



Neutral Citation Number: [2021] EWHC 35 (Admin)

Case No: CO/1370/2020

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 18/01/2021

Before:

HH JUDGE JARMAN QC

Sitting as a judge of the High Court
Between

WILD JUSTICE

Claimant

- and -

NATURAL RESOURCES WALES

Defendant

-and -

**(1) SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL
AFFAIRS**

(2) BRITISH ASSOCIATION FOR SHOOTING AND CONSERVATION

Interested Parties

-and -

NATIONAL FARMERS' UNION

Intervenor

Mr David Wolfe QC and Ms Anita Davies (instructed by **Leigh Day**) for the
claimant

Mr Timothy Corner QC and Ms Heather Sargent (instructed by **BDB Pitmans LLP**) for the
defendant

Sir James Eadie QC and Mr Richard Moules (instructed by **The Government Legal
Department**) for the **first interested party**

Mr David Elvin QC and Mr Mathew Dale-Harris(instructed by **Field Fisher LLP**) for the
second interested party

Mr Malcolm Birdling for the **intervenor**

Hearing dates: 18 December 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE JARMAN QC

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Introduction

1. Killing, injuring or taking wild birds is a criminal offence in the United Kingdom. Some species, however, can pose a threat to livestock or crops, or public health, or to other wild birds. For example, carrion crows, of which there are about 20,000 pairs in Wales, prey upon the eggs and chicks of ground nesting birds, such as curlews, of which there are less than 400 pairs left in Wales. One of the ways in which the law seeks to balance differing interests is to authorise appropriate authorities to issue licences to kill or take wild birds posing such threats where there are no other satisfactory solutions.
2. National Resources Wales (NRW), which is the appropriate authority for Wales, issued three general licences (the licences) for the year 2020. The claimant Wild Justice (WJ), which promotes nature conservation, takes issue with those licences. Mr Wolfe QC with Ms Davies, counsel for WJ, accept that the killing or taking of wild birds is necessary in some circumstances, as in the example given above, of crows to protect curlews, but argue that the licences are too broadly worded so as to allow casual killing of large numbers of wild birds unnecessarily and are accordingly unlawful.
3. The licences are given the prefixes GL for general licences and then numbers 001, 002 and 004. Each states in paragraph 1 the purpose for which it is given, respectively for preventing serious damage or the spread of disease to livestock, foodstuffs for livestock, crops, vegetables or fruit (001); for preserving public health and preventing the spread of disease to humans (002); or to conserve wild birds (004). WJ takes particular exception to the former and latter licences.
4. Mr Corner QC with Ms Sargent, on behalf of NRW, submit that the licences only authorise action where there is a present risk to the stated interests. Thus, in the example given above NRW accepts that the relevant licence (004) should be used only to kill crows during the months between egg laying and when the chicks are well grown, namely April to July, and only in those areas where curlews nest, which do not extend to urban areas. It should not permit someone to kill a crow in the autumn or in an urban area on the basis that that bird might someday at some place take a curlew's egg or chick. NRW has decided not to set out this level of detail in the licences, saying that it is for the licensee to show by objective evidence that an egg or chick was at real risk to justify the killing, and it is for the criminal courts to assess the evidence in any given case. NRW says that it is a matter of judgment for it as the appropriate authority in Wales to decide on the appropriate level of detail set out in the licences.
5. Each licence permits authorised persons for the stated purpose to kill or take one or more of six species of wild bird as specified in the licence, namely carrion crow, magpie, jackdaw, feral pigeon, wood pigeon and Canada goose. An authorised person is defined in each licence as the owner or occupier, or anyone authorised by them, of the land on which the action authorised is taken, or any person authorised in writing by named bodies such as local authorities, the Welsh Ministers, conservation bodies

and NRW. The licences set out the weapons, traps and nets which may be used. In the licence for conserving wild birds, it is provided that the licence is granted to conserve only the chicks and eggs of species of bird listed, of which there are almost 150, not all of which are commonly found in Wales.

