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Delivered: 25/10/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND
BADGER GROUP AND WILD JUSTICE FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT
FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS**

**David Wolfe KC and Blinne Ní Ghrálaigh (instructed by Phoenix Law) for the applicants
Tony McGleenan KC, Philip McAteer and Laura Curran (instructed by the Departmental
Solicitor's Office) for the respondent**

SCOFFIELD J

Introduction

[1] There are two applicants in these proceedings: the Northern Ireland Badger Group (NIBG), an independent voluntary group, established in 2006 and based in Belfast, which works to promote the conservation, protection, welfare and better understanding of badgers in Northern Ireland; and Wild Justice, a not-for-profit company which advocates on behalf of wildlife, including badgers. The respondent is the Department of Agriculture, Environment and Rural Affairs (DAERA) ("the Department"), encompassing the Minister who was responsible for and in charge of that Department at the relevant time ("the Minister").

[2] The primary target of the proceedings is a decision of 24 March 2022 – set out or evidenced in a statement made by the Minister that day and in a 'Bovine Tuberculosis Strategy for Northern Ireland' published by the Department the following day ("the Strategy") – to implement a non-selective cull of badgers as part of the Department's strategy for controlling or eradicating bovine tuberculosis (bTB) in Northern Ireland. The proposed cull will involve 'controlled shooting' (also

sometimes referred to as ‘free shooting’) of free-roaming badgers, delivered and paid for by farmer-led companies.

[3] The central plank of the applicants’ challenge is an alleged failure to conduct a proper and lawful consultation in relation to the impugned aspect of the Strategy. In turn, there are two strands to this case: first, that the respondent failed to disclose adequate information in the course of the consultation to permit properly informed response; and, second, that the Minister failed to give conscientious consideration to the product of the consultation in some respects. Leave to apply for judicial review was previously granted in relation to the ‘adequacy of information’ point. The ‘conscientious consideration’ point was dealt with on a ‘rolled-up’ basis at the hearing.

[4] The applicants also have a separate issue in respect of the way in which the Department intends to proceed. The Minister indicated an intention to do so by way of the making of one or more orders pursuant to Article 13 of the Diseases of Animals (Northern Ireland) Order 1981 (“the 1981 Order”). The applicants contend that a statutory pre-condition of the exercise of the power conferred by that provision is demonstrably not met (because, to make such an order, the Department must be satisfied that destruction of badgers is “necessary” in order to eliminate or substantially reduce the incidence of bTB in livestock in the area; and, the applicants assert, the Department has not even purported to be satisfied that there is no reasonably practicable alternative way of dealing with bTB in Northern Ireland). However, this element of the challenge was stayed at an earlier stage of the proceedings in favour of resolving the consultation issue first. If the decision in relation to the proposed wildlife intervention element of the Strategy is unlawful for want of proper consultation, it will require to be taken again. If not, the Article 13 question may come back into focus; but it would be more appropriate to deal with that issue when the making of such an order was in prospect. The respondent undertook that it would make no such order unless and until the applicants had been given notice of its intention to do so, providing sufficient time for them to have recourse to the court should they wish to do so.

[5] The application was initially pursued with a degree of urgency but, in the event, the respondent Department also undertook that no badger cull would begin until November 2023 at the earliest. In those circumstances, the urgency in the case dissipated to a considerable extent. Indeed, in light of the present absence of an Executive and sitting Assembly, it is probably unlikely that any order under the 1981 Order would be made at this point in any event.

[6] The applicants have been at pains to emphasise that the challenge in these proceedings is not a challenge to the respondent’s wider and overall consultation, nor its view that action is required to tackle bTB in Northern Ireland; nor to any other measures (not involving badger culling) which are to be pursued as part of that process, many of which are uncontroversial.

[7] Mr Wolfe KC appeared for the applicants with Ms Ní Ghrálaigh; and Mr McGleenan KC appeared for the respondent with Mr McAteer and Ms Curran. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

The impugned decision

[8] The applicants' principal evidence has been provided by Mr Richard Rendle, who is the founder of NIBG. The applicants have also filed evidence from the second applicant, Wild Justice, provided by its founder and director Dr Ruth Tingay, although it is accepted this organisation did not take an active part in the consultation process which is the primary focus of these proceedings; and from an organisation called Born Free, a charity registered in England which campaigns for compassion and respect towards wild animals, which was a respondent to the consultation. Mr Rendle takes as his starting point the announcement of the impugned decision on 24 March 2022. On that date the then Minister gave an oral statement to the Agriculture, Environment and Rural Affairs Committee of the Northern Ireland Assembly ("the Committee"). A written copy of this statement was issued by the Department contemporaneously.

[9] The Minister's statement indicated that the respondent Department was going to introduce a programme of badger intervention in areas of high bTB incidence. This was initially to be done through a cull of badgers, which would be achieved through a non-selective cull using controlled shooting as the predominant badger removal method. A non-selective cull is one in which it is acknowledged that both bTB infected badgers and healthy badgers will be killed. Para 36 of the Minister's written statement includes the following statement:

"Following this consideration I have decided that the most cost effective and practical way forward is to implement a limited cull of badgers in specific intervention areas where there is a high incidence of TB breakdown and a high density of badgers."

[10] There had been a consultation which preceded this decision – discussed in further detail below – and also, as appears from the Minister's statement, a business case. In the course of his statement, the Minister also said (at para 35):

"I want to assure you that I have considered the options presented to me, the scientific evidence, the experience of other jurisdictions, the robust analysis of the necessary business case, the responses to last summer's consultation environmental reports."

[11] The Minister stated that in the longer term he wished to see a move to a programme of badger vaccination. The aim of a non-selective cull in advance of that is to lower the badger population density in order to reduce the overall infection load in badgers and thereby reduce the bTB incidence in cattle who might become infected from them.

[12] The method settled upon by the Minister was effectively a version of Option 8 which had been set out in the consultation paper. The business case which was referred to by the Minister had not been disclosed as part of the consultation process. Nor had it been disclosed prior to the commencement of these proceedings, despite repeated requests from the applicants. The applicants emphasise that the Minister's statement made clear that he had weighed up consultation responses received against the business case. He said (at para 10 of his statement):

"I have carefully considered the views of all our stakeholders following a public consultation, and I have weighed these up against the evidence and information within a detailed business case and the recently completed Strategic Environmental Assessment."

[13] On 25 March 2022, the Department published the Strategy setting out in more detail the proposals which had been announced in the Minister's statement the day before.

The applicants' concerns about the impugned decision

[14] The applicants do not dispute that bTB is a matter of legitimate and serious concern to the Department. It is an infectious respiratory disease of cattle caused by the bacterium *Mycobacterium bovis* ("M bovis") which can also infect, and cause disease in, other mammals, including badgers. For a variety of reasons, the Department is rightly concerned to seek to eradicate bTB in Northern Ireland. The applicants do, however, dispute the role played by badgers in the spread of the disease in cattle and the efficacy of the respondent's proposed wildlife intervention. The applicants have quoted from the respondent's own website which states:

"The exact means of spread between the species and the relative importance of potential routes of infection have not been established. The proportion of the disease in cattle that can be directly attributed to badgers has not been quantified."

[15] It is not the function of the court in these proceedings to enquire into, much less seek to resolve, difficult scientific questions over how precisely bTB is transmitted to, from, and between cattle and other species. Broadly speaking, however, the evidence provided on behalf of the applicants makes the case that the disease is spread through infected milk and faeces and the bovine animal produces a

great deal more faeces than a badger, which is then typically spread as slurry on pasture and other agricultural land. Since badgers use their noses to disturb soil for much of their food, the applicants contend that they are highly susceptible to infection from soil contaminated by bTB-infected cow faeces. There are an estimated 33,500 badgers living in Northern Ireland, compared to an estimated 1.7 million cattle Northern Ireland. The test for bTB is acknowledged to perform poorly, resulting in a significant reservoir of undetected infection in the Northern Ireland herd. In short, and put crudely, the applicants contend that bTB is spread by and between cattle and that there is limited if any evidential basis for the suggestion that badgers materially contribute to the infection of herds.

[16] As a result, the applicants, and other organisations with a similar viewpoint, argue that it is extremely contentious that wild badgers materially contribute to the spread of bTB in cattle and that badger culling is capable of materially reducing that spread or is appropriate for that purpose. For its part, the respondent has relied upon the Bovine TB Strategy Review of October 2018 conducted by Sir Charles Godfray FRS (“the Godfray Report”). It says that this report concluded that the presence of infected badgers poses a threat to local cattle herds. In turn, the applicants emphasise that Sir Charles suggested that culling badgers could have a “modest impact”; and that his review emphasises limitations in the current cattle testing regime, the poor take-up of on-farm biosecurity measures to reduce the spread of bTB on farms, and the lack of adequate trading restrictions to prevent potentially infected cattle spreading the infection within or between cattle herds as major factors limiting the effectiveness of the current policy. The applicants also say it is important to note that Sir Charles and his team was explicitly asked *not* to evaluate whether the ongoing controlled-shooting culls in England (on which the proposed Northern Ireland intervention is based) was reducing bTB in cattle.

[17] The applicants are in favour of vaccination-led wildlife interventions, which they contend provide a practical and humane alternative to the killing of badgers, particularly the non-selective shooting of them. Their evidence is that vaccination has been shown to reduce the rate of new bTB infections in badgers by 76%; and that vaccinating adult badgers in a social group radically reduces new infections in unvaccinated badger cubs. They advocate a “Test, Vaccinate and Remove” (TVR) approach, which involves capturing live badgers, testing them for bTB, vaccinating those which have tested negative to disease and removing (i.e. killing) those which tested positive. The applicants contend that the success of a TVR approach in this jurisdiction has already been confirmed in a research project run by the respondent in the Banbridge area between 2014 and 2019.

