



Neutral Citation Number: [2021] EWCA CIV 1637

Appeal Nos: C1/2019/0752 and C1/2019/0783

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEENS BENCH DIVISION ADMINISTRATIVE COURT**  
**MRS JUSTICE LANG**  
**[2019] EWHC 585 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 November 2021

**Before:**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal, Civil Division)**  
**LORD JUSTICE NEWY**  
and  
**LORD JUSTICE PHILLIPS**

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**Between:**

**C1/2019/0752**

**THE QUEEN (on the application of  
THE ROYAL SOCIETY FOR THE PROTECTION  
OF BIRDS)**

**Appellant**

**- and -**

**NATURAL ENGLAND**

**Respondent**

**And between:**

**C1/2019/0783**

**THE QUEEN (on the application of  
MARK AVERY)**

**Appellant**

**- and -**

**NATURAL ENGLAND**

**Respondent**

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**David Forsdick QC** (instructed by **RSPB Legal Services**) for the **Appellant** in C1/2019/0752  
**David Wolfe QC** and **Zoe Leventhal** (instructed by **Leigh Day**) for the **Appellant** in  
C1/2019/0783  
**Paul Luckhurst** (instructed by **Natural England Legal Services**) for the **Respondent** in both  
appeals

Hearing dates: 27 and 28 January 2021  
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**Approved Judgment**

## Lord Justice Phillips:

1. Following a reserved judgment handed down on 15 March 2019, Lang J (“the Judge”) dismissed judicial review claims brought by the Royal Society for the Protection of Birds (“the RSPB”) and Dr Mark Avery (a scientist who worked for the RSPB until 2011) against Natural England, an executive non-departmental public body sponsored by the Department for Environment, Food and Rural Affairs (“DEFRA”). The claims, brought separately but heard together, challenged the lawfulness of the grant by Natural England, on 16 January 2018, of a licence to “take and disturb” birds listed in Schedule 1 to the Wildlife and Countryside Act 1981 (“the 1981 Act”), namely, hen harriers, for scientific, research or educational purposes pursuant to section 16(1)(a) of the 1981 Act (“the First Licence”). The specific activity in question was a scientific trial of brood management of hen harriers in the northern English uplands, the licence covering the first two years of a proposed 5-year trial. Absent a licence under section 16(1), the interference with hen harriers, their nests or their eggs inherent in such management would be a criminal offence under section 1 of the Act.
2. The RSPB and Dr Avery appealed that decision, with permission from Newey LJ granted on 10 October 2019, challenging the Judge’s rejection of two of the several grounds on which the claims were advanced. In summary:
  - i) both appellants contended that the Judge should have held that Natural England (as the appropriate licensing authority) failed to satisfy itself, as required by section 16(1A) of the 1981 Act, that there was no other “satisfactory solution” as regards the purpose for which the licence was granted. They contend that section 16(1A) required consideration of alternative solutions to brood management to achieve the ultimate purpose of the scientific trial, namely, the conservation of hen harriers, whereas the Judge wrongly held that such consideration was limited to alternative means of obtaining the evidence the trial was designed to elicit, namely, the effectiveness and practicalities of brood management as a conservation technique for hen harriers;
  - ii) the RSPB contended that the Judge should have held that brood management in Special Protection Areas (“SPAs”), permitted under the terms of the licence, would defeat certain of the Conservation Objectives for SPAs by internally displacing hen harriers and constraining their population, adversely affecting the integrity of the site contrary to regulation 63 of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”). The RSPB further contended that the Judge should have found that Natural England failed to carry out a proper assessment of the effect brood management would have on the integrity of the SPAs.
3. The hearing of the appeals commenced on 17 March 2020 before a different constitution of this court, but had to be aborted due to the ill-health of one of its members. Subsequently, on 20 May 2020, Natural England granted a further licence to permit the continuation of the brood management trial to 30 September 2021 (“the Second Licence”) in similar terms to the First Licence, but with some changes to the conditions imposed.
4. The appellants did not issue fresh proceedings to challenge the Second Licence, instead inviting this court to determine the issues raised by the existing appeal on the basis that

such determination would effectively, if not directly, resolve the question of the lawfulness of the Second Licence (and inform any decisions as to the grant of similar licences in the future). Natural England took the point that the appeals in respect of the First Licence had become academic as the First Licence had expired and had been superseded by the Second Licence, but ultimately did not object to the appeal proceeding on the basis proposed by the appellants. In the event, the parties focused their arguments on the terms of the Second Licence, to the limited extent that they differed in any relevant respect from those of the First Licence.

### **The background facts**

5. The relevant background was set out in detail by the Judge in her judgment. The following summary of the facts pertinent to these appeals is drawn primarily from that account.

#### (a) Hen harriers and their habitat

6. Hen harriers are birds of prey, breeding widely across Eurasia and North America. In England, hen harriers nest mainly in the northern moorlands among the heather to be found, in particular, on grouse moors, but their numbers have long been in serious decline, to the brink of extinction. In 2016 there were only four pairs in England, of which only three bred successfully<sup>1</sup>.
7. Due to their rarity and vulnerability, hen harriers have the highest level of protection, summarised by the Judge as follows:
  - i) they are listed in Annex 1 of the Birds Directive (2009/147/EC) as a species which is particularly threatened in Europe. As a result, member states are required by Article 4 to take “special conservation measures” in order to ensure their survival and reproduction, and designate SPAs for their conservation;
  - ii) they are a species of principal importance for biodiversity conservation in England, under section 41 of the National Environment and Rural Communities Act 2006;
  - iii) they are protected under Schedule 1 of the 1981 Act;
  - iv) the species is classified as “red” (denoting the highest level of concern) in the *Birds of Conservation Concern 4* list, drawn up by bird conservation organisations.

