derogation will not be lawful.

[41] If the respondent reaches the conclusion that there is no measure which is not a derogation which will serve the purpose in question, it must ask a further question, namely whether the derogation will be detrimental to the maintenance of the population of the species at a favourable conservation status in its natural range. If the answer is yes, then there can be no lawful derogation. If the answer is no, then the derogation will be lawful. In a situation where there is more than one derogation which would serve the purpose in question, but one derogation would not affect adversely the favourable conservation status of the species, and the other or others would, then only the first would be lawful. In that sense there may be a hierarchy of derogations, but it is one imposed by the requirements of regulation 44(3)(b), not 44(3)(a). The petitioner's analysis tends in my view wrongly to conflate these two requirements. The structure of the regulations reflects the importance of avoiding derogation in the first place.

[42] It is not necessary to approach the "least restrictive alternative" or "proportionality stricto sensu" in the manner for which the petitioner contended. The regulations impose particular requirements as to the way in which the first respondent must approach proportionality, by virtue of the requirements of regulation 44(3)(a) and (b). In so doing they reflect the terms of Article 16 of the Habitats Directive.

[43] The only reference to proportionality stricto sensu to which my attention was drawn in authorities relating to the Habitats Directive was in *Tapiola* in the opinion of Advocate General Øe, paragraph 47, footnote 13. He says that the criterion of proportionality stricto sensu is included in the requirement that the derogation must not be detrimental to the maintenance of the populations of the species at a favourable conservation status. Whether or not one regards that requirement as reflecting proportionality stricto sensu, the task for the court is not to determine whether the derogation achieves a fair balance between the

competing interests. It is to determine whether the first respondent has addressed in a lawful manner the question as to whether a derogation will or will not be detrimental in that way.

[44] There could be a situation in which there was no satisfactory measure which was not a derogation, and there was more than one derogation which satisfied the criterion of not being detrimental to the maintenance of the population of the species at a favourable conservation in its natural range. Senior counsel for the first respondent initially submitted that in relation to those options the discretion of the first respondent was unlimited. She correctly accepted in the course of discussion that the choice would have to be rational, and made with a view to furthering the purpose of the Habitats Directive.

[45] A number of the first respondent's documents reflect the notion that they in practice may choose one form of derogation over another in that way. Both the March and September 2019 versions of *Managing the impacts of beavers in Scotland – Guidance for land property and infrastructure managers amended September 2019* refer to "actions that would either not require a licence **or have less impact on beavers**", and "those actions with **the lowest impact on beavers** that solve the problem must be considered first" (emphases added). What the petitioner refers to as "the PAL Policy" and the first respondent refers to as internal guidance, entitled *Beaver Licence Assessments Prime Agricultural Land,* contains the following passage:

> "Where we consider that there is no satisfactory alternative to address damage other than to issue a licence, we must then consider what the appropriate nature is of the licensed intervention. In other words what licensed activity is most appropriate to be able to satisfy the need for which the licence is granted and with the least impact in terms of the overall aims of the Directive. The potential approaches are presented hierarchically in Table 1 below in relation to impact together with a consideration of the likelihood of the approach addressing serious damage on [PAL]".

The petitioner's case is not that the first respondent has exercised unlawfully a discretion to choose between different derogations. The petitioner's argument is that the first respondent has construed and applied the expression "satisfactory alternative" wrongly, and I reject that contention for the reasons already given.

[46] The provisions permitting derogation require to be interpreted strictly, and the burden of proving that the conditions for derogation are met fall on the authority which authorises the derogation: see, eg Case C-342/05 *Commission* v *Finland*, paragraph 25; Case C-557/15 *Commission* v *Malta*, paragraph 47; Case C-217/19 *Commission v Finland*, paragraph 66.

[47] The evidence that the conditions for derogation have been satisfied must be based on well-established scientific knowledge: C-217/19 *Commission* v *Finland* paragraph 70, and authorities cited there.

[48] It is for the first respondent to support, on the basis of rigorous scientific data, the proposition that derogation is capable of achieving the particular purpose being relied on: *Tapiola*, paragraph 45. It is not necessary for serious damage to be sustained before derogating measures can be adopted: Case C-342/05 *Commission* v *Finland*, paragraph 40. The first respondent must establish, taking account in particular of the best relevant scientific and technical evidence and in the light of the circumstances of the specific situation in question, that there is no satisfactory alternative that can achieve the objective pursued, in compliance with the prohibitions laid down in the Directive: *Tapiola*, paragraph 51.

[49] According to the Advocate General's opinion in *Tapiola* the precautionary principle means that where in the light of the best scientific knowledge in the field there is reasonable or significant doubt that a human activity will not have adverse effects on the conservation of habitats and protected species, that activity cannot be authorised. He uses the word

"reasonable" at paragraph 63 of his opinion, and "significant" at paragraph 92. What the court said was this (para 66):

> "… if after examining the best scientific data available, significant doubt remains as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation."

See also Case C-217/19 *Commission* v *Finland*, paragraph 84.

[50] On the petitioner's own analysis, by reference to *Scotch Whisky*, paragraph 56, the task for the court, looking at the material relied by the first respondent, is to examine objectively whether it may reasonably be concluded

(a) that the derogation is capable of achieving the purpose in question

(b) that there is no satisfactory alternative; and

(c) that the measure will not be detrimental to the maintenance of the species at a favourable conservation status within its natural range.

[51] Assuming that the first respondent has posed those questions to itself as it ought, the question for the court is whether the material reasonably permitted the conclusions it reached. In this context there is an additional requirement that the material be the best scientific knowledge available. The material must permit the first respondent, reasonably, to be satisfied to a high level of confidence.

Natural range

[52] There was a dispute between the first respondent and the petitioner as to whether the first respondent had taken the correct approach to the expression "natural range" when considering the conservation status of the species. The range the first respondent considered was Tayside, referred to in some of the documents as the Tayside catchment or river Tay

catchment. This included tributaries of the Tay, including rivers Almond, Earn, Isla and Tummel. The tributaries are sometimes referred to as sub-catchments. The petitioner submitted that the natural range of the species should at its narrowest encompass the whole of a member state, and might in some cases require to be considered across national boundaries: *Tapiola*, paragraph 61.