[18] Even assuming that an approach of non-selective culling is warranted, the applicants also take strong issue with the proposed means of killing badgers which has been adopted by the respondent, namely controlled shooting. The applicants say that this is particularly controversial, as against the availability and preferability of other possible wildlife interventions which would be more humane. In this regard, the applicants place heavy reliance upon the work of the Independent Expert Panel

(IEP) which looked at similar proposals in England in the course of the Randomised Badger Control Trial (RBCT). The applicants argue that the work of this group made clear that the disease could and should be controlled by cattle-based control measures alone; and that, on all the available evidence, culling (such as that now proposed by the respondent) is unlikely to contribute positively to the control of bTB at all. Returning to the issue of humaneness, however, the applicants draw particular attention to the fact that a subsequent report issued by the RBCT panel reported that up to almost 23% of badgers shot in Somerset and Gloucestershire as part of a cull using the controlled shooting of free-roaming badgers took longer than five minutes to die; and that a further proportion ran away injured.

[19] In summary, the applicants take issue with the necessity or propriety of badger culling at all in order to reduce bTB; with the non-selectivity of the proposed cull rather than the use of TVR; and, even assuming a non-selective cull is warranted, with the methodology employed (namely free shooting, rather than for instance cage trapping and shooting).

The consultation exercise

[20] Reference has been made above to the consultation which preceded the Ministerial decision-making in March 2022. On 16 July 2021, the Department launched a consultation seeking views on the next steps in the strategy to eradicate bTB in Northern Ireland. This involved publication of a consultation paper, which has been provided to the court and which has been the subject of detailed submissions and critique from both sides. The consultation sought views from the public on a range of issues and measures going beyond the question of badger intervention which is the focus of these proceedings. However, Part 4 of the consultation paper outlined proposals in relation to badger intervention, as well as changes to compensation payments to farmers for infected cattle which are subsequently slaughtered.

[21] It is relevant to note in passing that the consultation exercise with which these proceedings are chiefly concerned was the second of three consultations initiated by the Department in relation to its strategy for the eradication of bTB. The first was conducted in 2017; and the third, in relation to the Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA), was conducted in 2022. The first applicant in these proceedings responded to all three consultation exercises. It relies upon the fact that the SEA/HRA report found that Option 6 (TVR, followed by vaccination, using cage trapping for both) would be the least environmentally damaging option.

[22] Section 4.1 of the consultation paper confirms that the Department's long-term aim has been to vaccinate badgers in order to reduce both intra-species and inter-species spread of bTB and to support a healthy badger population. However, the consultation paper went on to set out the Department's view that it was first necessary to reduce the infection load in the badger population by way of culling in

order to enable follow-up vaccination to be effective. The Department asserted that this was consistent with veterinary and scientific advice that badger culling in high cattle bTB incidence areas, where badgers are implicated as a reservoir of infection, would reduce the weight of bTB infection in badger populations more quickly than vaccination alone and would therefore have a greater and more immediate beneficial impact on the incidence of infection in cattle. In its consultation response, NIBG took issue with this proposition, which it contends is not backed up by scientific evidence.

[23] Part 4 of the consultation paper set out some five different lists of options for dealing with bTB. The applicants observe that these lists are to some degree inconsistent; and it certainly seems to the court that the various options considered could have been more clearly and consistently set out. At section 4.1, four “high level options” are set out, labelled A to D. Two of those options – Option D (vaccinate only) and Option C (a non-selective cull in a core area, with a simultaneous TVR approach in a buffer ring area) – had been discarded. This left two remaining options: Option A (a non-selective cull followed by vaccination) and Option B (a selective cull, via TVR, followed by vaccination). A second list of options was set out in section 4.4, identifying five different intervention options which were said to have been considered in “the Business Case which underpins the bTB eradication strategy”. Three of those options related to a non-selective cull and two options related to a TVR-based selective cull; any of which, if adopted, was to be followed by a period of vaccination alone. A third list of options for delivery was set out at section 4.5. This section emphasised the Department’s commitment “to delivering a badger intervention which takes into account effectiveness, efficiency, animal welfare and value for money”. It identified three possible approaches involving a mix of delivery directly by DAERA staff, by the private sector, and by not-for-profit cull companies set up by farmers, with a mix of funding options also available.

[24] Section 4.8 is an important section of the consultation paper. It is headed, ‘Rationale for the preferred badger removal approach (i.e. to pave the way for follow-up badger vaccination)’. It begins in this way:

“The Business Case underpinning the bTB Eradication Strategy explored different methods of reducing the disease in badgers to a vaccination-only intervention. It also investigated the delivery methods applied in other jurisdictions, concluding that three possible approaches were; delivery by DAERA staff, delivery by the private sector under contract to government, following a tender process managed and monitored by DAERA as occurs in the RoI or, delivered by farmer-led companies authorised and monitored by DAERA as occurs in England.

The wildlife intervention options described above were considered in the business case alongside other bTB eradication programme proposals...”

[25] Eight options are then set out and this classification is the one which (we now know) was principally used for the analysis and comparison set out in the business case. They were as follows:

- “**Option 1:** Do Nothing;
- Option 2:** Status Quo - continue with the current programme;
- Option 3:** Programme Enhancements without wildlife intervention (WL);
- Option 4:** Programme Enhancements with WL - Non-Selective Cull using baited cages, paving the way for vaccination, delivered by the private sector under contract to government;
- Option 5:** Programme Enhancements with WL - Non-Selective Cull using restraints, paving the way for vaccination, delivered by the private sector under contract to government;
- Option 6:** Programme Enhancements with WL - Selective Cull (TVR) using cages, paving the way for vaccination, delivered by the private sector under contract to government;
- Option 7:** Programme Enhancements with WL - Selective Cull (TVR) using restraints, paving the way for vaccination, delivered by the private sector under contract to government;
- Option 8:** Programme Enhancements with WL - Non-Selective Cull using controlled shooting as the predominant badger removal method (as in England), paving the way for vaccination, delivered by farmer-led companies.”

[26] After the table setting out those options, the consultation document merely says this:

“Having taken into account strategic fit, costs and benefits, including sensitivity analyses on such; other non-monetary issues; and risks; the preferred option was identified as: Option 8...”

[27] NIBG responded to the consultation in detail, although making the point in the course of its consultation response that much had been made of the business case underpinning the decision-making and the rationale for the proposed strategy,

which had not been provided. In the absence of disclosure of this document it was, NIBG suggested, “impossible for consultees to scrutinise the financial arguments or make an informed independent judgement of its merits”. The consultation response was therefore provided, in effect, under protest.

[28] There was significant stakeholder interest in the consultation, with some 3,367 responses. Most of these (2,351) were from individuals with a farming background or from farming bodies. 3,334 responses addressed the preferred option of non-selective culling of badgers by controlled shooting. 2,853 were in favour with 481 against. The Department’s evidence indicates that there was substantial support for this proposal from those within the farming community and some veterinary organisations; but that those from the environmental community were opposed to this proposed methodology.

[29] On 19 October 2021 officials met with the Minister to discuss the preliminary analysis of the consultation responses. His attention was also drawn to two petitions which had been brought to the Northern Ireland Assembly (one coordinated by the Ulster Wildlife Trust (UWT), NIBG and the Ulster Society for the Prevention of Cruelty to Animals (USPCA) with around 10,000 signatures; and the other with approximately 3,300 signatures tabled by Alex Easton MLA). The Minister was provided with a submission dated 25 November 2021 containing a draft summary of the consultation responses. He received further advice on 10 March 2022, shortly before the decision was made which is challenged in these proceedings. Along with an overarching cover submission, there were three associated thematic submissions provided to the Minister on 10 March 2022, one of which specifically dealt with the proposed wildlife intervention and which, again, detailed key elements of the consultation responses. In the interim, the Minister had met with UWT on 23 November 2021, upon which the respondent relies for reasons set out further below.

Earlier engagement in relation to bTB strategy

[30] I have summarised above the key developments which provide the immediate backdrop to these proceedings. It is fair to record, however, that there had been a prior history of consideration of, and consultation upon, the strategy which the Department should adopt in relation to bTB eradication. The TB Strategic Partnership Group (TBSPG) was set up by a previous minister, Michelle O’Neill MLA, in 2014. NIBG and other badger groups had some engagement with this group. It produced an interim report which was issued for public consultation in June 2015. It then published its final strategy in December 2016. One of the proposals the TBSPG recommended was a non-selective culling of badgers, although in a core area only (with high levels of bTB in cattle), combined with a TVR approach in a surrounding buffer area to mitigate the perturbation effect. The TBSPG Strategy accepted that the badger population acts as a reservoir of bTB in the UK and the Republic of Ireland. It said that the removal of badgers had been shown to reduce disease in neighbouring cattle populations in both England (relying on the RBCT) and in the Republic of Ireland (relying on the Four Area Trial and the later national

programme of targeted badger culling). This group believed that badgers were an acknowledged reservoir of the disease and an important contributor to bTB infection in cattle.