#### (b) The problem

8. One of the main causes for the breeding failure by hen harriers in England is persecution, accounting for almost all nesting failures in driven grouse moors (other than in the Bowland Fells SPA). The persecutors are believed to be gamekeepers and others working on driven grouse moors, illegally killing hen harriers, destroying or disturbing their nests and taking eggs in order to reduce the number of birds preying on

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<sup>1</sup> It should be noted, however, that since the hearing of the appeal Natural England and the RSPB have announced that in 2021 hen harriers had had their most successful breeding year in England in over a decade, with 84 young fledged from 31 nesting attempts.

red grouse chicks (which adult hen harriers feed to their young during their breeding season) so as to maximise the number of grouse available for shooting in the autumn. A further aim of such illegal activity may be to limit the extent to which hen harriers overfly shoots, depressing the number of grouse taking flight.

(c) The potential solutions

9. The obvious and direct response to the criminal conduct involved in persecution of hen harriers is the investigation and prosecution of offences under section 1 of the 1981 Act. The Judge summarised at [16] of her judgment the assistance Natural England provides to the police forces responsible for investigation of such offences, including satellite tagging of hen harriers, assisting in searches for missing birds and the provision of forensic technologies. However, as summarised by the Judge at [17], criminal enforcement efforts have had limited effect. Given the extensive area over which hen harriers can nest, comprehensive surveillance of nests is impossible. Even where the disappearance of a hen harrier or a nest is detected at the time (and often it is not), finding evidence that a crime has been committed (rather than death or destruction by natural causes) is difficult. Even if there is evidence of a crime, identifying the perpetrator will be highly problematic.
10. Dr Avery contended that enforcement would have more effect if landowners were made vicariously liable for wildlife crimes committed by their employees, but as Natural England pointed out in evidence before the Judge, such liability could only arise if the guilt of the primary perpetrator could be established and would not assist with the considerable difficulties in that primary exercise.
11. The alternative approach to enforcement is to take steps to reduce the conflict between the hen harrier population and the grouse shooting industry. One technique, diversionary feeding, involves providing hen harriers with food supplies as alternatives to grouse chicks. Diversionary feeding has had considerable success in Scotland and has been licensed by Natural England for use in specified northern counties in England, but despite promotion by Natural England and the Moorland Association, take-up has been minimal. The Judge explained at [18] that possible reasons include cost and inconvenience and a concern that the presence of the diversionary food would attract other predators. Although Natural England has some power to require diversionary feeding, that power is limited to Sites of Special Scientific Interest (“SSSIs”) where hen harriers were among the features of special interest and, in any event, it is difficult to identify when and where nesting is taking place and to issue an enforcement notice in time to put diversionary feeding in place.
12. Brood management is a potential further technique, identified and discussed in scientific literature, for reducing the conflict. Once hen harrier nests reach a certain density in the vicinity of a grouse moor, eggs and unfledged chicks are removed from some of those nests, reared in captivity and then released when they are fledged into a suitable habitat. The hypothesis is that hen harrier eggs and chicks will be protected from persecution and, at the same time, predation of grouse chicks will be kept at levels which do not threaten the economic viability of the grouse moor, giving those involved in grouse moor management the confidence to co-exist with nearby hen harrier nests and a rising hen harrier population.

(d) Natural England's assessment of a trial of brood management

13. In October 2015 Natural England's Science Advisory Committee ("NESAC") reported that, whilst there was evidence that brood management could play a role in supporting hen harrier recovery, uncertainties remained around how and when it should be implemented, so there was insufficient evidence to support a widespread roll-out of a brood management programme. However, the members advised adopting a 'trial' designed to address some of the uncertainties identified. This would strengthen the evidence informing a future decision on a full roll-out of brood management. Natural England accepted that advice and communicated it to DEFRA.
14. In 2016 DEFRA established a group to consider issues concerning hen harriers in England. The group published a Joint Action Plan which included six proposals for action: (1) monitoring the populations in England and the UK; (2) diversionary feeding; (3) work to analyse monitoring information and build intelligence; (4) nest and winter roost protection; (5) reintroduction of the species to southern England; and (6) trialling a brood management scheme, licenced under section 16(1)(a) of the 1981 Act. The trial would use densities determined in modelling work "*to assess whether Brood Management as an intervention is likely to improve the number of hen harriers present in the uplands while protecting the economic viability of the moor.*"
15. On 13 February 2017 an application was submitted for a licence under section 16(1)(a) of the 1981 Act by the Brood Management Project Board, which comprised representatives from the group responsible for the Joint Action Plan, including Natural England staff. Although Mr Wolfe QC, on behalf of Dr Avery, pointed out that to some extent Natural England was applying to itself for the licence, no point was taken that this, in itself, rendered the process or the outcome unlawful. A Trial Project Plan in support of the application was submitted in September 2017.
16. On 19 December 2017 Natural England produced a Habitats Regulations Assessment ("HRA") under regulation 63 in relation to the impact of the grant of the licence on the two relevant SPAs, namely, North Pennine Moors and Bowland Fells. The HRA identified that the principal risk of the trial was that hen harrier breeding might decrease because of decreased site philopatry, decreased juvenile survival through to breeding or the capping of nest density at a level below that necessary to achieve population-based site conservation objectives, but also identified mitigation measures to address these risks. The HRA accepted that it was reasonable to assume that the number of birds reared to fledged would, on average, be greater than the number that would have fledged naturally due to the removal of health risks such as predation and poor food provision. Overall mitigation of the risk was provided by the proposed exit strategy and time-restricted nature of the trial. In conclusion, the HRA recorded that Natural England may grant the licence subject to several conditions, summarising the reasons as follows:

"The licence application as received did not contain enough detail to conclude no adverse impact on integrity of the designated sites involved. However, it is recognised that through improved knowledge and identification of successful approach the proposal could, if the trial is successful, contribute towards recovery of hen harrier population on North Pennines Moors SPA and Bowland Fells SPAs. As part of a time-limited trial and with appropriate conditions in place, to reflect Conservation

Objectives for the sites, it is concluded that the project can be compatible with conservation interests of the designated sites and no adverse effect on site integrity can be ascertained.”