[53] This was of significance in the context of the petitioner's emphasis on the need to consider trapping and translocation in every case. The first respondent submitted that trapping and translocation would have the same effect in the natural range as lethal control: the individual or individuals would be removed from it. The petitioner submitted that the translocation of beavers from Tayside had the potential to enhance populations elsewhere in the UK, although it would diminish genetic diversity in the Tayside catchment. On this analysis the destruction of any beaver in the United Kingdom is detrimental to the conservation status of the species within its natural range, because it removes an element of genetic diversity; if the beavers were translocated, the genetic diversity in the species, across the UK, would not be diminished. This analysis renders derogation in the form of lethal control virtually unworkable. That is not the intention of the Directive. The definition of favourable conservation status is set out elsewhere. While issues of genetic diversity, and how those will affect the population in the longer term, are clearly relevant issues, they are not the only issues to be taken into account in assessing and predicting conservation status.

[54] The discussion in *Tapiola* at paragraphs 59-61 arose because the member state maintained that it could rely on the circumstance that the natural range of the species extended outside its borders. The court emphasised that the effects of derogation were generally felt in the local area to which it related, and that the conservation status of a population at national or biogeographical level depended on the cumulative impact of

derogations affecting local areas. It was not saying that the natural range of a species should be regarded in every case as extending to the territory of the whole member state. That would be at odds with the meaning of "natural range" agreed by the Habitats Committee, and set out in the Commission Guidance at paragraph 19. That includes the following:

> "The natural range describes roughly the spatial limits within which the habitat or species occurs. It is not identical to the precise localities (the area actually occupied) or territory where a habitat, species or sub-species permanently occurs. Such actual localities or territories might be patchy or disjointed for many habitats and species (i.e. habitats and species might not be evenly spread) within their natural range. If the reason for disjunction proves to be natural, i.e. caused by ecological factors, the isolated localities should not be interpreted as a continuous natural range. For example, for an alpine species the range may be the Alps and the Pyrenees, but not the lowlands between them. However, the natural range includes areas that are not permanently used: for example for migratory species, their 'range' includes all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time during its normal migration.
>
> A natural range as defined here is not static but dynamic: it can decrease and expand. A natural range can constitute one aspect for the assessment of (un)favourable conditions for a habitat or species. If the natural range is insufficient in size to allow for the long-term existence of that habitat or species, Member States are asked to define a reference value for a range that would allow for favourable conditions and work towards this, for instance by fostering expansion of the current range."

[55] The determination of the natural range of a species involves matters of fact. The first respondent did not require to treat the whole of the UK as the natural range of the population. It may be that it should have been treated as extending beyond the Tayside catchment as defined above, given the information available to the first respondent that the range of the "Tayside" population had extended to territories in the Forth catchment. Nothing turns on that for present purposes, and the point did not arise in the course of the hearing.

[56] In any event, as I have already indicated, the regulations and the Directive do not require the first respondent to compare different derogations. I am also satisfied, for the

reasons given below, that the material available to the first respondent entitled them to conclude that translocation would be an appropriate measure only in very clearly defined circumstances.

The first respondent's approach to licensing and PAL, and translocation

Policy and internal guidance

[57] The first document of potential significance is *Managing the impacts of beavers in Scotland – Guidance for land property and infrastructure managers* as it stood in March 2019. It was later revised, in September 2019. It was intended to summarise the policy of the first respondent.

[58] The March version contained the following.

> "Test 1 Licence purpose
>
> We issue licences for purposes set out in the legislation: these include for *preventing serious damage* to certain interests such as crop, timber or fisheries, for *public health and safety* reasons or other important *social, economic or environmental* purpose which are in the public interest and for *conserving natural habitats or wild animals*.
>
> This means that there has to be a legitimate problem that needs addressing. To help us consider if this test is passed we may rely on information we already have, your own information and/or the information gathered by the expert adviser from a site visit.
>
> In certain situations which may be particularly vulnerable (eg dam building affecting areas or prime agricultural land or sensitive in-stream infrastructure, flooding public transport infrastructure, damage to protected features on Natura sites or burrowing into flood embankments) we consider that this test is likely to be met. Prime agricultural land means land classes 1, 2 and 3.1.
>
> Test 2 – Alternatives
>
> We issue licences as a last resort. This means we have to be assured that other possible actions that would either not require a licence or have less impact on beavers, have either been tried or are not likely to resolve the problem. Again we will rely on information from the affected person, the expert adviser and previous experience to help us judge whether this test is passed.

> We accept that there will be situations where it can automatically be assumed that there is no satisfactory alternative other than to issue a licence for lethal control. These situations include where there is serious damage (or the risk of it) to prime agricultural land, and where we know alternative mitigation measures either have not or will not address the problem.
>
> Test 3 – Conservation impact
>
> We have to ensure that licensed actions do not harm the conservation status of beavers in Scotland and so will not affect population trends or the overall range of beavers. In the first instance we would follow the principles above in that those actions with the lowest impact on beavers that solve the problem must be considered first. Where we licence lethal control of beavers we will monitor the cumulative impact of this management.
>
> Given the evidence from recent survey information that beavers continue to expand their range even with ongoing lethal control in places, we are confident that the actions we licence will not be detrimental to the conservation status of beavers and so this test is likely to be met. We will maintain an oversight of the cumulative impacts of what we licence and the population dynamics and range of the Scottish wild beaver population to ensure this is the case."

[59] It included also the statements "… where beavers are affecting or likely to affect areas of prime agricultural land we offer a streamlined approach to licensing" and "We accept that if beaver activity is affecting areas of … (PAL) then the three licensing tests are met and that a licence can be issued …"

[60] In the September version the passage headed "Test 1" was unchanged. The second paragraph under the heading "Test 2" read:

> "We accept that there will be situations where there is no satisfactory alternative other than to issue a licence for lethal control. These situations include where there is serious damage (or the risk of it) to prime agricultural land, and where we know alternative mitigation measures either have not or will not address the problem."

The words "it can automatically be assumed that" had been deleted. The two phrases to which I refer in the preceding paragraph no longer appear. The second one has been replaced with this:

> "Where beaver activity damages agricultural interests on areas of PAL, and alternative actions would not be effective, then the three licensing tests will have been met."

[61] The terms of the March document do not reflect the approach that the first respondent ought to have been taking as a matter of law. There is no room for an "automatic assumption" that there will be no satisfactory alternative to a derogation, or that all the tests for a lawful derogation will be met in respect of PAL. The first respondent does not suggest that there is.

[62] The petitioner has also produced an undated "Licensing Officer Aide Memoire" which includes the following:

> "- What type of problems are they experiencing
> - Is it just dam control needed or is lethal control being sought for
> - Have preventative measures already been tried, if so with what level of success
> …
> PAL: If yes then can automatically licence, if no then we can organise a visit "

[63] To approach matters that a licence can be granted automatically for PAL is wrong as a matter of law. A number of licences were issued between May and September 2019. The first respondent maintains that notwithstanding the terms of the March document, it did apply the regulations correctly.