[31] The TBSPG proposed strategy was consulted upon in late 2017, in the absence of a Minister. The consultation document issued then accepted that wildlife, in particular badgers, could be a contributing factor in the maintenance and spread of infection in cattle; and that the badger population acts as a reservoir of bTB in Northern Ireland. Nonetheless, it also recognised that there remain many unknowns about the role badgers play in bTB transmission and that the direction and frequency of transmission between cattle and badgers was not known. It recognised that any intervention in the wildlife population must be proportionate and humane and must consider the welfare of both badgers and cattle. In the 2017 consultation exercise, farming bodies were in favour of a non-selective cull, but with strong opposition to any form of non-selective badger cull from NGOs, academics and the general public.

[32] Some of the strands of work arising from the TBSPG's work were able to be progressed in the absence of a Minister; but officials considered that issues of wildlife intervention and changes to the compensation regime should be for a Minister to decide upon once one was in post. This work was therefore picked up when Edwin Poots MLA became DAERA Minister in January 2023.

[33] One TBSPG proposal which had been implemented was the establishment of the TB Eradication Partnership (TBEP) in June 2018, which was designed to be a representative group. Its primary role was to provide independent advice and input into the development of the Strategy; and NIBG was a member of this group.

Summary of the parties' cases

[34] There was no significant dispute between the parties as to the relevant legal principles to be applied in this case (summarised below). The respondent accepted that the task for the court is to determine whether the process which had been adopted was fair. The applicants accepted that perfection in the consultation arrangements was not required. The key issue was whether the consultation had been conducted in a way which, by reference to one of the *Gunning* requirements, was so unfair as to be unlawful. The submissions of the parties focused on the facts and documentation in this specific case and how the *Gunning* requirements applied in this context.

[35] As mentioned above, the key element of the applicants' challenge is that the Department failed to properly undertake a consultation process which complied with the relevant legal requirements. They contend that the respondent failed to provide them with sufficient and adequate information and/or materials regarding the proposed strategy for controlling or eradicating bTB. In particular, they contend that the business case which underpinned the Strategy ought to have been disclosed by the Department or, at least, sufficient information relating to the business case

and/or the evidence which underpinned the option which was ultimately selected, in order to ensure that a meaningful response could be provided by consultees. The applicants argue that the business case provided the basis for the recommendations made and the decisions which were then taken, including by reference to assumptions and judgments contained within the business case (along with the supposed evidential bases for these) which are foundational to the respondent's consideration of the matter. In his oral submissions, Mr Wolfe focused on the criteria contained within the business case, the weightings adopted in respect of those criteria and the factual information which fed into the scoring mechanism (including in particular the scientific analysis and the specific scientific report with which consultees have still not been provided).

[36] Additionally, the applicants contend that the respondent (and, in particular, the Minister) failed to conscientiously take into account the consultation responses which were received in advance of making the decision of 24 March 2022 to implement a non-selective cull of badgers. This alleged failure was said to be "particularly stark" in relation to the Minister's failure properly to consider consultation submissions on the relative 'humaneness' of the various options for addressing bTB.

[37] The respondent's evidence emphasised the seriousness of the health problem presented by bTB (with close to 10% of all herd keepers in Northern Ireland under some form of restriction), which is not seriously in doubt; and the Department's view that any approach to the eradication of bTB must address all factors of disease spread and maintenance.

[38] In relation to the consultation challenge, the respondent contends that the applicants have wrongly taken the 2021 consultation exercise out of context from all that preceded it in the development of the bTB strategy from a much earlier stage, from at least 2014. In particular, Mr McGleenan emphasised the ongoing work of the TBSPG from late 2014 onwards, including the prior consultation exercise in late 2017 and early 2018. As to the 2021 process, the respondent submits that all information which is relevant to the matters within the scope of the consultation was summarised in the consultation document which was issued with sufficient detail to ensure an informed response on the part of consultees. It further contends that business cases are not normally published and that there was a risk, in the event that the lengthy business case was published in this case, that consultees would lose focus on the relevant material.

[39] On the issue of conscientious consideration, the respondent contended that this would be best dealt with at a time when the court was considering a final decision to make a particular order under Article 13 of the 1981 Order. In any event, it further relied upon the submissions provided to the Minister, along with the summary of consultation responses, and, in addition, the fact that he was given the UWT response and met with that organisation. In the respondent's submission, read

fairly, the UWT response addressed the relevant issues which the applicant contends were not drawn to the Minister's attention adequately or at all.

Relevant legal principles

[40] The public law requirements in respect of consultations carried out by public authorities as to proposals which affect the rights and interests of others are now relatively well known. They are often summarised in the form referred to as 'the *Gunning* principles', arising from the case of *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168. These principles were later endorsed by Lord Woolf in the Court of Appeal in England and Wales in *R v North and East Devon Health Authority, ex parte Coughlin* [2001] QB 213, at para [108], in the following terms:

"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

[41] As a result, the relevant principles are also now sometimes referred to as the '*Coughlan* principles' (or, indeed, as the '*Sedley* principles', after leading counsel in the *Gunning* case, later Sedley LJ, who initially formulated them). In any event, there are four key elements: (1) the consultation must be undertaken when the proposals are at a formative stage; (2) there must be sufficient reasons given for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; (3) adequate time must be afforded for this; and (4) the product of the consultation must be conscientiously taken into account when the decision is taken. The present case involves allegations of breach of the second and fourth *Gunning* principles.

[42] A more recent leading authority in this field is the decision of the UK Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56. That authority has been endorsed and applied by the Court of Appeal in this jurisdiction in *Re Lynch's Application* [2020] NICA 32. A thread running throughout the case-law is that, to be lawful, a consultation process must be fair. The *Gunning* principles represent elements of what fairness requires of a consultation process. The ultimate test of whether a consultation process has been conducted lawfully or not is whether it was conducted in a way which was so unfair as to be unlawful (see, for

instance, Morris J's helpful summary of the principles relating to consultation in *R (Electronic Collar Manufacturers' Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) at para [27](6); and Bean LJ in *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074, at para [69]). Perfection is not required (see *R (Keep the Horton General) v Oxfordshire Clinical Commissioning Group* [2019] EWCA Civ 646, at paras [18] and [66]), so that a challenge will not necessarily succeed simply because a consultation could have been carried out in a better way. The question is whether the failure complained of has led to real unfairness. That is a highly context-specific question, depending upon the facts and context of the particular case. In some circumstances, fairness may require that interested persons are consulted not only upon the preferred option but also upon arguable yet discarded alternative options (see *Moseley* at para [27]).

[43] Hickinbottom LJ provided a helpful summary of the relevant principles in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098, at para [90], as follows:

- "i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (*R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 at [23] per Lord Wilson JSC).
- ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response (*R v Secretary of State for the Home Department North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at [112] per Lord Woolf MR, and *Royal Brompton and Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (*Coughlan* at [108]); or where the consultation paper is materially misleading (*R v Secretary of State for Transport ex parte Richmond upon Thames London Borough Council (No 2)* [1995] Env LR 390 at page 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

- iii) As I have indicated (see paragraph 87 above), the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in *The Mayor and Corporation of Port Louis v The Attorney General of Mauritius* [1965] AC 1111 at page 1124 (“the nature and the object of consultation must be related to the circumstances which call for it”), Lord Reed JSC in *Moseley* said (at [36]):

“[Statutory duties of consultation] vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out.”

Lord Wilson (at [23]) also referred to the requirements being linked particularly to the purpose of the consultation.

- iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (*Moseley* at [37]-[43] per Lord Reed).
- v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, “clear unfairness must be shown” (*Royal Brompton* at [13]); or, as Sullivan LJ said in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: “... a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong.”

- vi) The product of the consultation must be conscientiously taken into account before finalising any decision (*Coughlan* at [108]).”

Relevant statutory provisions

[44] Article 13(1) of the 1981 Order provides as follows:

“Without prejudice to any other powers conferred on the Department under this Order, where the Department is satisfied in the case of any area, –

- (a) that there exists among the wild members of one or more species in the area a disease, other than rabies, which has been or is being transmitted from members of that or those species to livestock of any kind in the area; and
- (b) that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in livestock of any kind in the area;

the Department may, after consultation with the Department of the Environment and subject to the following provisions of this Article, by order, provide for the destruction of wild members of that or those species in that area.”

[45] By virtue of Article 13(2), an order under that Article must specify the area to which it relates, the disease to which it applies, and the one or more species to which it relates. Article 13(3) then provides as follows:

“An order under this Article providing for the destruction of wild members of one or more species in any area may –

- (a) where the Department is satisfied, having regard to all relevant considerations and, in particular, the need to avoid causing unnecessary suffering to wild members of the species in question, that use of the method or methods in question is the most appropriate way of carrying out that destruction, authorise the use of methods of destruction which would otherwise be unlawful; ...”

[46] Also relevant are the Wildlife Order (Northern Ireland) 1985 (“the 1985 Order”) and the Welfare of Animals Act (Northern Ireland) 2011 (“the 2011 Act”). The 1985 Order provides protection to badgers and their setts. Pursuant to Article 10(1), subject to the provisions of Part II of the Order, if any person intentionally or recklessly kills, injures or takes a badger (being an animal specified in Schedule 5 as one which is protected at all times) he shall be guilty of an offence. So too is it generally an offence to have in one’s possession or control a live or dead badger. Pursuant to Article 11(3), notwithstanding anything in Article 10, an authorised person shall not be guilty of an offence by reason of the killing or injuring of a wild animal included in Schedule 5 “if he shows that his action was necessary for the purpose of preventing serious damage to livestock... and he notifies the Department immediately after taking such action”. Article 10(1) also does not apply to anything done for the purpose of preventing the spread of disease or for the purpose of preventing serious damage to livestock if it is done under and in accordance with a licence granted by the Department: see Article 18(1) and 18(3).