17. On 9 January 2018 Natural England completed a Technical Assessment of the scheme, recording as follows:

“As the application considered is for a trial and to establish evidence where this does not exist, then the application can be considered under the licensing purpose for science, research and education (section 16(1)(a) of the [1981 Act]. Although the wider and longer term intention is to improve the conservation status of the species, so the ‘conserving wild birds’ purpose (Section 16(1)(c)) has also been considered. However, this application is for a trial to deliver data and evidence against narrow objectives and as such, in itself, will not deliver the wider benefit to the species that would be required of a ‘conserving wild birds’ application. Therefore whilst the ultimate aim of the project is to conserve the species, this application has been considered on its merits against the science and research purpose. It is not possible to totally disconnect the two aspects (the current trial and future application of lessons learned from the trial), therefore, where appropriate, comment has been made with regard to how this project can best deliver outcomes for any next stage of the project.”

18. The Assessment recognised that interventions on small populations of species carry a very high degree of risk and alternatives to proposed actions require careful consideration with regard to other options possible or available. The options of doing nothing, undertaking the trial in Scotland, or waiting until the hen harrier population in England had recovered before undertaking the trial were all examined and rejected as satisfactory alternatives. The conclusion was that there was no satisfactory alternative to undertaking a scientific trial to investigate the effect of brood management on hen harrier numbers in the English uplands.

19. On 10 January 2018 Natural England decided to grant the First Licence for reasons summarised in a document headed Summary of Licencing Decision as follows:

“The existence of the Joint Action Plan, and the inclusion of a Brood Management trial as a sub- action, emphasises that there is a genuine problem to resolve. There is a lack of existing information available on brood management as the techniques are untested and their effects are not yet known. There is, therefore, a need to gather this evidence to increase our knowledge of brood management and inform a decision on the possible future use of brood management as a management tool to conserve hen harrier population.

There is no satisfactory alternative to undertaking a scientific trial to investigate the effects of brood management on hen harrier numbers in the English uplands. The need for such a trial

is outlined in the Hen Harrier Joint Action Plan, and research is required to investigate the suitability of a brood management scheme as a conservation tool. The trial must be carried out in the English uplands to be able to determine the effect on human perceptions and behaviour and the impact on the English hen harrier population. There is currently no evidence to indicate that hen harrier numbers will recover to a higher level without further intervention and the continued decline has been recorded by past population surveys. Therefore, it is not considered a satisfactory alternative to wait for a population recovery prior to trialling brood management...

... The proposed trial has the disadvantage that the trial is taking place at a density that will be less likely to meet licensing tests if used in a future licence application for a full scheme, making conclusions of the trial less powerful. The use of a lower intervention density threshold, however, has the advantage that the trial of brood management is more likely to commence within the licence period. The low intervention threshold reduces the power of the trial, but the actions are still proportionate to the problem to be solved...

A licence with conditions could be issued, provided the conditions addressed the outstanding issues and allow the licensing test to be satisfied.

The issue of licence, including stringent conditions, to allow a limited trial of brood management of hen harriers and grouse moors was appropriate.”

(e) The terms of the First Licence

20. The First Licence was duly issued on 16 January 2018, permitting brood management of hen harriers in upland areas of England above the moorland line for a period of two years, subject to conditions which included the following:
  - i) no eggs or juvenile hen harriers could be taken into captivity unless the trial intervention threshold of two nests within 10km was surpassed (additional condition 4);
  - ii) hen harriers taken from a SPA had to be released back within the boundaries of the same SPA (additional condition 12);
  - iii) no hen harrier pair could be subject to brood management on successive nesting attempts, whether in the same year or from year to year.
21. Further additional conditions set out requirements as to the establishment of a scientific advisory group to oversee the research, the security of the release pens, consent of relevant landowners, satellite tagging of all taken birds and notification of all relevant details to Natural England.



22. An “additional note” provided that hen harriers should not, where possible, be released in sight of burnt heather strips (typically found on grouse moors as they provide a beneficial habitat for grouse). The letter accompanying the First Licence explained that this was an attempt to make the hen harriers lean toward a different type of habitat when they reach sexual maturity, so reducing the likelihood of conflict with grouse moor management.

(f) Events following the grant of the First Licence

23. The claims for judicial review were issued in April 2018 and permission to proceed was granted on 26 July 2018. In addition to the grounds pursued in these appeals, the appellants between them also argued that (i) the trial should have been run in Scotland where the hen harrier population is higher and less vulnerable (a point which was included in the RSPB’s Grounds of Appeal but not advanced in its skeleton arguments or orally); (ii) that the purpose of the research was “inchoate”; (iii) that the conditions did not achieve the stated purpose; and (iv) that there was no justification for granting a two year licence for a trial designed to last five years. As referred to above, Lang J dismissed the claims on all grounds on 15 March 2019.
24. The brood management trial commenced in 2019, with five chicks being removed from one intervention nest in the North Pennine Moors SPA. All five were successfully raised to become healthy fledglings and were released in the same general area as the nest from which they were taken, in heather moorland approximately 500m from moorland managed as a grouse moor. Arrangements for the security of the chicks both during rearing and at the release site were successful and veterinary checks revealed no health problems. There has been no evidence of health issues post-release.
25. Application was duly made for a renewed licence to continue the trial in the 2020 and 2021 breeding seasons. In May 2020, Natural England carried out a further HRA, which expressed the view that the trial intervention in 2019 demonstrated a strong success rate compared to the 2018 nesting data (showing that five of 14 wild nests failed entirely and only two were able to fledge five chicks) and the provisional data for non-intervention nests in 2019 (showing that three of the 15 monitored nests failed entirely and only three were able to fledge five chicks). The HRA stated that, whilst it was too early in the trial to draw any conclusions, this supported the view that captive rearing may have the capacity to produce a higher number of healthy fledglings than would, on average, be produced by nests in the wild. The conclusion of the HRA was that there would be no adverse effect on the integrity of the hen harrier qualifying features at the Bowland Fells and North Pennine Moors SPAs.
26. In May 2020 Natural England recorded its reasons for renewing the licence for the trial in an undated Licence Determination Record (“the LDR”). The LDR set out that brood management may deliver an improvement in the conservation status of hen harriers, but that it had never been tested and there was no evidence as to whether it would work or how effective it would be. The LDR continued:

“If the research indicates that brood management is highly effective and capable of delivering a substantial increase in the English hen harrier population then there may be an application to Natural England by stakeholders for a licence to permit brood management on a long-term basis as a conservation scheme

under section 16(1)(c) of the [1981 Act]. Natural England would only be able to licence a brood management conservation scheme if it was satisfied that there was no other satisfactory solution, i.e. it would need to be satisfied that *other* conservation methods were not satisfactory alternatives. To undertake that exercise Natural England would need evidence about the likely effectiveness of brood management as a conservation technique. If brood management is revealed by this research to be extremely effective this might support a conclusion that other techniques are not an “other satisfactory solution” (and vice versa). It is therefore appropriate to adopt a two-stage approach, i.e. to permit research into the effectiveness of brood management (for a limited period of time, under the supervision of a Scientific Advisory Group), followed by a full assessment of any application for a licence under section 16(1)(c) to conduct brood management as a long-term conservation scheme, should this be applied for.

At this initial stage, Natural England does not consider that other conservation methods will *inevitably* be an “other satisfactory solution”. The main alternative methods which have been tried or suggested to date have limitations. Some of these methods and their potential limitations are set out below to provide further context. However, the key point is that the exercise of comparing other options against brood management cannot be undertaken without evidence of the effectiveness of brood management.”

27. The LDR concluded that it was proportionate in all the circumstances to grant a renewed licence for two breeding seasons. Continuing the research would not adversely impact the conservation status of the species and was considered likely to increase the population compared to a non-intervention scenario.
28. The LDR noted that the licence would not contain a recommendation equivalent to the additional note attached to the First Licence as regards not releasing hen harriers in sight of burnt heather strips and the applicant had confirmed that this would not be taken into account in the selection of potential release sites and location of release pens.

#### (f) The terms of the Second Licence

29. The Second Licence was granted on 20 May 2020, permitting the brood management trial to continue in the same upland areas, subject to revised and updated conditions designed to further protect and conserve the managed hen harriers. As anticipated in the LDR, the previous additional note about not releasing in sight of burnt heather strips was not included.

#### (g) Events following the grant of the Second Licence

30. On 2 June 2020 four chicks were taken from a nest in North Yorkshire. All were successfully reared in captivity and released approximately 21.2km from the intervention nest. Both the intervention nest and the release site were within the North Pennine Moors SPA.

31. A further five chicks were taken from a nest in the Yorkshire Dales on 6 June 2020. Four of the five chicks were successfully reared in captivity and released 30.8km from the intervention nest. One chick did not survive. Neither the intervention nest nor the release site was within an SPA.
32. It follows that the three interventions during the trial so far have resulted in 13 healthy fledglings from 14 chicks. It was suggested by the appellants during the course of the hearing of the appeals that the survival rate of the fledglings after release was low, but there was no evidence in that regard and no comparison with the expected survival rate of hen harriers raised in the wild.

### **Whether Natural England misapplied section 16(1) of the 1981 Act**

#### (a) The legal framework

33. It was common ground that the 1981 Act was amended with a view to giving effect to the Birds Directive (2009/147/EC). Although there was no suggestion that the amendment failed to achieve that purpose, Mr Wolfe stressed that reference to the Birds Directive remained apposite for a proper understanding and interpretation of the 1981 Act, and in particular in this case, section 16(1) and (1A).
34. The Birds Directive provides, so far as relevant, as follows:

#### “Article 1

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.

#### Article 2

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. ...

#### Article 4

The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In this connection, account shall be taken of: (a) species in danger of extinction; (b) species vulnerable to specific changes in their habitat; (c) species considered rare because of small populations or restricted local distribution; (d) other species requiring

particular attention for reasons of the specific nature of their habitat

Trends and variations in population levels shall be taken into account as a background for evaluations. Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies. ...

#### Article 5

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. ...

#### Article 9

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. ...

#### Article 10

Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. Particular attention shall be paid to research and work on the subjects listed in Annex V. ...

#### Article 13

Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1.”

35. Annex 1 to the Birds Directive lists species which are to be protected by the special conservation measures referred to in Article 4. Hen harriers are included in that annex.
36. As the Judge explained in [37], articles 5 and 9 of the Birds Directive were given effect in domestic law by sections 1 and 16 of the 1981 Act (although hunting is dealt with in section 2). Section 1 makes it an offence to kill or take a wild bird, damage or destroy its nest when it is being built or in use or to take or destroy its eggs. Part 1 of schedule 1 sets out the wild bird species, including the hen harrier, which are protected by the special penalties at all times, corresponding to Annex 1 of the Birds Directive.
37. Section 16 of the 1981 Act provides the power to grant licences for actions which would otherwise be a breach of section 1 in the following terms, in so far as relevant:

“16. Power to grant licences.

(1) Sections 1, 5, 6(3), 7 and 8 and orders under section 3 do not apply to anything done –

- (a) for scientific, research or educational purposes;
- (b) for the purpose of ringing or marking, or examining any ring or mark on, wild birds;
- (c) for the purpose of conserving wild birds;
- (ca) for the purposes of the re-population of an area with, or the re-introduction into an area of, wild birds, including any breeding necessary for those purposes;
- (cb) for the purpose of conserving flora or fauna;
- (d) for the purpose of protecting any collection of wild birds;
- (e) for the purposes of falconry or aviculture;
- (f) for the purposes of any public exhibition or competition;
- (g) for the purposes of taxidermy;
- (h) for the purpose of photography;
- (i) for the purposes of preserving public health or public or air safety;
- (j) for the purpose of preventing the spread of disease; or
- (k) for the purposes of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters,

if it is done under and in accordance with the terms of a licence granted by the appropriate authority.