6. The licences set out detailed conditions as to use, including that the licences do not authorise any action within listed protected sites or within a buffer zone surrounding such sites. A long list of Sites of Special Scientific Interest, Special Protection Areas, and Special Areas of Conservation are annexed to the conditions. There are notes attached to each licence, note 3 of which provides that failure to act within the purpose of the licence as set out in paragraph 1 or failure to comply with any of the conditions of the licence may mean that the licence cannot be relied upon and an offence may be committed. Note 7 provides that the licence may be modified or revoked at any time.
7. Although the licences have now lapsed, NRW has or will issue similarly worded licences for the year 2021. There was no evidence before me that the licences have led to widespread unnecessary killing of wild birds or prosecutions in that regard.
8. NRW is supported by the first interested party in these proceedings (SofS) who is interested in how these proceedings may affect licencing in England. Sir James Eadie QC with Mr Moules on behalf of SofS say that it is a matter for each authority what licences to issue and how to word them, and different authorities may come to different views. SofS does not agree or disagree with NRW's view of what its licences permit.
9. The second interested party (BASC), represented by Mr Elvin QC and Mr Dale-Harris, has some 6,500 members in Wales and acts as a representative body for responsible and sustainable shooting. It also seeks to uphold NRW's licences, although it does not agree with all of the evidence filed on its behalf as to precisely what the licences permit. The National Farmers Union (NFU) has 55,000 members in Wales and England and was permitted to intervene on the basis of written representations only, which were submitted by Mr Birdling. NFU supports NRW's opposition to the grounds of review, but makes representations only on the third ground.

The grounds of challenge

10. There are three grounds of challenge, in respect of which permission to bring judicial review proceedings was granted by Griffiths J on consideration of the papers. The first two grounds involve the particularity of the licences, and the third ground relates to the evidence upon which NRW made its decision to grant the licences.
11. Ground 1 of the challenge is that each licence should have specified the circumstances in which it may be used. WJ contends that without the licences specifying limits of time and space, the killing or taking of some wild birds may be authorised when such control is unnecessary. In the example given above, the licence should be limited to the nesting seasons and to the areas where nests are located.
12. Ground 2 is that a general licence is not appropriate where NRW could not satisfy itself that there are no other satisfactory solutions on each occasion that the licence is

used. WJ contends that such a licence should be conditioned to limit its use to where NRW can be satisfied that appropriate solutions have been considered to try to fulfil the stated purpose prior to use of the licence. To put it another way, the contention is that every time the licence is used killing or taking must be as a last resort.

13. Finally, in ground 3 WJ contends that as such licences are granted under a framework of limited derogations from the general prohibition on the killing or taking of wild birds, such derogations are only lawful if properly justified. This means that positive evidence is required to justify derogations, and not just an absence of evidence pointing to other satisfactory solutions.
14. Written evidence was filed on behalf of WJ by one of its directors, Dr Mark Avery, on behalf of NRW by one of its managers Dr Sarah Wood, and on behalf of BASC by Glynn Evans, one of its heads. Whilst there was some disagreement between Dr Avery and Dr Wood, there was little if any difference between them on how the licences given for the purposes stated in them should work in practice. Mr Wolfe made it clear that WJ welcomed such clarification but submits that these clarifications should have been expressly imported into the wording of the licences. He points to the fact that Mr Evans interprets the licences more widely than NRW, and submits that that is a cogent reason why the licences should specify the circumstances of their use in greater detail.

The legal framework

15. The origins of the law of the UK in this area is to be found in European law, namely Council Directive on the conservation of wild birds 79/409 EEC. The current legislation is set out in Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the Directive).
16. Article 1 of the Directive sets out its applicability:

“1. This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2. It shall apply to birds, their eggs, nests and habitats.”
17. Article 2 of the Directive provides:

“Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.”
18. Article 5 of the Directive provides as follows:

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

- (a) deliberate killing or capture by any method;
- (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
- (c) taking their eggs in the wild and keeping these eggs even if empty;
- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- (e) keeping birds of species the hunting and capture of which is prohibited.”

19. Article 9 provides:

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

- (a)-in the interests of public health and safety,
 - in the interests of air safety,
 - to prevent serious damage to crops, livestock, forests, fisheries and water,
 - for the protection of flora and fauna;
- (b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
- (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations referred to in paragraph 1 must specify:

- (a) the species which are subject to the derogations;
- (b) the means, arrangements or methods authorised for capture or killing;
- (c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of paragraphs 1 and 2.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of the derogations referred to in paragraph 1 are not incompatible with this Directive. It shall take appropriate steps to this end.”