[64] The *PAL Assessment* is a lengthy document from which, in the interests of brevity, I will not quote all the potentially relevant passages in full. It includes consideration of the effects of dam building, burrowing and feeding. It contains discussion of the use of buffer zones. Those are zones created or maintained to support beavers and create riparian habitats a minimum of 10 to 20 metres and up to 50 metres or more from watercourses where beavers are present. The document notes that they involve the permanent change of

agricultural land into non-agricultural land. So far as licensable purpose is concerned, the purpose to which this document refers is the one in regulation 44(2)(g). The question the first respondent is addressing at this stage is whether a derogation is capable of meeting the purpose in question. After referring to various studies, and to site visit reports from an expert adviser over five years, the experience of the first respondent's staff and the farming community, the passage under the heading "Test 1 – Licensable purpose" concludes:

> "The relatively generic physical nature of PAL (in terms of soil structure/type, topography and drainage requirements) and our experience of this means that we are confident that the risk of serious damage is likely to apply across most areas of PAL. However, where discussions with landowners/managers, site-visits or from other information available (eg from our *Geographic Information Systems, GIS)* highlight potential exceptions to this assumption [the first respondent] will investigate on a case-by-case basis to inform assessment of licensing tests, including potential alternative approaches. This will be particularly pertinent in new areas of PAL colonised by beavers.
>
> We therefore consider that Test 1 is likely to be passed where beavers are present on PAL but will check each case to ensure that these assumptions can be met."

[65] The next section of *The PAL Assessment* is headed "Test 2 – No Satisfactory Alternative". As I have already indicated, when considering whether there is a satisfactory alternative, the first respondent must ask itself whether there is a satisfactory alternative which is not a derogation. That approach is reflected in the first sentence of this section:

> "A satisfactory alternative is an action that would provide a solution to the identified need without having to resort to a derogation. In other words in this case an approach that would prevent serious damage to [PAL] without a licence being necessary."

The document then goes on to deal with measures to deal with the impacts of damming and burrowing, in the following terms:

> "There are a range of measures that could potentially reduce or prevent impacts of beavers on agricultural (and other) interests. These measures are largely focussed on managing the two key behavioural activities that can give rise to damage; damming

and burrowing. Some of these measures are likely to require a licence and some are not. These alternatives are summarised below and are covered in more detail in the Annex to this paper, as is their potential applicability to situations on Prime Agricultural Land.

Potential methods of managing the impacts of damming that would not require a licence

There are a range of techniques associated with managing the impacts of damming. These include manipulation of dams, removal of dams, preventing dams being built, excluding beavers from areas where they might build dams, trapping and translocation and lethal control. We consider that all of these approaches may require a licence. Given this we consider that in order to address serious damage caused by damming activities by beavers on Prime Agricultural Land, there is likely to be no satisfactory alternative than to licence actions necessary to resolve that need.

We acknowledge that possible exceptions to this assumption may occur in certain circumstances and this will be assessed on a case-by-case basis.

Potential means of managing the impacts of burrowing that would not require a licence

There are a range of techniques associated with managing the impacts of burrowing. Green bank engineering and re-alignment of flood-banks are two measures which could potentially be used and which would not require a licence.

Realignment of flood-banks, whilst potentially reducing the risk of burrowing weakening their integrity, is unlikely to resolve issues of erosion of land as a result of burrowing and furthermore would be likely to result in the loss of productive land as a result of moving the flood-bank structure away from the river bank. Therefore we do not consider that this would likely resolve the need for which a licence may be required. Furthermore, the scale and commercial cost of such action is likely to be extremely high. As such we do not consider that this is likely to constitute a satisfactory alternative.

Green-bank engineering approaches have not been well-trialled but may present potential solutions to minimise damage arising from burrowing in the future. Due to their nature they may take time to become established and to be able to gauge their effectiveness. As such we do not consider at this time that our current knowledge of these approaches means that they are a satisfactory alternative to address the need in question.

Therefore we consider that it is most appropriate to trial a range of techniques in this respect and monitor effectiveness before considering them as a satisfactory alternative. As we learn from these trials we should be able to develop our understanding of whether or not they are satisfactory in different situations. We will

therefore investigate and implement trials of these techniques, possibly in combination with other schemes.

Given the above we consider that in order to address serious damage caused by burrowing activities by beavers on Prime Agricultural Land, there is likely to be no satisfactory alternative than to licence actions necessary to resolve that need. We acknowledge that possible exceptions to this assumption may occur in certain circumstances and this will be assessed on a case-by-case basis."

[66] The document goes on to deal with the conservation implications of licensing on PAL. Under the heading "What is favourable conservation status", the first respondent, correctly, directs itself to the definition in Article 1(i) of the Habitats Directive, and quotes that. The document then reads:

"For most other species of EPS there are reference values against which any assessment of conservation status is made. These are often based upon the data available when the Directive came into force in Scotland in 1994 but because beavers were not present at that time then no such value exists. Therefore we need to consider a more pragmatic approach to assessing and monitoring conservation status in Scotland."

The conservation status of beavers in Scotland

The three "components" for consideration of conservation status are considered below against the information currently available for beavers in Scotland;

- Population dynamics: in Tayside the survey data indicates that the population size, density and distribution increased substantially between the 2012 and 2018 surveys. In Knapdale the population has not increased (although this was not the aim of the Scottish Beaver trial). Current and on-going translocation work will continue with the aim of supplementing the existing population there.

- Range: the recent surveys have shown that the Tayside population has continued to expand in range and has spread beyond the wider Tay catchment. In Knapdale the range of the population has not changed significantly.

- Availability of suitable habitat: Available habitat for beaver from *Beavers in Scotland* indicates sufficient habitat availability both now and in the foreseeable future.

> In summary, we have recent, good quality survey information which concludes that the Tayside area population is increasing and its range expanding here. The small, remnant trial population at Knapdale also contributes to the number and range of animals living wild in Scotland. Given the above we consider it appropriate to conclude that the conservation status of beavers in Scotland is improving."