(1A) The appropriate authority –

- (a) 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;

....

(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 therefor 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.

....

(7) It shall be a defence in proceedings for an offence under section 8(b) of the Protection of Animals Act 1911 or section 7(b) of the Protection of Animals (Scotland) Act 1912 (which restrict the placing on land of poison and poisonous substances) to show that –

(a) the act alleged to constitute the offence was done under and in accordance with the terms of a licence issued under subsection (1) or (3); and

(b) any conditions specified in the licence were complied with.”

38. There was a degree of disagreement between the appellants and Natural England as to whether derogations provided for in Article 9 of the Birds Directive and the purposes for which licences may be granted in section 16 of the 1981 Act should (i) be interpreted and applied restrictively, and (ii) must not produce effects that are contrary to the objectives pursued by the Directive, the appellants contending for both of those approaches. Natural England contended that there is no basis for interpreting or applying the derogations other than according to their terms and that, whilst the broader objectives of the Birds Directive must be borne in mind, there was no requirement that the effect of a derogation must be consistent with those objectives.

39. The provisions, and the two relevant decisions of the CJEU<sup>2</sup>, were considered in detail by Ouseley J in *R (McMorn) v Natural England* [2016] Env LR 14, who concluded at [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...There is, second, no general rule that a general derogation must be interpreted strictly...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.”

40. Ouseley J’s analysis therefore fully supports Natural England’s approach. However, Mr Wolfe contended that a stricter approach on both aspects referred to above is apparent from the October 2019 decision of the CJEU in the *Finnish Wolves* case C-674/17. That decision related to the Habitats Directive which, Mr Wolfe submitted, was applicable by analogy as it also limits derogations to situations where there is “no satisfactory alternative”.

41. As to interpretation, at [30] the CJEU in *Finnish Wolves* noted that the derogation provision:

“...which defines in a precise and exhaustive manner the circumstances in which Member States may derogate ... constitutes an exception to the system of protection provided for by that directive, which must be interpreted restrictively...and which imposes on the authority taking the decision the burden of proving that those conditions are present for each derogation...”

42. In my judgment it would be inappropriate to apply that more restrictive approach to interpretation of the derogations set out in the Birds Directive (and in section 16(1) of the 1981 Act) as those provisions relate to all wild birds (including those which are common, abundant and permissibly hunted). As Ouseley J rightly explained, the derogations form part of a balancing exercise between the protection of birds on the one hand and human interests on the other. But in any case, if there were any doubt as to the approach, it appears to be resolved in a case such as the present, relating to research into brood management, such a purpose being of the type that Member States are expressly required to encourage by virtue of Article 10 of the Birds Directive.

43. As regards the effect of a derogation, Mr Wolfe asserted in his skeleton argument that at [38] the CJEU in *Finnish Wolves* held that derogations must not “produce effects that are contrary to the objectives pursued by the Directive”. However, the CJEU’s wording was in fact more circumscribed and possibly opaque, holding that derogations must not have such an effect “taken as a whole”. In my judgment it is self-evident that a derogation will at least to some extent be inconsistent with the general objective of the

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<sup>2</sup> *Commission v Finland* C-344/03 [2005] E.C.R. I-11033 and *Commission v Republic of Malta* C-76/08 [2009] E.C.R. I-8213.



directive in question. The concern is that the number or extent of such derogations should not undermine the overall objective of the directive. As Ouseley J explained, the derogations should be interpreted with the other objectives of the directive in mind and should be applied proportionately in that context. Again, it is a balancing exercise between competing interests.

(c) The appellants' contentions before the Judge

44. The appellants contended that Natural England had erred in considering the application for the First Licence only in terms of research under section 16(1)(a) of the 1981 Act, thereby failing to consider the purpose of conserving hen harriers under section 16(1)(c), which was declared as the ultimate purpose of the licence and one from which the application could not be divorced.
45. Thus, in considering whether there was another satisfactory solution under section 16(1A), Natural England should have considered whether there were satisfactory alternatives to brood management as a conservation technique, not merely whether there was a satisfactory alternative to undertaking the trial. The RSPB argued that diversionary feeding was another satisfactory solution, known to work, not a high-risk invasive scheme like brood management and recommended in the Joint Action Plan. Dr Avery argued that Natural England failed to assess the alternative of effective enforcement of section 1 of the 1981 Act.
46. In this regard, the RSPB further argued that Natural England was circumventing the purpose of the 1981 Act, effectively avoiding the need to consider alternative solutions to brood management by splitting what was really one project into different parts and labelling the first part as a trial. Dr Avery, on the other hand, argued that even trialling brood management was to protect and accommodate the interests of those who were criminal persecutors of hen harriers, whereas the whole purpose of the 1981 Act was to criminalise and prevent such behaviour.

(d) The Judge's reasons

47. The Judge rejected the appellants' contentions in admirably succinct terms. She held at [57-58] that the references in section 16(1A)(a) to "any purpose mentioned in subsection (1)" and "as regards that purpose" were to the specific sub-section under which the licence is granted. Natural England was therefore statutorily required to consider whether there were other satisfactory solutions to the section 16(1)(a) scientific purpose and not with respect to any other purpose. The wording of Article 9 of the Directive is less explicit, but did not point to a different interpretation. Natural England was therefore correct to consider: (1) whether the proposed trial was capable of delivering against its scientific purpose, i.e. generating evidence in relation to the two main matters that the trial was intended to investigate; and (2) whether there were any other satisfactory alternative means of obtaining that evidence.
48. The Judge further stated at [59] that it was clear that it was the advice of NESAC and the policy of DEFRA in the Joint Action Plan that there should be a scientific trial licensed under section 16(1)(a) to establish evidence. The application was expressly made, assessed and granted under that provision, as confirmed in the Technical Assessment, notwithstanding the reference in that document to the fact that the ultimate purpose was the conservation of hen harriers.