20. The Directive was implemented in the UK by the Wildlife and Countryside Act 1981 (the 1981 Act) as amended. There was no suggestion before me that such implementation is deficient in any way.

21. Section 1 of the 1981 Act provides the protection by creating criminal offences:

“Subject to the provisions of this Part, if any person intentionally—

(a) kills, injures or takes any wild bird;

(aa) takes, damages or destroys the nest of a wild bird included in Schedule ZA1;

(b) takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or

(c) takes or destroys an egg of any wild bird,

he shall be guilty of an offence.”

22. However, by section 16(1) (all references to section 16 hereafter are to the 1981 Act unless otherwise indicated) those provisions do not apply to anything done for certain purposes, three categories of which are relevant in these proceedings. There is a further requirement for such derogation that the act done must be in accordance with the terms of a licence granted by the appropriate authority. Section 16(1A)(a) provides that the appropriate authority:

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

23. Section 16(5) and (5A) implements the derogations envisaged in Article 9 of Directive as follows:

“(5) Subject to subsections (5A) and (6), a licence under the foregoing provisions of this section—

- (a) may be, to any degree, general or specific;
- (b) may be granted either to persons of a class or to a particular person;
- (c) may be subject to compliance with any specified conditions;
- (d) may be modified or revoked at any time by the appropriate authority; and
- (e) subject to paragraph (d), shall be valid for the period stated in the licence;

and the appropriate authority may charge therefore such reasonable sum (if any) as they may determine.

(5A) A licence under subsection (1) which authorises any action in respect of wild birds—

- (a) shall specify the species of wild birds in respect of which, the circumstances in which, and the conditions subject to which, the action may be taken;
- (b) shall specify the methods, means or arrangements which are authorised or required for the taking of the action; and
- (c) subject to subsection (5)(d), shall be valid for the period, not exceeding two years, stated in the licence.”

The case law

24. The Directive has been considered by the Court of Justice of the European Union (CJEU) and by the courts in the UK. There was broad agreement between the parties before me as to the principles to be applied in this particular case, and differences were relatively minor. In particular, the CJEU has considered whether various member states have properly interpreted the derogation provisions, usually in cases brought by the Commission of the European Communities (the Commission).

25. In *Commission v Kingdom of Belgium* Case 247/85, the CJEU said at paragraph 7:

“...the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations.”

26. In *Commission v Finland* C-344/03 [2005] ECR I-11033, the CJEU held that the derogation provisions should not be interpreted in such a way as to negate them. The phrase "no other satisfactory solution" was at issue. The CJEU concluded that to prohibit shooting in spring on the grounds that it would be a satisfactory solution to shoot another species in spring or autumn would render the derogation at least partially nugatory since, even if the permitted level of spring hunting met the other requirements of the particular derogation, hunting that species would still be prohibited.

27. In *Commission v Republic of Malta* [2009] C-76/08 ECR I-8213, the CJEU made clear that derogations must be proportionate. The court said this:

"57. It is apparent, however, from the provisions of Article 9 of the Directive, which refer to the strictly supervised conditions for that derogation and the selective basis on which birds are captured, and, moreover from the general principle of proportionality, that the derogation of which a Member State intends to make use must be proportionate to the needs which justify it."

28. The CJEU has also made clear that any derogations must be clearly specified so as to accord with the principle of legal certainty, saying in another case against the Republic of Malta, C-557/15:

"47...Accordingly, the applicable national legislation must specify the criteria for the derogation clearly and precisely and require the authorities responsible for their application to take them into account"

29. In *R (McMorn) v Natural England & Anor* [2015] EWHC 3297 (Admin) Ouseley J after referring to the CJEU decisions set out in paragraphs 25 and 26 above said:

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

141...The Directive provides a broad and general protection, sufficiently broad to require derogations in a wide variety of

interests so as to create the desired balance between wild life and human interests. There is no warrant for requiring the principal derogations to be construed narrowly; they should be construed with proportionality and the balance of the objectives in the Directive in mind.”