[67] The document goes on to record that despite unregulated lethal control, the number of territories in PAL increased substantially between 2012 and 2017/8. The range of the "Tayside" population had expanded into territories in the Forth catchment. There was no reason to believe that the levels of control under licence would be higher than that undertaken before the beaver became protected. The first respondent would monitor the position. It was not anticipated that there would be a significant requirement for lethal control outside areas of PAL. Half of the beaver population occurred outside PAL, and with protection, that should facilitate further expansion of the population to the north, west and south. There was no reason to think that the increasing trend in range would not continue. Although some conclusions are expressed in terms of likelihood and probability, they are summarised as follows:

> "We consider that the proposed approach to licensing on Prime Agricultural Land will not be detrimental to the improving trend of the conservation status of beavers in Scotland. We accept that in these areas beaver densities may be lower than elsewhere and sometimes locally absent. However, as the beaver population more widely continues to expand, the relative influence of control of animals on the limited area of land that is classified as PAL will be reduced."

[68] There are several documents recording the first respondent's approach to translocation. The following passage from *Managing the Impact of Beavers in Scotland* is an accurate summary of it:

> "Translocation (ie trap and relocation) of beavers that are causing impacts to other interests is possible. However, whilst it may initially be seen as an attractive alternative to lethal control there are also risks with this as an approach. Translocation can have significant welfare implications associated with capture,

> transport and following release. It can also be a time consuming and costly process and has to be carefully planned. Translocation is only likely to be a viable option if either a suitable unoccupied site is available nearby or if it is undertaken as part of a recognised reintroduction or reinforcement project."

[69] *The Translocation of Beavers in Scotland*, is a published policy of the first respondent. It records that there was a presumption against translocations within Scotland beyond the current range of the species in Knapdale and in Tayside, including contiguous areas into which the population had naturally expanded. It sets out a series of potential risks and limitations, namely the limited availability of suitable release sites in the longer term, the risk of recolonization of the capture site, potential adverse impact on animal welfare, and practicalities including cost and effort. Each of these is described in more detail in the document.

The material relied on by the first respondents as supporting their policies and guidance relating to licensing on PAL and translocation

[70] *The PAL Assessment* refers to a number of other documents, all produced in 2015, including report of the Tayside Beaver Study Work Group ("*TBSG Report"),* and *Managing wild Eurasian beavers: a review of European management practices with consideration for Scottish application* ("*SNH Commissioned Report No 812"),* and *Beavers in Scotland: A Report to the Scottish Government* ("*Beavers in Scotland").* Each of these is a substantial document. There are passages duplicated among these documents. In particular *Beavers in Scotland* contains references to the other documents produced in 2015.

[71] *Beavers in Scotland* is a report by the first respondent. It was intended to inform the decision as to the future of beavers in Scotland. It is 204 pages long. The references or endnotes themselves extend to several pages. At pages 13-17 it lists a number of reviews

and studies which the first respondent commissioned before seeking permission for the trial reintroduction of beavers in Knapdale, and further studies which the first respondent organised thereafter. They include a review of the European experience in applying derogations for protected reintroduced species, including beavers.

[72] Chapter 3 contains material about population expansion and population modelling. Pages 36-37 relate to population growth and range expansion in the context of the Scottish populations, with and without reinforcement. The authors predicted a population of 771 beavers in 160 families in the Tay and Earn catchments by 2042, assuming no human interference. Chapter 3.3 relates to beaver genetics, and recognises the importance of maintaining genetic diversity. The genetic diversity within populations of the Eurasian beaver generally was low, reflecting previous hunting to near-extinction: page 37. The report considers the interaction of beavers with the habitat and other species, and also the interaction of beavers with various human activities, including fishing, forestry and agriculture. Chapter 4.4 relates to agriculture. It records, amongst other things, the risk of flooding to agricultural land posed from burrowing into the banks of watercourses and the building of dams. It refers to and summarises the findings of the Tayside Beaver Study Group in relation to negative impacts, the majority of which were recorded in intensively farmed lowland areas at sites directly adjacent to watercourses. At page 136 the report includes the following:

> "The use of techniques such as notch weirs or flow devices is not usually effective in these situations, and the removal of dams is usually followed by rapid reconstruction if the beavers remain".

That theme is expanded upon in Chapter 5, which deals with "legal issues and the management of beavers and their impacts". It includes consideration of beaver

management techniques employed in Europe and North America. The following passage appears in that chapter:

> "The management techniques described in the preceding sub-sections all focus on the management or mitigation of beaver impacts. This section considers management of the animals themselves.
>
> The perceived need for, and methods of, regulating beaver populations vary greatly across Europe, from hunting quotas in Norway (frequently unlimited because the demand for hunting is below the rate of natural increase in many river systems) to removal by employed or trained volunteer beaver managers in Germany. In countries where beaver populations are still recovering they are usually fully protected and mitigation and non-lethal management methods prevail.
>
> In cases where beaver conflicts cannot be suitably managed, because costs are too high or the potential impacts too great, the removal of their presence through trapping and translocation, or culling, may be the only practical solution."

[73] It refers to the Scottish Beaver Trial, described as "the central beaver-related project", which involved monitoring the population in Knapdale over five years in order to:

> "– Study the ecology and biology of the Eurasian beaver in the Scottish environment
> – Assess the effects of beaver activities on the natural and socio-economic environments
> – Generate information during the proposed trial release that will inform a potential further release of beavers at other sites with different habitat characteristics
> – Determine the extent and impact of any increased tourism generated through the presence of beavers
> – Explore the environmental education opportunities that may arise from the trial itself and the scope for a wider programme should the trial be successful"

The first respondent carried out that trial in conjunction with various academic institutions and other public authorities: page 14.

[74] *Beavers in Scotland* refers also to the *TBSG report*. The Tayside study group was established in 2012 following a decision by the Minister for Environment and Climate Change to tolerate the unlicensed beaver population on Tayside (specifically the Tay and Earn catchments). The group aimed to gather information about the Tayside beavers and

monitor impacts on local wildlife and land uses in the area; and to help identify a variety of means to resolve any conflicts between beavers and land uses in the area, provide advice and practical help to land owners locally, and to consider how those means could be used more widely in the future. The activities of the group included gathering information on the health and genetic status of the population; understanding breeding success to aid population modelling; recording impacts on land use and investigating and trialling methods to minimise negative impacts. The *TBSG report* relates that priority was given to documenting land use issues and conflicts (paragraph 1.1). It involved site visits across Tayside: paragraph 8.2.

[75] Among the findings was one that many of the beavers in the Tayside catchment were closely related, and that the degree of inbreeding in the future could become a concern. Forestry and woodland was the most commonly impacted interest, with agriculture having the second highest incidence of impact. The issues cited included damming in drainage ditches and consequential impacts on field drainage; erosion of land due to burrowing, and diverted water flows around dams; flood bank damage due to burrowing, and three cases of crop foraging. The first respondent issued questionnaires to landowners, and the report discusses the responses to that questionnaire. Agriculture was recorded as the interest with the second highest incidence of impact; from damming and burrowing, and also crop foraging.