49. At [60-61] the Judge further accepted Natural England's case that there was a meaningful distinction between a scientific/research licence and a general licence and the purpose of the licence was to gather evidence to assist the policymaker in determining whether brood management could be part of a broader conservation strategy. There was simply no evidence to support the appellants' contention that Natural England was seeking to circumvent the overall statutory purpose of the conservation of an endangered species.

(e) The arguments on appeal

50. Dr Avery's first ground of appeal was that the Judge had misunderstood what was required by section 16(1)(a) of the 1981 Act, failing to appreciate that it was necessary to assess not only the trial proposed, but the wider purpose for which the licence was sought, namely, the use of brood management as a conservation technique. Mr Wolfe accepted that the licence application was properly categorised as being for scientific or research purposes under section 16(1)(a) (the RSPB not accepting that categorisation), but contended that it was wrong to look narrowly at the research element whilst ignoring the ultimate aim of the trial, which was clearly identified as conservation of hen harriers. Once that greater purpose was identified, the alternatives to brood management had to be considered.
51. The difficulty with that contention is that, as the Judge held, the structure and wording of section 16(1) and (1A) of the 1981 Act could not be clearer. The "purpose" in respect of which "other satisfactory solutions" must be considered is undoubtedly the specific purpose for which the licence is sought, being one of those listed in the sub-section. Many of those purposes, taxidermy being an obvious example, do not have an ultimate or even tangential conservation purpose. Indeed, the inclusion of "conserving wild birds" as a separate purpose (section 16(1)(c)) makes it plain that conservation is not a necessary aspect of the other purpose.
52. Indeed, Mr Wolfe accepted that his argument would not apply if a licence was sought for "pure" scientific research, where there was no conservation aim at all in view. But, in my judgment, this would be a difficult line to draw in many cases. Further, it would lead to a strange and unjustified difference in approach between those cases where the purpose was "pure" and those where there was a conservation element to the project in question.
53. Dr Avery's second ground of appeal was that, regardless of the apparently clear structure and wording of section 16(1) of the 1981 Act, the Judge should have read that provision in the light of Article 9 of the Birds Directive. Dr Avery's contention was that the phrase "no other satisfactory solution" in Article 9 was not referencing just the specific derogation, but the broader objective of the Birds Directive. However, and again in agreement with the Judge, I see no merit in that contention. Whilst the language of Article 9 is less precise, it is clear that the effect is intended to be the same as that which has been implemented in section 16(1). The Article provides that derogations may be granted from the general prohibitions in the Directive for listed "reasons" rather than "purposes", but the rationale is the same: the reasons are to protect an interest which is inconsistent with the general prohibition. The alternatives which must be considered must necessarily be alternative ways of protecting the competing interest.

54. Dr Avery's third ground of appeal was that the Judge failed to take into account, properly or at all, that the whole purpose of the relevant provisions was to criminalise and prevent persecution of the kind being visited on hen harriers by participants in the grouse shooting industry. It was incompatible with that purpose, Mr Wolfe argued, to read section 16(1) as permitting a scheme, even on a temporary basis, which moved from a "dissuasive criminal enforcement" regime to one which involved removing hen harriers and their eggs to placate the criminals. However, no matter how strongly Dr Avery may feel about the respective merits (in terms of both effectiveness and ethical propriety) of brood management and criminal enforcement (which will no doubt be hotly debated if a roll-out of brood management of hen harriers in England is proposed following the trial), Natural England properly addressed the question of whether a trial of brood management was appropriate in order to collect evidence to weigh in the balance. For the reasons the Judge gave, and discussed above, the purpose of conducting such research can and must be considered separately from the broad objective of the Birds Directive and the 1981 Act, precisely because it is a derogation from the provisions giving effect to that objective.

#### (f) Conclusion

55. In summary, the Judge was right, for the reasons she gave, to hold that the application was properly considered as one for permission to carry out a research project falling within section 16(1)(a), seeking evidence about brood management as a technique for possible future roll-out, and not a conservation project under section 16(1)(c). She was further right to hold that Natural England was therefore required to consider alternative solutions for that evidence-gathering process and not alternative conservation techniques. For those reasons, there is also no merit in the argument advanced on appeal by Mr Forsdick QC for the RSPB that Natural England should have considered diversionary feeding as an alternative satisfactory solution to the brood management trial. Despite some of the attractions and benefits of that technique, it was not one that excluded altogether the potential need for brood management and certainly would not provide any evidence of its effectiveness.
56. This does not entail that Natural England can simply disregard the overall purposes of the legislation in deciding whether to grant a derogating licence. In deciding whether to grant a licence for research, Natural England must not only consider whether there is any other satisfactory way of doing the research which does not derogate, or derogates less, from the prohibitions in the 1981 Act, but must also exercise its discretion rationally in all the circumstances (with an enhanced margin of appreciation: see *R (Mott) v Environment Agency* [2016] EWCA Civ 564 per Beatson LJ at [69] and *Wild Justice v Natural Resources Wales* [2021] EWHC 35 (Admin) at [66]) and its decision must not thwart or run counter to the policy of the relevant legislation: *R (Padfield) v Ministry of Agriculture and Fisheries* [1968] AC 997.

### **Whether the decision to license brood management in SPAs was unlawful**

#### (a) The legal framework

57. Article 4 of the Birds Directive provides, as set out above, that species mentioned in Annex 1 (including the hen harrier) shall be the subject of special conservation measures concerning their habitat.

58. The obligations arising where an area has been classified as being subject to special conservation measures under Article 4 (i.e. an SPA) were replaced by those set out in Article 6(2)-(4) of the Directive on the Conservation of National Habitats and of Wild Fauna and Flora (92/43/EEC) (“the Habitats Directive”), which provide as follows:

“(2) Member States shall take appropriate steps to avoid, in the special areas of conservations, the deterioration of natural habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive

(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest...the Member State shall take all compensatory measures necessary...”