30. The proper approach of the courts in Wales and England in reviewing whether the requirements of section 16 have been complied with and whether it is appropriate to grant a licence thereunder was considered by the Court of Appeal in *R (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564. Beatson LJ, giving the lead judgment, observed at paragraph 69;

“The very helpful submissions from both parties showed that it was common ground that in principle the court should afford a decision-maker an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments.”

31. A subsequent appeal to the Supreme Court was dismissed ([2018] UKSC 10). Such an appeal in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 succeeded, but which left undisturbed the observation in the Court of Appeal that whilst there must be some evidence reasonably supporting the grant of a licence, full scientific certainty is not required (paragraph 259).

32. The parties differed somewhat on the application for present purposes of decisions of the CJEU which did not concern the Directive but other directives such as those relating to hunting and habitats. An example of the latter is *Luonnonsuojeluyhdistys Tapiol Pohjois-Savo – Kainbury* Case C-674/17 [2020] 2 CMLR 1, where the court concluded that derogations in the contexts of habitats must be assessed in light of the precautionary principle, saying at paragraph 66:

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

33. As Mr Birdling for NFU submitted in his written submissions, none of the wild birds permitted to be killed or taken by the licences are endangered or at risk, and accordingly the focus in this case in my judgment must be upon the wording of the Directive and the 1981 Act. In fairness to Mr Wolfe, he accepted in his closing submissions that each of WJ’s grounds of challenge are essentially concerned with whether the licences comply with the 1981 Act.

34. An illustration of how licences circumscribed by reference to statutory purposes under section 16 apply in practice is given in *RSPCA v Cundey* [2002] Env LR 17. The licence there under consideration specified that it permitted the killing of listed wild birds for the purposes of protecting wild birds or public health or air safety. Mr

Cundey relied on this licence to shoot starlings in the summer months to protect public health. He was convicted by magistrates of an offence under the 1981 Act, who found it was almost unheard of for starlings to pose such a risk during the summer. His appeal by way of case stated was considered by Silber J. At paragraph 22, after referring to that finding, Silber J concluded that the licence in that case did not provide any defence to the prosecution.

35. With those principles in mind I turn to consider the grounds in greater detail.

Ground 1

36. Dealing firstly with ground 1, Mr Wolfe relies heavily on the words in Article 9(2)(c) of the Directive and section 16(5A)(a) that the licence shall specify the circumstances in which, and the conditions subject to which, action may be taken. It is not enough, he submits, for the licence to set out the purposes for which action may be taken, because although there is no requirement to set this out in the licence, as licences can only be granted for the statutory purposes, the requirement to specify the circumstances in the licence must add something. To do so also fulfils the requirements of legal certainty, of proportionality and for derogations to be narrowly applied. Otherwise it is left to the licensee to work out such circumstances.
37. As an illustration he points to the fact that the licence for the purpose of conserving birds sets out in annex 1 a list of the birds to be conserved, including some not present in Wales and for whom the activities of crows or magpies, for example, are irrelevant. But a licensee will be required to know which birds pose a conservation risk to those in the list. Further, as the NRW's General Licence Review Report dated September 2019 (the report) shows, further research is required as to whether magpies, jackdaws and jays pose a risk to eggs and chicks. By failing to circumscribe the circumstances, NRW sanctions lethal control as the first and only resort.
38. In reply, Mr Corner with the support of Sir James and Mr Elvin, submits that the licences set out the purposes for which they may be used (which set out some but not all of the purposes set out in section 16), the birds against which they may be used, the action which may be taken, the methods of undertaking the action, the authorised persons who may take the action, and where action may not be taken. The licences are limited in duration to one year. These are the circumstances, he submits, which comply with section 16.
39. The submissions of NRW and the interested parties continue that if action is not taken for the purpose or one of the purposes specified in the licence, then such action is not within its terms. Thus, for example, if there is no evidence that a particular species damages crops, then anyone killing a bird of that species could not claim to be doing so for the purpose of avoiding such harm. That was the basis upon which the prosecution in *RSPCA v Cundey* succeeded, that it was almost unheard of that starlings pose a risk to public health in the summer months. If there is no risk of the harm identified in the licences or taking action would not avert the risk, or no connection between the killing and the harm identified, then the licence will not avail those purporting to rely upon it. NRW's judgment that it is not necessary to set further circumstances out in the licences, for example as to temporal or spatial limitation, is well within the wide margin given to environmental regulators making scientific or technical judgments. Licences need not, and probably could not, cover all potential

factual permutations when it is necessary to kill wild birds to protect other wild birds, or crops or livestock.