[47] Recognising, as the authorities emphasise, that the context of the consultation is extremely important, it is appropriate to step back for a moment to appreciate the basic legal position in relation to the status of badgers. The starting point for consideration of any proposal that badgers be killed is that this would be a departure from the present protection afforded to them, namely that the killing of large numbers of wild badgers would currently be serious criminal conduct. Although legal mechanisms may exist to ensure that a badger cull could be carried out lawfully, the baseline position is that badgers are provided a high level of protection in domestic law (reflecting international obligations under the Bern Convention on the Conservation of European Wildlife and Natural Habitats).

[48] It is also a criminal offence under section 4(1) of the 2011 Act for a person, in certain circumstances, to cause unnecessary suffering to an animal. Whether or not the suffering is unnecessary is to be determined having regard to a number of considerations set out in section 4(3), including whether the suffering could reasonably have been avoided, terminated or reduced; whether the conduct which caused the suffering was in compliance with any relevant statutory provision; whether the conduct was for a legitimate purpose (including the purpose of protecting another animal); whether the suffering was proportionate to the conduct concerned; and whether the conduct was in all the circumstances that of a reasonably competent and humane person. Section 2 defines a “protected animal” for the purpose of the Act as including an animal “under the control of man whether on a permanent or temporary basis”. It is an offence to carry out a prohibited procedure on a protected animal, that is to say a procedure which involves interference with the sensitive tissues or bone structure of the animal, save in certain circumstances (see section 5 of the 2011 Act). The section does not apply to any procedure which is carried out for the diagnosis of disease, or to any other procedure specified in regulations made by the Department: see section 5(a)(ii) and (iv).

Was sufficient information provided to consultees?

[49] Generally, the second *Gunning* principle will require the consulting body to make consultees aware of what factors will be considered by it to be decisive or of substantial importance in making its decision: see, for instance, *R (Capenhurst) v Leicestere City Council* [2004] EWHC 2124 (Admin), at para [46]; and *R (Devon County Council) v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin), at para [68]. In short, it is not enough for the decision-maker merely to identify options or its preferred option. It must explain, to some degree, how it is proposing to make its decision. This allows consultees an opportunity (a) to contend that the decision-maker has adopted the wrong criteria in some way, or should apply a different weighting to them; and (b) to make points as to how the factors considered to be of importance apply, or do not apply, to the various solutions under consideration. An important aspect of consultation is to allow consultees to properly address the concerns of the decision-maker. This requires some indication of the concerns which the decision-maker has, described by De Smith (8th edition, at para 7.056) as “candid disclosure of the reasons for what is proposed”. This can require disclosure of particular documents or particular information to quite a degree of granularity in the course of a consultation (see, by way of example only, *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin), at para [50]).

[50] There are two essential strands to the applicants’ case on the second *Gunning* principle: first, that the Department did not properly explain the criteria it was using (or, put another way, *why* it had selected Option 8 as the preferred approach); and, second, that the information or analysis taken into account in this regard, was not adequately disclosed to permit meaningful engagement on the substance of the issue. The latter complaint can also be sub-divided into concerns about non-disclosure of the content of the business case and concerns about non-disclosure of scientific papers taken into account. I deal with the issue of the scientific evidence separately.

Criteria, scoring and information within the business case

[51] As to the first of the above strands, the applicants are particularly critical of the content of section 4.8 of the consultation document (discussed at paras [22]-[26] above), which is really the key section for present purposes. Option 8 was identified as the preferred option “having taken into account strategic fit, costs and benefits, including sensitivity analyses on such; other non-monetary issues; and risks”. ‘What does this mean?’ one might ask. What is “strategic fit”? How was it assessed? What were the benefits of this option which were identified over others? What other “non-monetary issues” were considered important or influential in selecting the preferred option? What risks were, and were not, identified; and how were they assessed? The thrust of the applicants’ case, with which I have considerable sympathy, is that this jargon-laden, conclusionary statement really provides no insight into *why* the Department preferred Option 8 and what factors it really considered important in reaching that view.

[52] This point is expressed in the applicants' skeleton argument in this way:

"However, the consultation document did not set out an explanation as to what those different factors consisted of (nor therefore how the final list and recommendation had been drawn up): notably, the terms "strategic fit", "sensitivity analyses" and "non-monetary issues" which were said to have driven the answer did not otherwise feature in the consultation paper, other than in the introduction at section 4.1. No information was provided as to any ranking or rating system employed by DAERA to grade the different factors in relation to any option, or to rate the different options themselves... Consultees were left essentially in the dark."

[53] This complaint is conceptually separate from, but allied to, the complaint of non-disclosure of the business case, or at least information contained within it. As the applicants have consistently pointed out, the 2021 consultation paper (and the later SEA/HRA consultation papers) repeatedly made reference to the Department's business case. This was described as 'underpinning' the Department's decision and as, essentially, providing the rationale for various aspects of the Strategy. The consultation paper made a number of references to assessments or judgments made in the course of the business case, as well as a number of assumptions on which those assessments and judgments were premised. Notwithstanding this, the business case was not disclosed to prospective consultees. It was specifically requested by the USPCA by way of a Freedom of Information Act request in order to inform responses to the consultation paper. However, the Department declined to disclose it on the basis that policies were still being formulated and it was an internal aid to policy development. In refusing disclosure, the view was expressed that "key parts of the business case were reflected in the consultation document".

[54] When the first applicant in these proceedings came to make its consultation response, it complained about having been hampered in doing so by reason of the non-provision of the business case. In particular, it contended that this made it impossible for consultees to scrutinise the financial arguments or make an informed independent judgment in relation to their merits. Similar concerns were expressed by another consultee, the Born Free Foundation.

[55] Certain parts of the business case have now been disclosed in the course of these proceedings. The respondent's case, quite simply, is that the key information and evidence contained within the business case – indeed, all information which was relevant – was summarised within the consultation document in sufficient detail. Section 6.8 of the business case discusses the options for wildlife intervention. In particular, it is noted (at para 6.8.1) that the following sections of

the document explain why each option was shortlisted for further analysis or, alternatively, discarded. The scientific evidence is not reviewed again in the business case. Rather, it essentially relies upon the TBSPG view, as later endorsed by another internal Wildlife Science Sub-Group, which is summarised above (see para [30]). Option E, the vaccinate-only option, is discarded because “scientific reviews commissioned by DAERA conclude that badger culling will be required in areas of high bTB risk prior to mass vaccination”. The footnote here indicates that the “scientific reviews” referred to are the ‘Review of Science and Epidemiology’ conducted by the scientific and veterinary members of the TBSPG, Dr Cecil McMurray and Dr George McIlroy (“the McMurray and McIlroy review”) and a later DAERA/NIEA (Northern Ireland Environment Agency) Scientific Opinion Paper. In relation to culling, a proposed methodology by way of gassing was discarded in the business case as it was deemed “inhumane”; but there is no discussion about the humaneness of other proposed approaches (capture and shoot, both by restraint and cage trap; and controlled shooting) – a matter to which I return below.

[56] A good deal of detail is provided in relation to costings for various options. An analysis was conducted of the net present cost (NPC) of each option, applying a variety of assumptions in relation to herd incidence reduction in bTB, leading to a ranking of options. Each option was also risk assessed to produce a risk index scoring, assessing risk in each case relating to funding, speed of bTB reduction, unplanned changes, availability of data and risk to trade.

[57] Non-monetary costs and benefits are dealt with in chapter 8 of the business case. DAERA recognised that it had a duty to ensure that any intervention was progressed in a manner which was humane. However, it commented that it was “content that the options shortlisted are acceptable in relation to welfare and humaneness”. There were five non-monetary criteria which were applied, each with a weighting, to give a total score of 100. These were as follows:

1. Improved overall cattle health and welfare (15);
2. Enhanced protection of human health in Northern Ireland (10);
3. Wildlife stakeholder engagement (15);
4. Enhanced support from the regional farming community (30); and
5. Improved internal and external trading confidence (30).

[58] The table in the business case showing the weighted scores attributed to each option discloses that the lowest scoring option was Option 2 (maintaining the status quo) with a score of 285. Option 3 (non-wildlife enhancements only) also scored relatively poorly, with a score of 400. There were two options placed joint first with a score of 545: Option 8 which was selected; and Option 5 which involved a cull using restraints. Options 6 and 7, including a selective cull by way of TVR, both scored 500.

[59] The final table showing the rank order for the eight shortlisted programme options addressed the cost of each option over 15 years, the non-monetary score of each option and the risk index score. Option 8 – the Department’s preferred option – scored best on cost, on risk and (joint first) on non-monetary factors. However, the applicants take issue with the assessment of the scoring on each of these, in a variety of ways, both as to methodology and inputs.

[60] In Mr Rendle’s second affidavit, he addresses a number of concerns about the content of the business case which, he says, could and would have been addressed in the course of the consultation (by both NIBG and others) if additional information had been provided. For instance, he takes issue with the assumptions used in the modelling of assumed reductions in bTB levels as a result of the strategy options. Another example is the business case’s assessment of policing costs associated with wildlife intervention being estimated at nil (based on significant such costs having been assessed by DEFRA in relation to culling in England). Some of the most fierce criticisms are directed towards the assessment of non-monetary factors.