59. The Habitats Directive was implemented in domestic law by the Habitats Regulations, the above provision being reflected in regulations 63, 64 and 68.
60. The Conservation Objectives in relation to hen harriers (being one of the “qualifying features”) for the North Pennine Moors and Bowland Fells SPAs are follows:

“Ensure that the integrity of the site is maintained or restored as appropriate and ensure that the site contributes to achieving the aims for the Wild Birds Directive, by maintaining or restoring:

- The extent and distribution of the habitats of the qualifying features
- The structure and function of the habitats of the qualifying features
- The supporting processes on which the habitats of the qualifying features rely
- The population of the qualifying features, and,
- The distribution of the qualifying features the site.”

61. The meaning of “integrity” in this context was considered by Advocate General Sharpston in *Sweetman v An Board Pleanála* (C-258/11) [2013] 3 C.M.L.R. 16 in [AG54]-[AG56] of her Opinion:

“54 ... It is the essential unity of site that is relevant. To put it another way, the notion of “integrity” must be understood as referring to the continued wholeness and soundness of the constative characteristics of the site concerned.

55 The integrity that is to be preserved must be that “of the site”. In the context of a natural habitat site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status....

56 It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining the whether the integrity of the site is affected the essential question the decision-maker must ask is “why was this particular site designated and what are its conservation objectives?”...”

62. The CJEU endorsed this approach in [39] of its judgment as follows:

“Consequently, it should be inferred that in order for the integrity of the site as a natural habitat not to be adversely affected for the purposes of the second sentence of art.6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the A.G. has observed...the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.”

63. The above passages were followed by the Court of Appeal in *RSPB v SSEFRA and BAE* [2015] EWCA Civ 227, a case concerning a proposal to the cull up to 25% of gulls at a site in an SPA due to risk of bird strike to military aircraft. At [7] Sullivan LJ concluded that the Secretary of State was correct that conservation objectives were “fundamental” to his consideration of whether the cull sought by BAE may have (1) a significant impact on the site and (2) an adverse effect on the site.

(b) The arguments before the Judge

64. The RSPB contended that Natural England’s starting point in considering the First Licence was wrong because, rather than looking at how to protect hen harriers and their natural processes consistently with the Conservation Objectives, Natural England considered how to manage hen harrier predation of grouse so as to protect driven grouse moors and thereby reduce persecution of hen harriers.
65. The result, the RSPB contended, was an unlawful decision to remove hen harriers from their natural habitats in the SPAs, the grouse moors, and relocate them within the SPA but away from the burnt strips of grouse moors so as to reduce conflict. The intended

effect of the process was to change their natural habitat and their distribution within the SPA, contrary to the Conservation Objectives, all to reduce conflict with an industry which was preying on them. It was a clear breach of the requirement not to adversely affect the relevant habitat in the SPAs.

66. The RSPB further contended that Natural England had failed to undertake a proper assessment of the displacement effect of the trial and, contrary to the requirements referred to in *R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231, had failed to consider mitigation measures and evidence of their effectiveness. Neither had Natural England considered alternative solutions to the impact on the integrity of the site or whether there was an imperative reason of overriding public interest justifying the displacement.

(c) The Judge's reasons

67. The Judge started at [89] by rejecting the overarching criticism that Natural England was acting to protect the driven grouse moor industry rather than to protect hen harriers. The purpose of licensing the brood management scheme was to seek to further the conservation of hen harriers through research.
68. As for the arguments on displacement, the Judge pointed out in [90]-[92] that SPAs formed only a small part of the total area of keepered grouse moors, and that the numbers of hen harriers in SPAs were then very small indeed. It was therefore possible that there would be no brood management in SPAs at all.
69. Nonetheless, Natural England had assessed the risks to the conservation objectives of the SPAs, including decreased loyalty of adult birds to the SPA, and found them to be sufficiently mitigated. The Judge referred at [92] and [94]-[96] to the conditions that no hen harrier pair could be subject to brood management on successive nesting attempts, and that hen harriers taken from an SPA must be released back within its boundaries. The recommendation that fledglings should be released near bracken/rush rather than near burnt heather strips was intended to encourage the birds to locations away from active grouse moors, but did not mean that the hen harriers would leave the SPA. Further, the density threshold for intervention meant that, before a brood could be moved, there must be another nest nearby, which necessarily safeguards the number of chicks in the SPAs. The Judge also took into account at [93] the assessment that the brood management of chicks was likely to improve their prospect of survival.
70. The Judge concluded at [97] that, in the light of the HRA, Natural England was entitled to conclude that the scientific trial would not adversely affect the integrity of the two SPAs.
71. As for the criticism of the HRA, the Judge referred at [103] to the fact that the starting point for the assessor was that the current SPA population of hen harriers was effectively zero. The HRA recognised that the question was whether the trial could raise the levels from effectively extinct to a recovering trajectory. The question was whether the trial would hinder, delay or undermine the long-term achievement of SPA objectives.
72. After referring at [105] to the conclusion of the HRA set out in paragraph 16 above, the Judge stated that she did not accept that the passage meant that the assessors did not

have enough information. The HRA properly considered whether the project could potentially have an adverse effect, followed by whether the project would adversely affect the integrity of the site, taking into account any mitigation measures imposed or agreed. The conclusion was that there would be no adverse effect provided specific licence conditions were in place.

73. The Judge concluded at [107] as follows:

“The displacement of hen harriers from SPAs was not assessed because displacement was neither the purpose, nor the effect, of the trial. No adult birds will be removed from the SPAs. There will be restrictions on how many eggs can be removed from the SPA at any time. Chicks reared in captivity will have better survival prospects than they would have in the wild and they will be returned to the SPA as fledglings. Fledglings will be fitted with satellite tags, to monitor dispersal, survival and productivity, and the scheme can be halted at any stage if unforeseen problems arise. This is a temporary trial, not a permanent scheme”.