[76] Paragraph 9.2 relates the findings of beaver impact case studies. One of these looked at the impact of damming, including the effect on drainage, on a farm of 445 hectares of lowland arable land. The landowner regularly removed dams, but monitoring revealed that they were rebuilt very swiftly: paragraph 9.2.1. Paragraph 9.2.2 records the findings of a

case study into the effects of burrowing in flood defence banks, on a farm of lowland arable land adjacent to the River Isla.

[77] Chapter 10 relates to mitigations, and records, like other passages in the report, some lack of enthusiasm on the part of landowners so far as mitigations were concerned. There was a reluctance to have in place those which might encourage beavers to remain, and a perception that mitigations would be ineffective. The report contains the outcome of trials of mitigations. Some of these relate to the protection of trees, where some mitigations appear to have been quite effective: paragraphs 10.1.1-2; 11.4.4. Regarding flow control devices, the report records:

> "In the right circumstances, particularly where damming occurs at a natural pinch point in the system (such as the outflow of a pond), a correctly installed flow control device can be extremely effective. They work at sites where a degree of rise in water level behind the dam is tolerable. ….
>
> Straight narrow water courses such as drainage channels do not provide suitable situations for a flow control device as it's likely beavers will attempt to dam at other points in the system because there is no natural pinch point. It is also unlikely that a rise of water level would be acceptable in principle."

[78] Paragraph 11.4.2 is headed "Impacts on intensive agricultural land", and reads:

> "The most serious concerns were reported within the areas of highest importance for agricultural production. This was especially so within the intensively cultivated arable ground on the flood plain of the lower River Isla and its confluence with the River Tay. This land is subject to extensive networks of drainage ditches and associated field drains, and much is protected from river flooding by flood banks. The concerns and impacts reported by land managers were associated with the construction of beaver dams and burrows.
>
> The shallow gradients on these flood plain areas results in a very low tolerance threshold for any rise in water levels before the field drain network ceases to function. If beaver dams were left in situ within the drainage ditches, the resultant waterlogging and flooding could prevent cultivation of productive land. The only mitigation option available in this situation was dam removal. It was, however, a frequent experience at some sites that removed dams were quickly replaced by beavers. The fears over the consequences of impeded drainage, led to a significant increase in the monitoring frequency of ditches. This together with repeated removal

> of any dams, resulted in additional costs in terms of time and the associated use of any equipment.
>
> Also of great concern was the potential risk posed by burrowing activity to the integrity of earthen flood banks. Many of these banks lie within 10 metres of the river bank, and could be impacted by burrowing activity. While breaches of these flood defences have occurred before beavers were present, the example documented by TBSG in the case study was a major event and is an example of a breach resulting from beaver burrowing activity.
>
> No trial of potential mitigation/prevention options was offered by TBSG in response to burrowing, as the cost to protect an adequate length of bank would have been beyond the resources available. For similar reasons, no land manager was willing to undertake a trial at their own expense."

[79] At paragraph 3.1.2 of *Managing wild Eurasian beavers: a review of European management practices with consideration for Scottish application (Scottish Natural Heritage Commissioned Report No 812)* the authors record that the most significant impact of beavers on agriculture is the damming of drainage ditches and/or nearby water bodies so that the backup of water directly floods agricultural land. The increased ground water levels can impede drainage and cause water logging of crops. So far as flow devices are concerned, the authors write, at page 10:

> "The installation of flow devices can be a very effective, relatively low cost, method for resolving beaver damming conflicts in comparison to regular road maintenance, dam or beaver removal programs (Boyles & Savitzky, 2009). Failure rates can be significant, and tend to occur in the first 2-12 months if they are installed by inexperienced personnel, placed at inappropriate sites or are incorrectly designed (Czech & Lisle, 2003; Callahan, 2003; Lisle 2003). One study recorded a flow device success rate of 87% at 156 beaver conflict sites in North America, with most failures resulting from insufficient pipe capacity, lack of maintenance and damming of the fencing associated with the flow device (Callahan, 2005). The construction of new dams downstream by the beavers was also considered a 'failure' in this study, though it should be noted beavers may have multiple dams with a territory and build tiered dam systems depending on habitat type. Insufficient pipe capacity can be rectified through replacing with a more appropriate pipe. Higher success rates have been demonstrated by other experienced practitioners, it should be noted that skill and knowledge will significantly influence flow device success."

The authors noted, also at page 10, that removing dams may stimulate rebuilding, and opine that it may be more effective to allow a dam to remain and to manage its size and the extent of resultant backwater.

[80] Paragraph 3.4 contains a passage in identical terms to that already quoted from Chapter 5 of *Beavers in Scotland*. So far as trapping and translocation, and lethal control, are concerned, the following passages appear at pages 18 to 21.

> "Trapping and translocation – any trapping effort to remove beavers from an area should seek to ensure no dependent offspring remain. Juvenile beavers for at least their first year of life are reliant on their parents and older siblings for shelter, protection and food provision. They also rely on the communal body warmth of larger individuals in winter. The trapping and relocation of heavily pregnant or lactating females should be avoided. Any trapping programme must recognise that a repetitive process of trapping and monitoring (pre- and post), will be required to completely remove beavers from an area. Beavers commonly display varying levels of bait and trap shyness, with sub-adults tending to be more easily trapped than adults, and males tending to be more easily trapped than females (Schulte & Müller-Schwarze, 1999; Müller-Schwarze, 2003).
>
> As beavers are a highly territorial species, fighting can inflict serious wounds and even death, so care must be taken to ensure that any translocated individuals are not released directly into the territories of non-related animals. Beavers from different family units should never be mixed in the same transport crate. Ideally pairs or family groups should be released together in available habitat. Any translocation should follow best practice guidelines including IUCN (2013) and Best Practice Guidelines for Conservation Translocations in Scotland (National Species Reintroduction Forum, 2014).
> …
> The trapping and translocation of 'problem' individuals is a viable but ultimately limited management tool.
> …
> Based on the current evidence from free living beavers in Britain, any populations which are not eliminated swiftly are likely to establish and expand. As Eurasian beavers are now largely recovered across throughout most of Europe and there is no credible prospect of translocating beavers from Britain as a means of ameliorating local beaver conflicts. If internal translocation is not possible or becomes exhausted within mainland Britain, then management through culling when irresolvable conflicts arise will be the only practicable option over time.
> …
> Translocation – under appropriate licencing, translocation could provide a relatively cost effective source of beavers for re-colonisation projects, if the health and genetic status are considered favourable. Additionally translocation could be a practical

> management tool to relocate 'problem' animals. Potential relocation sites should be identified in advance, with landowner permission secured. Trapping protocols and equipment should be standardised, through an authorising body, to ensure consistency and appropriate animal welfare standards.
>
> Humane dispatch - successful beaver management will eventually require humane lethal control initially through the identification of problem animals; or the removal of beavers to prevent colonising of predetermined 'beaver free zones', or to achieve annual culling quotas (realistically not a perceived management requirement for a number of decades, once beaver populations are widely established). If beavers are to be dispatched by shooting, then certain factors should be considered to ensure dispatch is humane. Currently beavers can be shot without a licence in Britain, provided landowner permission is granted, firearm and animal welfare laws are complied with."