[61] The question for the court is not whether the business case required to be provided to consultees in this instance simply because it was a ‘business case’. There is no obligation that such a document *necessarily* be published in the course of a consultation. By the same token, there is no defence to the applicants’ consultation challenge regarding failure to disclose this document (or material parts of it) simply by virtue of the fact that the document was a business case or an internal departmental document. In short, the title of the document is neither here nor there. The key issue for the court is whether there was material information which, as a matter of fairness, was required to be disclosed in order for consultees to have a proper opportunity (as required by the principles of public law discussed above) to engage meaningfully with the respondent’s thinking and proposed course of action. I have little hesitation in concluding that there was.

[62] The court was unimpressed by the respondent’s argument that disclosure of the business case would be too complicated or distracting for would-be consultees. It is possible that a public authority might fall foul of public law requirements in undertaking a consultation in circumstances where it swamped the public with documentation and detail to such an extent that the average citizen who wished to engage with the subject matter of the consultation could not reasonably do so, or could not do so without excessive effort or in the limited consultation period afforded. Government departments are, however, well versed in summarising complex issues and presenting consultation papers in accessible formats. The need to ensure that less well-informed or well-resourced consultees can participate in a consultation process does not excuse the consulting body from making available the necessary detail or data which a well-informed and well-resourced consultee will require in order to meaningfully engage at the level of specialism or expertise which they can contribute.

[63] The business of government is becoming increasingly complex. Where consultation is required or is voluntarily undertaken, it presents one means by which policy-makers can harness expertise outside of government. However, for this to be effective, and for expert bodies within industry or the NGO sector to meaningfully contribute to policy development, or as the case may be to protect their interests (or the interests of those they represent), it will sometimes be necessary for the policy-maker to share a level of detailed analysis which the average member of the public might find unnecessary or even unhelpful. This point was underscored by Lord Wilson in the *Moseley* case, in which he explained (at para [26]) that “the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting”. As I have mentioned above, it is well within the capability of government to publish material and invite consultation in a way which caters both for the interested but non-expert citizen and the sector-specific expert body. A common and effective technique (mentioned by way of example only) is to provide the detail of analysis in annexes to the consultation document which may or may not be considered by consultation respondents at their own discretion. In addition, public authorities cannot reduce the disclosure which fairness would otherwise require in relation to contentious proposed decisions simply by bundling those decisions together, or bundling them together with other elements of policy-making in an overarching strategy.

[64] A further basis for declining to disclose the business case when it was requested by stakeholders was that some information within the case had been shared with the Department by other jurisdictions on a confidential basis. It was noted that this information would need to be redacted if the business case was to be published or released. Little if any such information has been identified to the court. However, where legitimate concerns about breach of confidence or commercial sensitivity arose, this could be dealt with by way of redaction or summary. I am satisfied that much of the key information relating to the Department’s assessment of the proposed options does not fall within this category.

[65] I have borne in mind that the question of what needs to be published about a proposal is, in the first instance, a matter of judgment for the person carrying out the consultation (see, for instance, *R (Devon County Council and another) v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin), at para [68]) and that it is appropriate to afford the consulting department a degree of discretion in relation to this. However, as Ouseley J went on to emphasise immediately after recognising that, this discretion is subject to the obligation of fairness to disclose sufficient information as to the factors likely to be of substantial importance to the decision and/or the basis upon which the decision is likely to be taken. That is precisely what the applicants contend was not done in the present case.

[66] I accept the applicants’ submission that the business case contained the detail of the evaluations and calculations made in reaching the judgments involved in the Department’s selection of Option 8 as the preferred option; and that further

illumination of the evaluation and reasoning contained within that document was required for consultees to understand and have a fair opportunity of engaging with the Department's thinking. In particular, the business case identified the factors (other than costs) which were influential in the Department's thinking and disclosed the weighting each factor was given and the resultant comparative ranking when weighted scores were ascribed to each option (see Tables 40, 41 and 42 in the business case). Those criteria and weightings, along with the estimated costs and assessment of risks, were what determined the preference for Option 8. Using the language of the *Coughlan* case (at para [112]), it was the criteria, weightings and scores which allowed consultees to "know in clear terms what the proposal is *and exactly why it is under positive consideration...*".

[67] By way of example, the weighting (of 30%) given to "Enhanced support from the regional farming community" was twice that of the weighting (of 15%) given to wildlife stakeholder engagement. It may be thought surprising that support from the farming community and improved trading confidence were each given a weighting of 30%, and therefore 60% between them, when the weighting for "Improved overall cattle health and welfare" (expressly recognised as relating to "the main aim of the bTB eradication strategy") was merely given a weighting of 15%. Consultation respondents could well have made a variety of points about the propriety of the factors selected and, perhaps more importantly, the weightings applied.

[68] The applicants contend that the process of allocating weightings and scores appears to have been overly simplistic and arbitrary. (They contend, for instance, that some factors, such as the assumed reduction of bTB in cattle, are so uncertain as to mean that weighting that factor is inherently arbitrary.) It is not the role of the court - at least not within the bounds of the pleaded grounds in the present case - to consider the rationality of the factors taken into account or their weighting. These were only disclosed in the course of the proceedings. The key issue for present purposes is the lack of transparency in the basis for the Department's thinking which prevented consultees from critically engaging with it. Put another way, the Department may be entitled (for instance) to prioritise support from farmers over that of conservationists; but it must be frank about such prioritisation in order to allow consultees a fair opportunity to persuade it otherwise.

[69] The applicants also contend that the relative humaneness of each of the options does not appear to have been factored in at all in the course of the non-monetary criteria. They rely upon the IEP conclusion in England that it was extremely likely, in relation to the badger cull there, that between 7.4% and 22.8% of badgers that were shot at were still alive after 5 minutes and therefore at risk of experiencing marked pain. This represents unnecessary suffering (or "barbarity" in the words of the NIBG consultation response) which was not factored into the decision-making in relation to the option to be selected. They contend that they were deprived of the option of pointing out this important alleged shortcoming in the criteria adopted.

[70] The applicants further contend that the issues identified above were plainly material given that the differential between the total score for the selected option (Option 8, scoring 545, which they contend is the least humane option) was only 45 marks, or less than 10%, away from the score for the TVR option (Option 6, scoring 500) which they contend was the most humane option.

[71] The first applicant's deponent, having seen a copy of extracts of the business case which were disclosed in the course of these proceedings, provided evidence about a range of issues or representations which they would have wished to have raised in the consultation response had they been in possession of this information earlier. He has emphasised that he was constrained in this exercise because he could not discuss the contents of the business case with others who had additional knowledge or expertise. Nonetheless, he has averred that there are "numerous inconsistencies and contradictions" in the rationale disclosed in the business case which the applicants and others would have wished to have challenged in the course of the consultation, had they been able to. Some matters he has identified as being of particular concern in this regard include: (a) the paucity of recent scientific evidence relied upon (that is to say, such evidence post-dating 2016); (b) the absence of any mention of welfare implications of any of the proposed badger intervention options or any scoring or weighting in this regard; (c) the acknowledgement in the business case that TVR had been used in Wales, contrary to the explicit statement in the consultation paper that "TVR has not yet been deployed anywhere as a means of wildlife intervention"; and (d) the assessment of the policing costs of the preferred option as being zero.

[72] The applicants also contend that another matter of overarching concern is the failure of the business case to take into account the two main conclusions of the RBCT. In summarising its conclusions, the Independent Scientific Group responsible for the RBCT said this: "Scientific findings indicate that the rising incidence of disease can be reversed, and geographical spread contained, by the rigid application of cattle-based control measures alone"; and that, on the basis of their review of all of the currently available evidence they concluded "that badger culling is unlikely to contribute positively to the control of cattle TB in Britain".

[73] Of course, a number of these matters, where they represent alleged omissions in the Department's reasoning at the stage of formulation of the business case, could have been cured by the consultation itself. Put another way, there was nothing to stop the applicants or other consultees from drawing attention to, and strongly relying upon, matters such as the RBCT's conclusions or the successful use of TVR in Wales when they responded to the consultation. I am sceptical about the suggestion that any material unfairness arose in the consultation process as a result of some of these matters not having been disclosed, provided the points made about them by consultees were conscientiously considered at the end of the consultation process (which is discussed further below).

[74] In summary, however, I have been persuaded that, in circumstances where the Department had identified a clearly preferred option but declined to provide consultees with the analysis underpinning its selection of that option (and, relatedly, the criteria it applied and its assessment of the relative importance of those criteria), the applicants (and other consultees) were not provided with a fair opportunity to respond in sufficient detail. In the context of this application, the business case was central to the Department's thinking and to the basis for its selection of Option 8 as the preferred option. There was no proper reason for concealing the detailed analysis which lay behind the (provisional) selection of this option from those who were to be consulted. The fact that consultees did their best to respond on the basis of the more limited set of information which had been disclosed to them does not alter the respondent's obligation to act fairly.

[75] Consultees were, in my judgment, entitled to further information about the analysis behind the Department's preference for Option 8 including the non-monetary criteria used (along with their weightings) and how the options were ranked on both cost and risk, with some indication given of why the options were so ranked. It was this analysis which exposed how the decision was proposed to be taken and with which consultees would have to meaningfully engage to have any prospect of persuading the Department to a different view. It is hard to read the section of the consultation paper issued by the Department which deals with wildlife intervention options, alongside the detailed analysis in the non-disclosed business case dealing with the same issue, without being driven to the conclusion that the Department was determined not to expose the precise reasons why it was proposing Option 8 as the preferred option. In light of the detailed analysis lying behind this preference, much of which is hotly contested, I find that consultees were not told enough - and in sufficiently clear terms - to enable them to make an intelligent response in the context of this consultation exercise.