40. The way that Sir James puts it is that the statutory scheme permits NRW to set the boundaries of permitted activities and the statutory purposes play a central role in what is and what is not permitted and so must form part of the circumstances in setting those boundaries. There is no requirement for licences to define such circumstances closely and such definition probably could not cover all potential factual permutations, and what they do cover is who is licenced, when they are licenced (when they are acting for the purposes specified) and where (outside buffer zones of listed designations).
41. Mr Elvin also accepts on behalf of BASC that it is for the licensee who relies on the licences to show that the action was taken for the purpose stated. There may be myriad individual circumstances where such action is so justified and the extent to which those circumstances are detailed in the licences is a matter for NRW acting within its margin of appreciation.
42. In response, Mr Wolfe emphasises that each of WJ's grounds deal with whether the licences are compliant with the 1981 Act. He accepts that it is for NRW to decide where the boundaries of derogation are to be drawn, but submits in this case it is clear from Dr Wood's evidence that the licences on their face permit activity which NRW accepts they should not permit, for example shooting crows in the autumn or in a town.
43. As attractively as Mr Wolfe makes the case that the licences should set out the precise limit to their ambit, which ambit is to a large extent accepted by NRW in its evidence, I have come to the conclusion that the attractiveness only goes so far. The specifications of precise limitations in the licences, as to seasons or as to where crops or livestock are located, for example, are likely to involve difficult decisions as to just how precisely such limitations should be worded, with the consequence that every situation where the statutory purposes arise might not be covered. By specifying that the action must be for the statutory purposes, amongst the other circumstances summarised above, such difficulties are diminished if not avoided. As shown in *RSPCA v Cundey*, the question of whether the action is for such a purpose is likely to involve evidential issues of the sort which the criminal courts are well experienced in dealing with.
44. Accordingly, I am not persuaded that it has been shown that the licences are unlawful on ground 1.

Ground 2

45. Ground 2 focusses on the prohibition in section 16(1A)(a) of the issue of a licence for the purposes set out in section 16(1) unless NRW (in this case) is satisfied that, as regards that purpose, there is no other satisfactory solution. The process by which NRW says it became so satisfied is set out in its report. This was one of its main findings:

“A literature review was carried out to address whether there are non-lethal deterrents that could be applied to meet the legal

test of ‘no other satisfactory solutions’ for GLs 001, 002 and 004. The findings confirmed that the number of published studies available was too small to assess against each of the 28 identified deterrent methods, with the exception of lethal control, and did not provide any quantitative and robust evidence of other satisfactory solutions that were effective and proportionate to the risk.”

46. This is amplified by Dr Wood’s evidence. She says that NRW scored each non-lethal solution with regard to whether it was (i) effective, (ii) practical, (iii) sufficient and (iv) proportionate and then produced a composite score to represent whether or not the method was, on its own, a satisfactory method of reducing the adverse impact of all the bird species which became the subject of the licences. So, for example the species which are the subject of the licence to protect livestock and crops (GL001) are named there because NRW concluded that those species cause one of more of the types of harm set out in the licence and that to prevent the harm, there is no satisfactory alternative other than to give licensees the option of using lethal methods. In other words, NRW concluded that it was not possible to prevent that harm solely through non-lethal methods.
47. Mr Wolfe accepts that NRW properly contemplated issuing the licences only where it concluded that non-lethal methods in combination would not always prevent the identified harm. He submits however, that the wording of the licences as granted flips from the recognition that lethal control may sometimes be necessary, to allowing such control as a first option and a universal solution. He submits that the focus of each licence should be on whether there is no other satisfactory solution to the particular risk which the licence is aimed at rather than to the grant of the licence itself, and that the licence should be worded so that action is only authorised if in the particular circumstances of that action there is no satisfactory solution other than lethal control.
48. Mr Corner, again with his supporters, submits that the meaning and effect of section 16 (1A)(a) is that NRW must be satisfied that it is appropriate to grant a licence allowing lethal control, not whether it is necessary to use such control in every case where a risk of harm arises. It might be that a particular bird can be prevented from causing harm by some other method, but that does not invalidate NRW’s conclusion that there is no other satisfactory solution to achieving one of the purposes set out in section 16 other than to grant a licence allowing lethal control in the circumstances set out. Otherwise, it is submitted, the statutory scheme of allowing general licences to be granted would be unworkable, contrary to the approach applied in *McMorn*. Whether there is no other solution which is satisfactory involves a broad judgment in which social, economic and practical considerations play a part.
49. Sir James submits that it is inherent in the grant of a general, as opposed to a specific, licence that there will not be a case by case assessment of whether other solutions are satisfactory. In England, the SofS has also issued general licences for the purposes set out in NRW’s licences, and has also concluded that there is no other satisfactory solution to granting those licences. The SofS has imposed a condition requiring reasonable efforts to achieve the relevant purpose using lawful methods not covered by the licence unless their use would be impractical, without effect or disproportionate in the circumstances.