[81] The first respondent also commissioned a report in relation to the genetic assessment of the Tayside beavers: *Genetic assessment of free-living beavers in and around the River Tay catchment, east Scotland* (*SNH Natural Heritage Commissioned Report No 682)* (2015). All the samples collected were found to originate from a source population in Germany, most likely Bavaria. Three genetic lineages were evident from the data. The Knapdale beavers originally came from a population in Norway. The authors of the study say, at section 6 of the report:

> "The measures of genetic diversity in the River Tay "population" are consistent with healthy beaver populations across the Eurasian range. Although the current population centred on the River Tay catchment is estimated to consist of ~ 38 active groups (Campbell et al, 2012), it is suspected that this 'population' was established by a limited number of founders, and so genetic diversity could be compromised as a result of limited founding diversity and subsequent genetic drift. However, the founding population's source (Germany) has the highest recorded genetic diversity so far measured, a likely consequence of an admixed descent, and therefore genetic diversity in the River Tay catchment beaver 'population' is consistent with the highest levels of genetic diversity in populations across Eurasia."

[82] In 2019 the first respondent published *Survey of the Tayside area beaver population 2017-2018 (SNH Commissioned Report No 1013)*. The authors summarised their main findings as follows:

> "Beavers are spreading in distribution and are present outside the catchments of the Tay and Earn. Small numbers of territories occur within the Forth catchment from Loch Achray in the Trossachs, parts of the Teith and Devon, and the main stem of the Forth near Stirling.
>
> No evidence of beaver presence was found on the South Esk nor in several freshwater bodies associated with the lower Forth and Forth estuary, including Loch Leven.
>
> Distribution in Tayside ranged from as far north as Dunalastair Water, extending out to the River Dochart and River Lyon in the west, over to Forfar Loch in the east and down to Loch Earn in the south.
>
> 114 active beaver territorial zones were identified in this study, giving a conservatively estimated number of approximately 433 beavers (range 319 – 547). This number is based on a previously reported European mean group sizes of 3.8±1.0 animals per territory, which was also used in the 2012 SNH survey. Some identified zones may constitute multiple families and additional active territories, along with dispersing singletons, are likely to exist both within Tayside, especially on minor watercourses, and outside of the Tayside catchment which it was not feasible to cover during this survey.
>
> Out of the 114 beaver territories defined using the 2017/2018 survey data, 100% were contained within the areas identified as 'Potential Beaver Woodland' and 95% were contained within the 'Potential Core Beaver Woodland', as defined by previous SNH GIS mapping exercises (Stringer et al. 2015).
>
> Potential management issues were recorded at a total of 159 points, across 21 territories, ranging from dam building, collapsed burrows, tree felling, crop feeding and damage to fence lines.
>
> A total of 86 dams, or sites where dams had been removed, were recorded. Of these, 41 dams occurred within one private estate.
>
> There was an increase in both beaver distribution and density compared to the 2012 survey although spatial variability was evident, with areas of expansion and infilling, along with smaller areas of habitat abandonment potentially through culling."

They noted (paragraph 2.1.1) that they might have underestimated beaver numbers and the figures were conservative (paragraph 4.1). The report contains an explanation of their methodology. There had been a large increase in beaver activities across the Tayside and adjacent catchments, from a minimum of 38 to 114 territories, between 2012 and 2017/8

(paragraph 3.3.1). It was not possible to determine what impact unregulated culling had had on population growth, as the reports of it were unvalidated, and estimated numbers culled varied widely: paragraph 4.5. That also made it difficult to predict the effects of regulated culling. Annual population growth rates had been recorded between 5 and 34% in various studies.

[83] The petitioner produced an article, *Beaver Genetic Surveillance in Britain*, Global Ecology and Conservation 24 (2020) by M Gaywood and ors. This was a study of the genetics of the Tayside beavers and also a population in the River Otter in Devon. Both populations were displaying evidence of growth and increased distribution. Like the Tayside beavers, the Devon beavers are of German origin. The authors concluded that individuals in both populations were closely related, though the Devon beavers were significantly more related. This might have important repercussions for the long-term viability of populations founded only from this stock. There was no evidence in the form of body condition or pathology that the beavers were failing to adapt to the British environment or experiencing compromised welfare. The Tayside beavers could provide a reasonable source of founding individuals for any future reintroduction of the species, though the authors recommended genetic management to encourage diversity. They recommended caution about sourcing from the current Devon population. If the decision was made to reinforce or reintroduce beavers to other parts of Scotland or Britain, then the suitability of Tayside Beavers from a purely genetic stance would need to be carefully managed. Repeatedly moving small groups of animals from one part of Britain (without further enriching of genetic material) to seed new releases in another might reduce genetic diversity in the source population, likely resulting in sub-optimal genetic diversity in the founder populations. That would not generate additional genetic diversity in Britain, and

might lead to localised inbreeding. Decisions on beaver management had to take into account many complex biological and socio-economic considerations. Increasing the use of translocation in the future would better enable the preservation of genetic diversity which might be otherwise lost through lethal control.

Policies and guidance about licensing on PAL and translocation: decision

Was the first respondent to take the PAL Assessment into account?

[84] The first respondent says that it is entitled to take the approach described in the *PAL Assessment*. The first respondent accepts that it must, and contends that it does, consider the circumstances relative to each licence individually.

[85] Among the conclusions expressed in the *PAL Assessment* are that what it describes as the first two licensing tests are likely to be met in respect of beaver activity on or near PAL. If the first respondent determined to grant licences simply because it was likely that the conditions for derogation were met, that would be an error of law.