[76] Mr Wolfe made the point that some 94 pages of the business case had been précised down to a mere single page in the consultation paper. I cannot accept Mr McGleenan's eloquent, although misguided, submission that the content of those pages were mere "minor notes in the symphony". There is some force in the respondent's submission that several of the applicants' criticisms are in fact criticisms of the business case. But that merely illustrates the applicants' point: had more detail been disclosed about the Department's approach to the decision-making which coursed through the business case, these points could have been made before the crucial decision was made.

The scientific papers

[77] I turn then to the non-disclosure of scientific reports. One important issue - as to why the 'vaccination only' option was discarded - was the Department's view that it was first necessary to reduce the infection load in the badger population in order to enable follow-up vaccination to be possible. This is strongly contested by the applicants, including in the evidence from Dr Mark Jones of the Born Free

Foundation to the effect (he avers) that the evidence of badger culling in England over several years has revealed “no evidence to suggest” that this has resulted “in any reduction in cattle herd bTB incidence or prevalence”. For its part, the respondent contended that the scientific experts within the TBSPG considered a range of evidence on the effectiveness of implementing a stand-alone badger vaccination intervention and they concluded that, at present, vaccination alone would not achieve the desired effect within a reasonable period of time given the current levels of infection present in badgers in Northern Ireland. In light of this, and the time which would be taken to develop an effective oral bait vaccine, along with concern that vaccination is relatively ineffectual in populations with a high level of infection, it was considered that a period of badger removal was required prior to focusing on a vaccination only approach. The second key issue, therefore, was how this would be done and, in particular, whether it would be by way of a selective cull using TVR or a non-selective cull as the respondent proposed.

[78] There were two scientific reports referenced in the business case which were not published as part of the consultation. These reports are discussed in the fourth affidavit of the Department’s deponent Mr Gartland (which was lodged several weeks after the hearing). The first report or paper (‘Scientific Opinion on the Available Evidence on Badger Intervention’) was produced jointly by Michael Hatch (Deputy Chief Veterinary Officer, Veterinary Science Animal Health Group) and Helen Anderson (Director of Natural Environment Division, Northern Ireland Environment Agency) in December 2018 (“the Scientific Opinion Paper”). It provides veterinary and environmental opinion on the scientific evidence on badger intervention options for Northern Ireland. It is said to be based on current scientific evidence, policies or strategies in other jurisdictions and their reported progress. It was designed to assist in the identification and shortlisting of the most feasible badger intervention options, summarising the scientific evidence in relation to them and providing an agreed interpretation of the evidence to assist policy-making. The second was a Badger Intervention Methodology Paper produced by the Department’s Veterinary Epidemiology Unit (VEU). It assessed methodologies for delivery of two potential intervention options, pro-active culling and a TVR approach, and provided data to support the costing of these options.

[79] Mr Gartland was keen to emphasise that neither of the papers recommended a particular intervention strategy. In respect of the Scientific Opinion Paper, he has averred that it did not itself contain any novel findings and was simply a summary of existing evidence, accompanied by a reference list directing the reader towards the original scientific and research sources. It did not reach a conclusion on the most effective option and was caveated in that it did not address wider political, environmental or economic considerations.

[80] There were two related reports commissioned by DAERA and carried out by Animal Plant and Health Agency (APHA). The first was a ‘level playing field assessment’ of the various intervention options, which modelled the outcome of a TVR intervention against other options. Mr Gartland avers that this paper

“concluded that there was a minor difference between the lethal control options considered, and that all performed better than vaccination alone”. The finalised paper was produced in February 2019. The second modelling report from APHA used Northern Ireland data from the TVR research project conducted by DAERA and “validated TVR as an intervention approach”. This second report, of August 2019, was annexed to the Scientific Opinion Paper. These three pieces of work are to be read together. The Scientific Opinion Paper is described as an internal summary of numerous policy discussions by officials over several months which was not drafted or produced, or at any time intended, for publication. The papers were provided to the Minister on 10 March 2022.

[81] Each of these papers was exhibited to Mr Gartland’s fourth affidavit. The Scientific Opinion Paper builds on the scientific justification for the TBSPG report of 2016; but also draws on subsequent scientific papers published since then from the Republic of Ireland and Great Britain. It was plainly designed to be a relatively comprehensive and up-to-date summary of the scientific position, capable of being understood by a lay person (including, no doubt, officials and the Minister). The applicants’ evidence takes issue with it being comprehensive or up-to-date and, indeed, challenges some of the central points set out within it. That includes, for example, the statement that “international experience has shown that bTB eradication will only be achieved by simultaneously addressing all factors that meaningfully contribute to the persistence and spread of *M. bovis* in all animal populations”. The applicants have drawn attention to Scotland, a UK region which (they aver) has never culled badgers but which was granted TB-free status in 2009.

[82] The Scientific Opinion Paper raised concerns about whether badger vaccination by itself would be sufficient to limit bTB transmission in areas where there was a high level of bTB infection in badgers. Although recognising that there had been at least one study which found that vaccination alone could be an effective disease control strategy in higher density badger populations, depending on the efficacy of the vaccine, the general consensus from Ireland was said to be that badger culling would be required in high badger bTB prevalence areas prior to the use of mass vaccination. This was essentially the basis upon which a vaccinate-only option was discarded by the Department.

[83] The Scientific Opinion Paper also noted that two separate randomised controlled trials demonstrated a significant benefit in proactive (non-selective) culling with respect to the reduction in cattle herd bTB incidence, with extended benefits indicated for several years after the cessation of the culling. This robust evidence was tempered with the potential for a perturbation effect, although this was not observed in Ireland. At the same time, the paper also indicated that, albeit there was limited information about the effectiveness of TVR, from first principles and modelling outputs it should have a positive impact on both badger and cattle bTB levels, with improvement in the sensitivity of the relevant test having been identified since the modelling conducted for the TBSPG. It made the point that

modelling would also indicate that significantly fewer badgers (83%) would be removed during a five-year TVR approach as compared with a non-selective cull.

[84] The two APHA papers look more closely at the anticipated outputs of a TVR approach as compared with a non-selective cull. They proceed again on the basis that all options involving some lethal control performed better than vaccination alone. However, in the first of these papers, it was concluded that there was very little to separate the three lethal control options, which all provided substantial benefit. The second paper – agreed by Mr Hatch and Ms Anderson in August 2019 – did not make any recommendation but might be thought to provide a steer towards TVR rather than a non-selective cull. The Executive Summary included the following observations:

“7. Cattle TB herd breakdown outputs indicated very little difference between the options that include a lethal component. The vaccination only option appeared to be inferior indicating that removal of infected badgers is a major factor in achieving superior outcomes.

8. The TVR option results in removal of substantially fewer badgers (50%-80%) compared to proactive culling and leaves a resident badger population near to its original size with a vaccination coverage close to that observed with a vaccination only option.

9. This modelling exercise provides validation for use of a TVR approach and indicates additional ethical benefits.

10. Deployment of a TVR approach would gather further scientific evidence on this approach.

11. From a veterinary and conservation perspective, a TVR approach offers a more targeted option with respect to selective removal and therefore is less of a blunt instrument and possibly less likely to trigger any perturbation effect.”

[85] This paper emphasises that there are similar effects with either type of intervention, whether TVR or a non-selective cull, indeed with the former producing a greater reduction in TB breakdown in many of the modelled scenarios. The conclusion was as follows:

“On the evidence presented in the paper, there is nothing to differentiate between the options that have a cull component with respect to cattle breakdowns within the intervention area. The conclusions do firmly place TVR

(and indeed cull/TVR) on a par with proactive culling with respect to impact on cattle herd breakdowns. As previously mentioned in the science paper, a TVR approach substantially reduces the number of badgers culled, which makes it more ethically acceptable, particularly to the broader stakeholder groups. It also provides a higher vaccination covering within the remaining badger population at the end of the intervention period. Additionally, from a science perspective, deployment of a TVR approach would gather further evidence on this approach (if the intervention design permits) whilst proactive culling would simply repeat what has been commissioned elsewhere.”

[86] Part 4 of the consultation document dealt only briefly with the scientific evidence taken into consideration by the Department (at pages 23-24 of the paper). Reference was made to the Godfray Report as the basis for the conclusion that some form of wildlife intervention was required. The impression given was that the primary scientific evidence considered was the scientific reports which underpinned the TBSPG’s recommendation for a badger control policy. There is a non-specific reference to “scientific evidence” suggesting that vaccination only would not be effective in reducing cattle bTB incidence rates within a realistic timescale. The APHA modelling is referred to, albeit with no detail provided, in the section on TVR. In particular, although it is recognised that TVR “should deliver benefits”, no information is provided on the APHA findings about the relative predicted success of TVR and non-selective culling in bTB reduction or on the predicated proportion of healthy badgers which would be killed.

[87] The key driver in relation to the Department’s approach seems to have been the position adopted by the scientific experts on the TBSPG, Dr McIlroy and Dr McMurray. Their review of the evidence has been published on the Department’s website and available for quite some time, along with other published scientific and research evidence considered at that time.

[88] Although some scientific work which was considered important by the Department was publicly available to consultees such as the first applicant, and although I have not been persuaded that the respondent should have been required as a matter of fairness to publish every scrap of scientific evidence it considered or any internal summary of such evidence it produced in order to assist policy development, I have concluded that some further disclosure of the scientific input considered by the Department was required. This is simply another aspect of the requirement of fairness, discussed above, that the decision-maker provide consultees with sufficient reasons for the proposal which is under favourable consideration and sufficient detail to enable them to make an intelligent response upon the principal issues.