(d) The arguments on appeal

*(i) The integrity of the SPAs*

74. Mr Forsdick argued that the Judge’s approach to the integrity test in respect of the SPAs was flawed. The very concept of brood management was intrinsically unlawful, he contended, its rationale being the displacement of hen harriers from their natural habitat to other areas. The fact that such displacement was to be within an SPA did not absolve the exercise from breach of the Conservation Objectives, which included maintaining the structure and function of the habitats and distribution of hen harriers within the SPAs. The requirement was to protect the whole of the SPA, not simply parts of it – it was not permissible to “salami-slice” the site. In this regard, Mr Forsdick pointed out that in *Bagmoor Wind Ltd v Scottish Ministers* [2012] CSIH 93 the potential displacement of just one pair of golden eagles from the vicinity of a windfarm, constituting just 11% of the pair’s territory and just 1% of the total area of the SPA, was held to be an adverse effect on the habitat.
75. As regards the First Licence, Mr Forsdick contended that the recommendation that hen harriers be released away from burnt heather strips was an obvious attempt to remove the species from its preferred habitat (managed grouse moors) and cause it to habituate to a different habitat. Although that recommendation had been removed in the Second Licence, it was necessarily the case that brood managed hen harriers would be released a significant distance from their nest’s location: that was logically the case given that the aim was to keep hen harriers below a threshold in the managed grouse moor areas, leading to ever-increasing dispersal if the scheme was successful. Further, on a practical level, as the fledglings could not be returned to the area of their nest, those managing the trial would have to find another landowner who would consent to their release on their land, not necessarily to be found close-by. For example, in the Bowland Fells a substantial landowner, United Utilities, would not consent to brood management. Further, a key objective of the scheme was to reduce hen harriers overflying grouse shoots, again requiring that they be re-located far away. Hen harriers would be removed

at densities well below those consistent with the Conservation Objective for the population of hen harriers in the SPA.

76. Mr Forsdick further pointed out that the Judge’s supposition that brood management might not occur at all in SPAs had proved unfounded: two of the three intervention nests to date was in the North Pennine Moors SPA.
77. Mr Luckhurst, for Natural England, disputed the RSPB’s categorisation of brood management. He contended that displacement of adult hen harriers was not the purpose or effect of the scheme, pointing out the following:
- i) the only displacement was of eggs and chicks, taken and reared at a safe site before being released back into the wild;
  - ii) the maximum distance of the release site from the nest would be 50km (and usually much less), which was equivalent to the mean average natal dispersal of hen harriers tagged by Natural England in any event. In other words, the fledglings were released within the area to which they would in any event have dispersed naturally. The May 2020 HRA recorded that this was a “further layer of assurance that the brood management trial will not have a significant impact on the distribution of the qualifying features, and certainly not an adverse effect on integrity”;
  - iii) the intention of the scheme was to test whether brood management would increase the density of hen harriers throughout the SPAs, including driven grouse moors, that being a measure of the technique’s success. The concept of the technique was that brood management would remove the conflict with grouse moor management, causing them to be accepting of an increasing population on their estates.
78. Mr Luckhurst further stressed that the integrity test is concerned with the long-term preservation of the habitat at the site, whereas, as the Judge rightly recognised, Natural England was considering only a temporary trial. It was noteworthy that the proposal in *Bagmoor* was for a permanent exclusion of golden eagles from an area of the SPA and in *BAE* the proposal was to cull up to 25% of the population of the relevant species of gulls.
79. In my judgment brood management, properly understood, is not designed to displace hen harriers from their natural habitat, the true intention being precisely the opposite – to reduce their persecution and increase their population. The use of release sites at an average distance of about 21km from the nest is in no sense displacement in relation to a species which disperses as widely as this raptor. Mr Forsdick’s best point related to the recommendation in the First Licence as to release in a different type of vegetation, in an attempt to change the fledgling’s preferred habitat, but the Scientific Advisory Group subsequently recognised in their minutes of 18 July 2019 that this had no effect on the hen harrier’s choice of nesting habitat, and the recommendation has not been implemented and has been omitted from the Second Licence. I would therefore reject the RSPB’s contention that brood management in SPAs is inherently contrary to the integrity test and unlawful.



80. Further and in any event, the trial is temporary and highly unlikely to involve many interventions in the SPAs – there has been just one in each of the two seasons to date. I see no basis on which Natural England can be criticised for reaching the conclusion that, with suitable mitigations, the trial did not infringe the integrity test. The Judge’s decision was right, broadly for the reasons she gave.

(ii) Criticisms of the HRA

81. Mr Forsdick complained that, despite the fact that he had been making the point about internal displacement within the SPAs for over two years, Natural England had not assessed that risk properly or at all. The immediate answer is that, for the reason set out above, I agree with the Judge that internal displacement was neither the purpose nor effect of the trial. But in any event, the risk of such displacement was directly and fully addressed in the May 2020 HRA, the conclusion being referred to in paragraph 77(ii) above.
82. I agree with the Judge that the first HRA was an appropriate assessment carried out in accordance with the Habitats Regulations, which reached lawful conclusions. The same applies to the second HRA. There is no basis on which the conclusion of either assessment could be regarded as irrational, being the relevant standard of judicial review: see *Mynydd* at [8(8)].
83. Mr Forsdick further argued (both in relation to the adequacy of the HRAs and in relation to whether there was an alternative satisfactory solution within section 16(1A)) that no assessment had been undertaken in relation to diversionary feeding as an alternative. He pointed out that that technique did not involve removing eggs or chicks from their habitat, and that it was a ready-made solution which was already licensed. However, given my conclusion above in relation to internal displacement, and given that it was unnecessary to assess alternative conservation techniques in relation to a trial of brood management (as discussed above), I see no merit in the contention.

(e) Conclusion

84. For the above reasons, I would reject the RSPB’s appeal in relation to the application of the Habitats Directive and the adequacy of the HRAs.

**Overall Conclusion**

85. I would dismiss both of these appeals.

**Lord Justice Newey:**

86. I agree.

**Lord Justice Underhill:**

87. I also agree.