[86] The *PAL Assessment* does not indicate that the first respondent does or should grant licenses on the basis that it is satisfied that the first two tests are likely to be met. The assessments that the first two conditions for derogation are likely to be met are conclusions that inform an eventual decision as to whether or not to grant a licence. So is the conclusion that the proposed approach to licensing on PAL would not be detrimental to the improving trend of the conservation status of beavers in Scotland. If those conclusions are ones that the first respondent was entitled to reach, and the first respondent goes on to examine the merits of each application, there is nothing unlawful in that approach. If there are conclusions that can legitimately be drawn as to what are likely to be the effects of beaver activity in a particular context, then there is no reason why those conclusions should not be taken into

account when there is a licensing application in that context. It is proper for a body of information drawn from experience, investigation and scientific study to be used in the assessment of claims by individual landowners that activity is occurring, that it is having particular effects, and in considering what mitigations will and will not be effective in particular circumstances.

Was the first respondent entitled to reach the conclusions in the PAL Assessment?

[87] The material on which the first respondent relied is very lengthy and my reference to it, both elsewhere in this opinion and here, is necessarily selective. I am satisfied that it was the best information available to the first respondent, and that it was informed by experience and scientific study and investigation. The nature and vulnerability of PAL is explained at paragraph 11.4.2 of the *TBSG* report. That report contains cases studies of the impacts of beaver activities on low lying arable land in Tayside, both in relation to damming and burrowing. It includes advice from the Scottish Environmental Protection Agency about the risks to flood banks from burrowing. Apart from the case studies, it documents in detail a number of impacts from burrowing and damming, at paragraph 9.1.1. The reports to which I have referred above contain a wealth of references to the effects of damming and burrowing. The information supports the proposition that low lying land next to watercourses is at risk of flooding caused by damming, and from flood bank breaches and other forms of damage caused by burrowing. PAL is particularly valuable and productive land from an agricultural perspective. The information available to the first respondent was of such a nature that it might reasonably be concluded that the activities of beavers on or near PAL were likely to give rise to serious damage to crops and other forms of property. The first respondent was entitled to conclude that it was likely that the grant of a licence

would be capable of serving the purpose set out in regulation 44(2)(g) in relation to the activities of beavers on or near PAL.

[88] Potential management techniques feature in the material on which the first respondent relies. A number of management techniques are listed in chapter 5 of *Beavers in Scotland*. In relation to each there is information as to its purpose, limitations, the considerations relative to animal welfare, timing, legal considerations, costs and regulatory burden. Almost all involve derogations which would require a licence. That material supports the conclusion expressed in the *PAL Assessment* that all the potential methods of dealing with the effects of damming would require a licence. So far as the effects of burrowing are concerned, the first respondent in the *PAL Assessment* goes on to consider two measures to deal with burrowing that would not require licences. The first would itself result in the loss of agricultural land, and the second was not well-trialled. The first respondent was entitled to conclude that a measure which was not well-trialled was not something it should regard, at that time, as a satisfactory alternative to the grant of a licence. The first respondent was entitled to conclude that there was likely to be no satisfactory alternative to a licensed activity in relation to managing the effects of damming and burrowing on or near to PAL.

[89] So far as the population of beavers is concerned the first respondent in 2015 had information predicting a growth in the population. That prediction was borne out by the findings of the 2017-2018 survey. I accept that genetic diversity was one of the factors that the first respondents had to take into account in assessing conservation status: see eg *Commission Guidance* paragraph 16, footnote 17. The first respondent had information that the genetic diversity of the Tayside population was in line with the highest levels of genetic diversity in populations across Eurasia. There is nothing in the 2020 article which

undermines those conclusions. It is a nuanced piece. Although it indicates that translocation would preserve genetic diversity that might be lost by lethal control, it acknowledges that repeated removal of beavers from a location will reduce genetic diversity in the local population, and could lead to localised inbreeding. It acknowledges that decisions about beaver management are complex.

[90] The first respondent, correctly, considered and referred in the *PAL Assessment* to the definition of "favourable conservation status" in the Directive. It relied on a recent, detailed, survey of the Tayside beaver population. In the light of the information that the first respondent had in 2019 about the growing beaver population, it was entitled to conclude that the Tayside population would continue to grow in number and range. The information available was in the form of studies and surveys which themselves refer to earlier academic work. The first respondent was entitled to find itself satisfied, to a high degree of confidence, that the beaver population in Tayside was growing, and its conservation status improving. It did so against a background of population growth despite previously unregulated culling. The material available to the first respondent supported the reasonable conclusion that its proposed approach to licensing on PAL would not be detrimental to the maintenance of the species in its natural range.

[91] The first respondent was under no obligation to carry out a detailed or individual reassessment of the population every time it granted a licence. Against a different factual background it could conceivably be otherwise, perhaps in the case of very low or declining population, but that is not the situation here. Subject to review on the grounds of rationality, and the need to be satisfied to a high level of confidence on the basis of good quality scientific information, the nature and frequency of review of the population levels is a matter for the first respondent. The first respondent expected to receive the results of a

further population survey in the course of 2021, and produced a draft report of that survey. Its findings are irrelevant to this petition. The fact that it was instructed is in accordance with the intention expressed in the *PAL Assessment* to monitor the population once the licensing regime came into effect.

Managing the impacts of Beavers in Scotland

[92] The first respondent was entitled to use the conclusions in the *PAL Assessment* to inform its decisions in relation to individual licences. The September 2019 version of *Managing the impacts of Beavers in Scotland* reflects that position. The March version does not reflect that position, and if the first respondent took the approach set out in it in reaching its decisions, it would have erred in law. The first respondent asserts that it did not in fact take the approach in that document. I have not determined whether it did. No licences granted before September 2019 remain in force, as licences have a maximum duration of 2 years. There is no licence granted during the currency of that policy which would fall to be reduced in this process.

Generalised administrative practices

[93] The petitioner asserts that the first respondent has generalised administrative practices which are unlawful. Those are (a) failing to give sufficient and proper reasons for issuing each individual licence; (b) failing to consider the individual circumstances of a given application; (c) granting licences for the lethal control of Eurasian beavers in Scotland without due and proper consideration of the necessity and proportionality of issuing a licence in each individual case. Points (b) and (c) are different articulations of the same point. I deal with them together.

[94] The petitioner's primary position was that it was for the first respondent to demonstrate that all of the challenges to the grant of licences, whatever the legal foundation for those challenges, were unfounded. The petitioner also submitted that it had produced evidence to support its contentions.

[95] An authority requires to justify derogations. It is, however, for the party asserting the existence of a generalised unlawful practice to substantiate that. That distinction is observed in the jurisprudence cited by the petitioner. In C-342/05 *Commission* v *Finland*, the court found that the Commission had not adduced sufficient evidence of two specified administrative practices, while also holding that Finland had not been able to demonstrate by means of evidence that a measure was capable of achieving its objective.