50. However, he submits that there is wide scope for different appropriate authorities to reach different conclusions on the evidence as to the nature and scale of the problem, the effectiveness of non-lethal control and the extent to which such control provides a solution which is satisfactory. NRW's approach, which is to state in the licences that it is satisfied that as regards the purposes set out in paragraph 1 there is no other satisfactory solution, is rational and lawful.
51. Mr Elvin points out that BASC was consulted in the process leading to NRW's report and that Mr Evans in his evidence sets out the problems with other solutions.
52. In my judgment, it may be helpful for NRW to consider whether to attach a condition to any future licence it grants similar to that imposed by the SofS as to other satisfactory solutions. I accept however, that ultimately that is a matter for the NRW acting rationally on the evidence before it. I am not persuaded that in granting the licences in question it did anything other than to do so in deciding how to approach the requirement to be satisfied that there are no other satisfactory solutions. Having regard to the express power to grant general, as well as specific, licences in section 16, in my judgment the wording in section 16(1A)(a) does not require licences to deal with such solutions on a case by case basis. I further accept that such a construction is likely to lead to the statutory scheme of general licences becoming unworkable.
53. Accordingly, ground 2 is not made out.

Ground 3

54. As for ground 3, NRW does not dispute that derogations from prohibiting the killing of wild birds are lawful only if properly justified and that the precautionary principle applies. NRW further accepts that proper justification in this context requires positive evidence, and the absence of evidence to the contrary will not suffice.
55. Mr Wolfe again points to NRW's report, which accepts that there is no published scientific evidence to show that carrion crows, magpies or jackdaws cause serious damage or harm to livestock or crops, so this presents an evidential gap rather than providing evidence of no impact. Expert opinion and anecdotal evidence suggests there is a potential for such harm, such as carrion crows and magpies attacking vulnerable ewes or new born lambs, or magpies and jackdaws attacking newly drilled or mature arable crops, although the anecdotal evidence of such harm to crops is weak.
56. Table 10 of the report shows that further research is needed to establish whether magpies or jackdaws do cause serious damage to livestock and crops, and whether these species and jays cause serious damage to birds of conservation concern. Despite that evidential gap, magpies and jackdaws are included in the licence which seeks to protect livestock and crops, and these species and jays are included in the licence which seeks to conserve wild birds.
57. The report also referred to some evidence that there are satisfactory solutions that work in combination, but concluded that the quality and strength of that evidence is weak so that the general licences should continue to include the named species subject to further review.