[89] The scientific evidence considered in some detail by the Department was undoubtedly influential in the decision-making, both (a) as to the discarding of a vaccination-only option and (b) as to the choice between a selective cull by way of TVR and a non-selective cull. The consultation paper adopted the 2016 work of the TBSPG as the foundation for the scientific position. However, the Scientific Opinion Paper was designed to, and did, incorporate analysis of scientific papers post-dating 2016. The two related APHA papers certainly did so, arguably directly addressing the key issue in the consultation (assuming it was accepted that some kind of badger intervention other than vaccination alone was necessary), namely the relative effectiveness of a non-selective cull versus TVR, on the basis of the most relevant and up-to-date studies. It is clear that these papers took into account scientific papers which were not (and could not have been) considered in the course of the TBSPG's work; and other information, such as unofficial communication with Irish colleagues of the relevant Departmental officials.

[90] In the business case, it is now clear that Option 8 and the two TVR options (Options 6 and 7) were given the same score for improved cattle health and welfare and improved trading confidence, likely because of the findings of the APHA papers on the relative effectiveness of the two approaches on bTB eradication. However, no inkling of this result can be gleaned from the consultation paper itself; nor of the concerns expressed in the APHA papers about the proportion of healthy badgers to be killed by way of non-selective culling (as compared with TVR) for similar cattle health benefits. Powerful points could and would have been made about these matters (and others) if the up-to-date scientific picture available to the Department had been explained. When one considers the APHA work on the effectiveness of TVR, it can be seen that the TVR options ultimately lost out in the scoring of non-monetary factors because they achieved scores of only 4 (as compared with Option 8's score of 8) in the criterion relating to support from the farming community. Since this was weighted at 30%, the difference of 4 marks equated to 120 marks in the overall scoring. This basis of allocation of scores indicates that this was because there is "more effort, cost and disruption itself (whether undertaken by farmers themselves and/or government) required to carry out a TVR approach, so the Options 6 and 7 commencing with TVR prior to vaccination have been scored lower compared to cull options...".

[91] I have already held in the context of this consultation exercise that consultees should have been provided with information as to the factors considered important to the Department and how the options scored in that regard. That necessarily involves some explanation of how the options have fared in respect of each criterion, which in turn would require some disclosure of the respondent's view on the key scientific questions. The Science Opinion Paper is helpfully designed to set out, in an accessible format, the competing evidence in relation to these matters and, importantly, an agreed interpretation which would assist the Department in its decision-making. It is just such information which, I consider, in the context of this consultation exercise the Department should have disclosed. This would not necessarily have to be by means of full disclosure of internal briefing documents but

should have allowed consultees to understand the Department's view on the principal scientific issues relevant to the selection of its preferred option *and the basis* for that view. In turn, that would allow consultees to engage with that view in a meaningful way, including by directing the Department to updated or different evidence which it had not considered or by arguing that the Department had drawn the wrong conclusions from the studies it had considered.

[92] Instead, the consultation document effectively skated over the Department's reasoning on the scientific issues in a way which did not permit meaningful engagement from expert consultees. Indeed, setting what the consultation document says about TVR alongside the August 2019 APHA paper available to the respondent (which was agreed by the expert authors of the Scientific Opinion Paper), I have concerns that the consultation paper's treatment of this issue might be said to be materially misleading (cf. sub-para (ii) of Hickinbottom LJ's summary set out at para [43] above). Since that case was not made by the applicant – perhaps because the scientific papers were provided in evidence only after the hearing of the case – I do not need to address it any further.

Was there conscientious consideration of the responses?

[93] The fourth *Gunning* principle requires the product of the consultation to be conscientiously taken into account. This requires the decision-maker to personally engage with the substance of key issues raised during the course of the consultation responses. In respect of this issue, the applicants contend that the Minister was not told about what consultees including NIBG said about the humaneness of the various options proposed and about their impact on the well-being of the badgers to be culled (namely the level of suffering involved in the method of killing selected). The Minister stated on 24 March 2022 that his selection of Option 8 was “not anti-badger” [emphasis in original]. The applicants contend that this indicates that the welfare impact on badgers, not just of killing them but of the particular means of killing to be employed, was material to the decision. However, they argue that the underlying papers now make clear that the Minister failed to have regard to the welfare of badgers themselves because he was not informed about important information. The closest he came to doing so was considering ‘wildlife stakeholder engagement’, which the applicants contend is not a valid proxy for the issue of humaneness to badgers (and, in particular, the relative humaneness of the lethal options). It is not the feeling of environmental campaigners or conservationists which matters, they contend; but the suffering of the badgers themselves.

[94] I begin by rejecting the submission on the part of the respondent, which was only relatively faintly pursued, that this aspect of the challenge should not be permitted to proceed in favour of consideration of the issue if and when an Article 13 order has been made. The consultation process concluded and the Minister made the decision which that process had been designed to inform. He set the Department's course. It was at that time that he was required to conscientiously consider the consultation responses which were expressly invited in order to inform

the setting of the Department's strategy. If the methodology selected was to change, that might have knock-on effects for other aspects of the Department's options assessment (for example, in relation to the costs of each option). Having decided upon the Strategy, and the appropriate option to be selected in relation to badgers, it is entirely appropriate for a challenger in the position of the applicants to complain now that the consultation process was not lawfully undertaken. They should not be compelled to await further steps implementing that strategy before making their case.

[95] It is common case that there is no requirement for the decision-maker, in a case such as the present, to read through every line of every consultation response provided. It would be wrong to expect, much less require, a busy Minister in charge of a department of government to do so, albeit that that might be viewed as the gold standard. Instead, it is perfectly permissible, as often occurs, for departmental officials to summarise consultation responses for their minister. (This was recognised by Sedley LJ in *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, at paras [61]-[62] and [73]; and by Holgate J in *R (Friends of the Earth and others)* [2022] EWHC 1841 (Admin), at paras [199]-[200]). This course carries risks since, if the summary does not properly convey the detail, scope or weight of a point which has been raised, the decision-maker may be deprived of the opportunity to conscientiously consider it and may thereby act in a way which is unfair and unlawful. It is important, therefore, that consultation summaries convey the substance of all material points in a fair and accurate way. This follows from the nature of consultation as a means of informing the decision-maker and promoting better decision-making, rather than as a tick-box exercise. Subject to only limited exceptions (of which rationality is the most obvious example) a decision-maker will be free to disagree with points made by consultees. But he or she must conscientiously engage with those points which are material. To do so requires that they be fairly and squarely put before the decision-maker in one way or another.

[96] Instances of a decision being set aside for inadequate consultation because the decision-maker was personally unaware of one of the main arguments raised include *R (Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin) (see paras [35] and [68]-[69]); and *R (Morris) v Newport Council* [2009] EWHC 3051 (Admin) (see paras [37]-[39]). Whether a point which has not been considered is material is a matter for the court. As ever, the context will be important.

[97] The formal summary of consultation responses which was provided to the Minister in this case ("the Summary Report") was limited. It was provided with the submissions of 25 November 2021 and 10 March 2022. In addition, however, the Minister was also provided with other information gleaned from the consultation exercise in the course of various submissions provided to him, most notably the suite of submissions provided on 10 March 2022.

[98] The applicants accept that at least some of the points made by the first applicant were “to some extent summarised insofar as they were raised by other consultees”. Nonetheless, they still contend that the summaries provided were insufficient “in that they failed to identify the number and/or identities of the groups or individuals raising the same issues” (which is said to have been material to the Minister’s consideration given that similar such information was provided to him in some other respects). Relatedly, the first applicant contends that the Minister would have been unaware that it (NIBG), as a member of the Department’s TB Stakeholders’ Working Group and the only body in Northern Ireland concerned *solely* with the conservation and welfare of badgers, shared critical concerns raised by other groups.

[99] I have not been persuaded that it was material for the Minister to have been advised that a specific objection or representation came from NIBG in particular; nor that it was necessary for the Minister to be told the number (and identity) of various consultees who made the same point. I consider he was given a fair and adequate indication of where the various consultees were coming from and from which quarter the salient points emanated. There was no unfairness in the particular numbers not being spelt out in further detail; nor in the Minister not being told that NIBG shared particular concerns which had been raised by other groups with a similar outlook. The Summary Report made clear to the Minister that all environmental organisations which responded were against Option 8.

[100] I am more concerned about the applicants’ complaint that some fundamental concern raised by them, or by some others, was simply not put before the Minister *at all*, so that it was not considered by him at all. The key example given in respect of this is the issue of the relative humaneness of the different options considered. Indeed, this was really the only point relied upon by the applicants in any detail (if at all) in this regard. They complain that the Minister was not made aware of the particular concerns of the first applicant on this issue, despite the fact that it is the only group in Northern Ireland focused exclusively on the conservation and welfare of badgers. As a result, the applicants contend that the Minister would have been left with the impression that all of the proposed intervention options were considered equally humane and/or that no concerns had been raised about the humaneness of the controlled shooting. They assert that, had they been aware that this issue was not being appropriately considered, they would have further emphasised the “grave concerns” of eminent scientists and vets, including the IEP Chair Prof Munroe, regarding the humaneness of the controlled shooting badgers and the “strong probability that considerable animal suffering” occurs unobserved during licensed culls.