Failure to give reasons

[96] The first respondent has a general practice of issuing licences without giving reasons for doing so. The first respondent admits, in answer 45, that it does not issue "full reasoning" for its decision to grant each licence. It says that it is under no obligation to do so.

[97] In approaching matters on the basis that it has no duty to give reasons for granting a licence, the first respondent has erred in law. In *Keir* parties agreed that there was no requirement to give reasons. *Doody* and *Sharp* are not in point. I require to determine the meaning and effect of the 1994 Regulations in accordance with any retained case law and any retained principles of EU law: EUWA section 6(3).

[98] An authority derogating from the prohibitions specified in Article 12 of the Habitats Directive by reference to Article 16 must give reasons in the derogation decision. Those reasons must include an assessment of the conservation status of the species in question, and

must explain why there is no satisfactory alternative measure which is not a derogation: Case C-342/05 *Commission* v *Finland*, paragraphs 30-31; Case C-557/15 *Commission* v *Malta*, paragraphs 47, 50, 51; *Tapiola*, paragraphs 49-50; C-217/19 *Commission* v *Finland*, paragraph 66. Although the requirement to give reasons is not explicit in the words of Article 16(1), it is clear from the language used by the court that clear and sufficient reasons are a necessary condition for the lawfulness of a derogation decision under that article; *Tapiola*, paragraphs 49, 50:

> "49. Further, it must be noted that art 16(1) of the Habitats Directive requires Member States to provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative …
>
> 50. That obligation is not met where the derogation decision does not contain any reference to the absence of any other satisfactory solution or any reference to relevant technical, legal and scientific reports to that effect …"

[99] The Habitats Directive requires that certain matters be the subject of reporting to the Commission: Article 16(2) and (3). That is a separate, although related, obligation. The cases to which I have referred impose a requirement that the derogation decisions themselves contain reasons. The respondents, particularly the third and fourth respondents, suggested that the petitioner was contending for a duty to provide interest groups and NGOs with reasons for licensing decisions which did not affect them. They were concerned that there was a suggestion that the licensing process required the participation of the public, including the petitioner. Those were not the petitioner's contentions, and they are not what the jurisprudence requires. There is no question of requiring to provide reasons specifically to organisations like the petitioner, or for public participation in the licensing process. What is required is a statement of reasons in relation to each licensing decision.

There is no requirement to give reasons as to why one form of derogation has been chosen over another.

[100] The appropriate remedy is reduction of those licenses which have not already expired, listed in the schedule for service. Those are at points 39-49 inclusive in part 2.2 of the schedule.

Failure to consider the individual circumstances of a given application etc

[101] The petitioner produced call logs and other documents which relate to 21 specified licences.

[102] The first respondent provided information about these, and about other matters, in the form of an affidavit from Elizabeth McLachlan, its licensing manager. She provided information on the licensing process generally, and on the particular call logs and emails that the petitioner criticised. I have not relied on her commentary on the call logs where she seeks to explain why a call handler recorded a call in a particular way: eg paragraph 41, license 144389/150137. Although her role qualifies her to give informed commentary about documents that come from the first respondent, she was not party to any of the calls in question. I have no reason to doubt her description of the process that ought to be followed when someone applies for a licence. It is necessarily a description of a general character, and I have not relied on it in relation to the petitioner's contentions about individual applications. In some instances her commentary is, in effect, submission about the merit of the petitioner's criticism: eg paragraph 42. I have treated it as submission rather than evidence.

[103] The third and fourth respondents made their own investigations with their members about the petitioner's allegations regarding the licensing process. They produced two

affidavits describing how the investigations were carried out, and tables setting out the responses from their members.

[104] Some call logs contain lengthy and detailed records of telephone conversations, whereas others are much shorter. Some of the records disclose that the first respondent has visited on one or more occasions before. Where that is the case, it is understandable that fewer details have been recorded: eg licences 140960, 140968. Some contain expressions which, taken in isolation, suggest that the first respondent did not consider every application in respect of PAL on the basis of its individual merits. The call log for licence 144389 (later renumbered 150137) is an example. The call handler records having told the applicant that if his land had been PAL, he would have been given a licence straight away without the need for a site visit. Others provide a clear account of the features of the land, why damage is apprehended and indicate that particular other measures would not work: eg 141282. They are properly described as "snapshots" of a particular point in the application process.

[105] The petitioner's criticism in a number of instances relates to an alleged failure to consider alternatives to lethal control, as opposed to alternatives to derogation, or to allow lethal control where other non-lethal derogations have been allowed as well. The criticism is predicated on a mistaken interpretation of the 1994 Regulations, and is irrelevant. Examples are in relation to licences 140954, 141841, 142050, 143406,147828, 158639. Some of the criticisms are because the call log records that there is not a problem, but an apprehension, because of beaver activity nearby, and the nature of the landscape, that there will be: eg licence 141282. As I have already indicated (paragraph 48), it is not necessary that serious harm should have occurred before a licence is issued. The aim of the licensed activity is to prevent the harm.

[106] Licence 140968 refers to the circumstance that a mitigation trial of attempting to exclude beavers from the burn and drainage system has been completed at one site, and also to the possibility that the trial of a water gate may help to exclude beavers in the longer term, meaning that lethal control would not be necessary in the longer term. The first respondent had to consider whether there was a satisfactory alternative to granting a licence to prevent serious harm at the time of the application.

[107] I am not satisfied that the material produced by the petitioner demonstrates that the first respondent has generalised unlawful practices of the sort alleged. In a number of instances their criticisms are misconceived.

[108] For completeness, I record that the information provided by the third and fourth respondents provides a mixed picture. Some of their members describe quite a demanding and involved process in applying for a licence, and others do not. The responses come not just from the holders of the licences mentioned in the pleadings, but also from holders of other licences granted by the first respondent. Some describe many site visits by the first respondent and trials of mitigations, or the submission of photographic evidence vouching that the topography was not suitable for particular mitigations, whereas others simply describe filling in a form.

[109] Those members whose licences are mentioned in the pleadings generally describe much more extensive interactions with the first respondent than might be inferred simply from looking at the call logs. Their descriptions reinforce my view that the call logs should be treated as "snapshots".

Failure to review licences

[110] This raises no separate point of law. The contention is that the licences should have been reviewed and revoked because they should never have been issued in the first place.

Disposal

[111] Most of the declarators sought invite me to express conclusions about the law. I have expressed conclusions about the matters of law necessary for the disposal of the petition in this opinion, and see no purpose in granting declarators. I will reduce the licenses mentioned in paragraph 100.