58. Mr Wolfe submits that the evidence of risk falls well short of the positive evidence required to render lawful the derogation. He makes a similar point in relation to the evidence as to whether there are satisfactory solutions other than lethal control.
59. Dr Wood's evidence again sets out the approach of NRW in respect of evidence as to the risk of the type of harm identified in the statutory purposes. She says that the evidence base in respect of risk by predatory birds to other wild bird species is complex, and establishing particular impacts is challenging. An approach which required evidence of each species/harm combination separately would unduly inhibit NRW's ability to permit conservation action. In paragraph 50 of her witness statement, she goes into further detail of NRW's approach:
- “If there are species in need of additional conservation support which are only rarely threatened by one of the predator species (noting that corvids are generalist predators) - ie which are subject to an emerging threat, and/or one which arises rarely or only in specific locations – there are unlikely to be species-specific studies evidencing that harm. Our approach means that licensees can nonetheless rely on the licence in order to avert harm to chicks and eggs of that species if a risk of that harm arises.
60. Mr Corner submits that such an approach is within the objectives of the Directive given the express power to grant general licences, the enhanced margin of appreciation accorded to NRW as environmental regulator, the precautionary principle and the recognition that full scientific certainty is not required. The licences make it clear that they are granted only in furtherance of the statutory purposes and none authorises the killing of birds in the absence of evidence of risk.
61. As to other satisfactory solutions, it is inevitable that the evidence basis for this will continue to develop. This cannot lead to the conclusion that NRW should only allow non-lethal control until it is proven that such methods are ineffective, as that would render nugatory the derogations allowed under the Directive and 1981 Act. There was some evidence that such methods work in combination but in NRW's judgment that evidence was weak and so it was reasonable to conclude that there was no satisfactory solution other than lethal control. WJ's challenge under ground 3 is simply a disagreement with NRW's judgment as to what evidence is sufficient to justify retaining a species on a licence subject to review.
62. The way Sir James, in supporting Mr Corner, puts it is that the precautionary principle may justify issuing a general licence, for example to conserve wild birds, if there is reasonable scientific doubt that a particular species poses a threat to others whose conservation status is threatened. Such a licence would ensure protection of the threatened species until its conservation status improves or further evidence alters the understanding of the threat. Whilst there must be some positive evidence, neither the Directive or the 1981 Act imposes a certain evidential threshold.
63. Mr Birdling points to the language of the Directive which is couched in terms of risk and prevention of the harm identified in the permitted derogations. Whilst he does not accept that the precautionary principle does apply, as none of the species which are

subject to the licences are endangered, he submits that even if it did apply, NRW weighed up all of the evidence and came to a rational decision on the basis of it.

64. In my judgment, WJ in seeking to challenge NRW's approach to the evidence of risks on the one hand and whether there are other satisfactory solutions to deal with those risks on the other, is essentially disagreeing with NRW's weighing up of the evidence, some of which it found is complex and challenging. This is not surprising and that characterisation of the evidence was not disputed. In respect of risk, there was some expert and/or anecdotal evidence although NRW recognised that some of that evidence was weak and that further research is needed.
65. In respect of other solutions, NRW's assessment was that the evidence is weak or too small to assess against each of the non-lethal solutions and/or that there was no quantitative or robust evidence showing that such solutions were effective and proportionate to the risk.
66. These assessments were a matter for NRW in the context identified by Mr Corner. Accepting for present purposes that the precautionary principle applies, I am not persuaded that it has been shown that the NRW's judgment on the evidence, either in respect of risk, or other satisfactory solutions, is irrational.

Conclusion

67. Accordingly the claim fails. In that event, Mr Wolfe further submits that I should consider making a reference to the CJEU under Article 267 of Treaty on the Functioning of the European Union as to whether article 9 of the Directive permits the killing of wild birds under licence without evidence that such birds pose the identified risk, and whether the article can be satisfied if there is some evidence that there are no alternative satisfactory non-lethal solutions.
68. It was common ground before me that under the European Union (Withdrawal Agreement) Act 2020 such a reference is not possible after 31 December 2020, and although the hearing took place before then, no-one suggested that judgment should be handed down before that deadline. I do not understand the European Union (Future Relationship) Act 2020, enacted on that day, to alter that position. Even if such a reference were possible, in my judgment there is no justification for such a reference which is opposed by NRW and SofS. It is not NRW's case that the 1981 Act does permit killing wild birds without evidence of risk of harm, and I have found that its approach to the evidence as to other satisfactory solution was rational. These questions of interpretation and application of the Directive are not suitable for reference to the CJEU, and moreover, this court is not a court of last resort in this jurisdiction.
69. At the end of submissions I indicated that I would hand down judgment in writing after the holiday period. Counsel helpfully indicated that any consequential matters not agreed could be dealt with on the basis of written submissions. I invite them to submit a draft order agreed if possible and any such submissions within 14 days of handing down and I will then give a supplemental judgment if necessary on the basis of such submissions. I end by recording my grateful thanks to all counsel for their thorough yet focussed submissions, written and oral, in this interesting case.