[101] Albeit that, when stripped back, I consider the applicants’ point in respect of lack of conscientious consideration to be a very limited one, in my view it nonetheless has merit. Article 13(3) of the 1981 Order, which the Department intends to use to give effect to the wildlife intervention, refers to the issue of “unnecessary suffering”. In my judgment, it follows from this that the level of

suffering inflicted by means of the option selected (or, put differently, the humaneness of the option selected) is a statutorily-mandated relevant consideration. It is something to which the Minister must necessarily turn his mind. This embraces both the necessity of the killing of protected species and the method of killing where it is accepted that (exceptionally) killing is necessary. The Minister's statement refers on a number of occasions to welfare standards in relation to the method of culling, indicating that he considered (correctly) that this was a material consideration, albeit that it does not appear clearly (if at all) in the non-monetary criteria considered relevant.

[102] I accept the submissions made on behalf of the respondent that, in a broad sense, the Minister's attention was drawn to the general issue of relative humaneness. To some degree, these focused on this issue having been addressed in the UWT consultation response which the Minister had provided to him and the summary of the USPCA response. As to these contentions:

- (1) UWT is a registered independent charity established to support and champion native wildlife in Northern Ireland. It is described by the Department as a key environmental stakeholder representing a significant membership and with a highly respected voice within the sector. UWT provided a detailed response to the consultation and, in addition, requested a meeting with the Minister. The Minister accepted the request and agreed to meet with the board members of UWT. For the purpose of this, he was provided with a full briefing, including a copy of the UWT response to the consultation. The meeting took place on 23 November 2021 via Zoom and three members of the UWT Board and its Chief Executive attended. The record of the meeting notes that UWT were not opposed to a necessary cull but wished to see healthy badgers and favoured the TVR approach. The advice to the Minister also included a summary of the UWT views. In turn, that included reference to UWT's view that a non-selective cull was not the solution, including because it was inhumane. The group was also identified as being a joint sponsor, along with the USPCA and NIBG, of the 'Stop the Cull' petition. The UWT response refers to the need to adopt a humane solution – but its focus in this regard is plainly on the non-selective nature of the proposed option (namely, the indiscriminate nature of the cull, whereby healthy badgers will be killed). It does *not* address the suffering caused to badgers by means of the methodology of killing, which was a focus of the NIBG consultation response.
- (2) The USPCA response does address the humaneness issue in the same way as the NIBG response (although perhaps not in so much detail). For instance, it refers to the IEP report that up to 22.8% of badgers took longer than five minutes to die and a proportion run off injured. However, the very short summary of the USPCA response in the Summary Report upon which the Department relies does not address this point, referring only to the

suggestion that culling is not an effective way to reduce bTB and that it is a very emotive issue for the general public.

[103] Nonetheless, the Minister was informed that the Association of Veterinary Surgeons Practising in Northern Ireland (AVSPNI) was against controlled shooting and would only support an option that was “demonstrably humane”. More importantly, in the specific wildlife submission provided to the Minister on 10 March 2022, more information about this was provided. The Minister was there told that the British Veterinary Association Northern Ireland (BVA(NI)), in agreement with the AVSPNI, “were against the controlled shooting approach as they did not believe this to be humane, targeted or effective and that badger welfare should be pre-eminent”. As a result, the Minister was also informed that, “Both favour cage trapping and shooting”. In other words, the Minister was informed that these organisations considered free shooting to be inhumane but other cull methods, such as cage trapping and shooting, to be (more) humane. Later in that submission he was also told that the NIEA, which favoured a TVR approach, had “some welfare reservations regarding the use of controlled shooting...”. Further on, he was reminded of the views of the AERA Committee, which included a recommendation that the Department introduce a monitoring system for licence holders to record outcomes including, for example, time for animals to die and numbers “wounded and lost”, which would provide assurance as to the humaneness of culling activity.

[104] The business case does not address the issue of relative humaneness, presumably for two reasons. First, as noted above (see para [57]) the view appears to have been taken simply that all options passed a humaneness threshold. Second, the criterion relating to wildlife stakeholder engagement expressly noted that a consultation would be taken forward on deployment methods in due course, which would provide an opportunity for stakeholders to submit evidence they thought should be considered as regards deployment methods. It was noted that, “As that evidence is not available at this stage, there is no basis on which to vary the scores of different deployment methods”. The Minister is unlikely to have considered that he had to address his mind to this issue in any great detail, if at all, notwithstanding that his attention was drawn to the issue of relative humaneness in a general way.

[105] The very narrow issue to which this ground of challenge ultimately boils down in my view, insofar as it adds anything to the applicants’ complaint that the non-monetary criteria were not disclosed in order to permit them to make representations about their shortcomings, is as follows. The Minister does not appear to have been told that the basis for various consultees’ objections about the inhumaneness of free shooting was the evidence of the IEP that a significant proportion of badgers were injured but did not die within five minutes, amounting to unnecessary suffering. NIBG made this point strongly (indeed, in the opening paragraph of its response). It was also reiterated by the USPCA in its consultation response; by the Eurobadger group, which focused on this point in addressing its

concerns about cruelty; and again in the Born Free consultation response, which contained the following:

“‘Controlled shooting’, otherwise known as free-shooting, has been branded ‘ineffective’ and ‘inhumane’ by the Independent Expert Panel (IEP) appointed by Government to monitor the shooting of badgers in England in 2013, and rejected by the British Veterinary Association because of animal welfare concerns. The IEP reported that up to 22.8% of badgers targeted by controlled shooting may have taken longer than five minutes to die, and a proportion run off injured. We believe this clearly constitutes ‘unnecessary suffering’, and that the method would be regarded as unlawful if it were applied to livestock or other domestic animals.”

[106] As it happens, the further consultation on deployment methods did not transpire. This is explained in Mr Gartland’s fourth affidavit. He describes that the Department scrutinised the responses to the 2021 consultation “to ascertain if any respondents provided evidence relating to wildlife deployment methods that should be reflected in the business case”. In email correspondence which is exhibited to that affidavit, one sees that the relevant officials took the view that consultation respondents had “recorded various opinions” but provided no new evidence or information relevant to the issue. As such, it was determined that there was no reason to revisit the business case and no further consultation was required. This suggests to me that the consistent reliance by (at least) four organisations who were making a strong point about the alleged inhumaneness of controlled shooting, on the basis of evidence and analysis conducted by an expert body appointed by the UK Government to monitor a similar methodology in England and Wales, was simply side-lined or ignored. The respondent could not point to any evidence of this specific representation about the alleged proven inhumaneness of the selected option being placed before the Minister either in the Summary Report or a consultation response which he specifically and individually read. In this small but important respect, I conclude that the Minister did not conscientiously consider the product of the consultation exercise.

Conclusion and costs

[107] In summary, I will allow the application for judicial review on the following bases:

- (1) The respondent failed to comply with the requirements of a fair and lawful consultation by failing to provide consultees with sufficient information about the basis for its proposed decision (and the reasons why it favoured Option 8) to permit them to engage meaningfully with the Department’s thinking. The context of the proposed wildlife intervention which would

form part of the Department's bTB Strategy – involving not only highly emotive matters but multi-factorial decision-making, a highly contested scientific backdrop, a proposal to cull a high proportion of healthy animals which currently enjoy a high degree of legal protection, and interest from a range of highly informed and specialist groups – was such that fairness required disclosure of much more of the Department's rationale than was made available.

- (2) This did not involve a requirement to disclose the full business case which had been worked up by Departmental officials but, rather, such information as explained the key reasoning behind the Department's selection of its preferred option. In my judgment, that included disclosure of the non-monetary criteria used, along with the weighting attributed to them and how each option scored against those criteria; an indication of how the costings of each option were estimated and risks assessed; and a statement of the Department's views on the principal scientific issues in contention, along with an indication of the basis for those views.
- (3) I also hold that the respondent failed to conscientiously consider the product of the consultation exercise, in that the Minister ought to have been advised, but was not, of the evidential basis upon which a number of the consultation respondents contended that the Department's preferred option represented an inhumane option which would give rise to unnecessary suffering (even accepting that it was appropriate for healthy badgers to be culled).

[108] I grant leave on the 'conscientious consideration' ground and allow the application for judicial review on both grounds. I will accordingly quash the respondent's decision to implement a non-selective cull of badgers by way of controlled shooting as part of the Department's bTB eradication strategy. All other aspects of the Strategy remain unaffected by this decision. The result will be that, assuming the Department wishes to proceed with a wildlife intervention element to the Strategy, it will have to reconsult on that aspect of it in compliance with legal requirements. For the avoidance of doubt, this judgment speaks to the procedural fairness of the process conducted to date, which is all that the grounds of challenge required the court to consider; and nothing in the judgment should be read as any comment upon the substance of the options under consideration, which is a matter for the Department.

[109] I propose to dismiss that aspect of the applicants' case which was previously stayed relating to the Department's proposed use of an Article 13 order. As matters now stand, that element of the case is academic and/or clearly premature.

[110] There was no dispute that this was an Aarhus Convention claim within the meaning of regulation 2 of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013. In light of this, the parties agreed a protective costs order to the effect that the respondent, if successful, should recover costs only up to a

maximum of £10,000 plus VAT from the joint applicants; and that the applicants, if successful, should recover costs only up to a maximum of £35,000 plus VAT from the respondent. I will hear the parties on the issue of costs but provisionally consider that the appropriate order is for the respondent to bear the applicants' costs of these proceedings, such costs to be taxed in default of agreement and to be capped in the sum outlined in the protective costs order mentioned above.