

Case No: C1/2014/2898

Neutral Citation Number: [2014] EWCA Civ 1405
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
THE HON. MR JUSTICE KENNETH PARKER
[2014] EWHC 2909 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 29th October 2014

Before :

LORD JUSTICE DAVIS
LORD JUSTICE CHRISTOPHER CLARKE
and
LORD JUSTICE BEAN

Between :

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

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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

Hearing date : 09 October 2014

Judgment

Lord Justice Bean:

1. Bovine Tuberculosis (bTB) has been described as the most pressing animal health problem in England. In the 1970s it was confined to a few pockets in the South West of England, but levels of bTB in England have been rising for 25 years. Badgers are a wildlife reservoir for bTB which they transmit to cattle.
2. The Claimant, the Badger Trust, promotes the conservation and welfare of badgers, their setts and habitat. The witness statement in these proceedings of the Trust's Financial Director, Jeffery Hayden, describes it as the leading voice for badgers in the UK. It has about 60 affiliated local voluntary groups and over 1800 individual supporters. It campaigns on a wide range of badger protection issues, not solely those relating to bTB.
3. Natural England is a body corporate established by the Natural Environment and Rural Communities Act 2006. Under section 16 of the 2006 Act the Secretary of State may issue directions to Natural England, with which it must comply. She also has power, under section 15(2) of the same Act, to issue guidance to Natural England as to the exercise of its functions. Such guidance may be given only after she has consulted Natural England itself, the Environment Agency and such other persons as she thinks appropriate: see section 15(3). Natural England must have regard to such guidance, but is not obliged to follow it.
4. Under section 10(2)(a) of the Protection of Badgers Act 1992 a licence may be granted by the Secretary of State to take and kill badgers for the purpose of preventing the spread of disease within a specified area, subject to compliance with any conditions specified in that licence. In an agreement made under section 78 of the 2006 Act, on September 29th 2006, the Secretary of State authorised Natural England to exercise that licensing function (among many others) for 20 years.
5. In September 2010 the Department for the Environment, Food and Rural Affairs ("Defra") published a consultation document "Bovine Tuberculosis: the Government's approach to tackling the disease and consultation on a badger control policy". In July 2011 two further documents were issued. One of these, "Bovine TB Eradication Programme for England", fulfilled an obligation to report each year to the European Commission on the implementation of the UK (GB) Bovine TB Eradication Plan; the other was a public consultation document on what guidance should be issued to Natural England on the "Implementation and Enforcement of a Badger Control Policy". The Ministerial Foreword to the first document included this passage:

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

and if this is found to be humane and effective by an independent scientific panel of experts, only then would this policy be rolled out more widely."

6. Paragraph 27 of the second document stated:-

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

The December 2011 Policy and the IEP

7. The Secretary of State issued a document entitled "The Government's Policy on Bovine TB and Badger Control in England" ("the Policy") on 14 December 2011, in which it was stated:

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

5.42. We are confident that controlled shooting will be an effective and humane shooting method given its widespread use in other species. However, in response to concerns about the lack of evidence on this, we propose to take a precautionary approach by piloting the policy in two areas initially. The pilot will test our assumptions about the effectiveness (in terms of removing 70% of badgers from the cull area over six weeks) and humaneness of controlled shooting. The design and evaluation of the pilots will be overseen by a panel of independent experts, whose role will include overseeing the design of the data collection, its analysis and interpretation. A decision on further roll-out of a policy that allows controlled shooting will be made following evaluation of results from the six weeks of culling.

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

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

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

"To help Ministers evaluate the effectiveness (in terms of badger removal) and humaneness of controlled shooting the Independent Expert Panel will:

- a. oversee the development of scientifically robust and policy-relevant monitoring protocols;
- b. advise on appropriate auditing of data collection and analysis (either by panel members or by the independent auditor);
- c. on completion of the cull and where appropriate:
 - i. provide advice to Ministers comprising their view of the robustness of the data collection and analysis conducted by the research teams, and a discussion of factors that may have influenced the results obtained;
 - ii. advise on other factors of scientific relevance that are material to the monitoring of effectiveness (in terms of badger removal) and humaneness of controlled shooting, and recommend (if appropriate) options for monitoring if the policy is rolled out more widely;

- iii. consider the report on the public safety of controlled shooting following the pilots and other information that may arise regarding operator safety, and
 - iv. recommend any changes or improvements to the licence criteria, training course content, or Best Practice Guidance."
- 9. The IEP's primary roles were to (i) guide the development of scientifically and statistically sound protocols and (ii) assess the robustness of the data collection and their analysis. As stated in its final report, "the IEP was not involved in either the implementation or the day to day monitoring of the pilots during the six week period set aside for culling".
- 10. It was recognised that the culling policy should be tested before a decision was made on whether to extend it more widely. Accordingly, it was piloted in two areas, Somerset and Gloucestershire, to test assumptions which had been made about the effectiveness, humaneness and safety of the proposed primary method of culling, namely controlled shooting. (The term "controlled shooting" refers to the shooting of unrestrained badgers. The other method of culling is by cage trapping and shooting. That alternative method is significantly more expensive than controlled shooting.)
- 11. The Badger Trust challenged the decision embodied in the Policy of 14th December 2011 by way of an application for judicial review on three grounds, two of statutory construction and one raising a relatively narrow factual issue. The application was dismissed by Ouseley J on 12th July 2012: [2012] EWHC 1904 (Admin). There was no rationality challenge to the Policy.

The Guidance to Natural England

- 12. At the same time as the Policy the Secretary of State also issued guidance ("the Guidance") to Natural England on the exercise of its function of granting licences under the 1992 Act to kill or take badgers for the purpose of preventing the spread of BTB. Although the two documents had different purposes, Mr David Wolfe QC for the Claimant accepts that they were intended to be and should be read together.
- 13. The Guidance envisaged that Natural England would be responsible for the grant of licences to cull in two areas in which the effectiveness, humaneness and safety of controlled shooting would be tested. It also envisaged that Natural England would be responsible for granting licences to cull using that method in other areas. The Guidance included the advice that in all cases any culling, once begun, should continue annually for a minimum of four years to ensure that it achieved its disease control objectives.
- 14. Paragraph 20 of the Guidance stated:
 - "... Should the results of the pilot highlight an issue with controlled shooting (whether its effectiveness, humaneness or safety), Defra will consider how this should be addressed (for example, by amending or tightening the requirements in the Best Practice Guidance or training). If necessary, Defra will

advise Natural England that the licence conditions for the pilot areas should be amended to permit only cage-trapping and shooting and will review whether controlled shooting should continue to be an approved culling method."

15. Natural England granted licences to take and kill badgers using controlled shooting in an annual cull in each year over a four year period until the end of 2015 (or for such longer period as Natural England might specify) in respect of areas in Somerset and Gloucestershire, subject to compliance with the conditions specified in those licences. The culls in Somerset and Gloucestershire were licensed for a four-year period and began in 2013. The Policy had expressly stated that culls should continue for a period of not less than four consecutive years. The need for at least four years of culling was based on expert scientific advice, and on evidence that culling should be done over a sustained period of at least four years in order to achieve a net reduction in the number of new confirmed TB herd incidents.

The IEP's report and subsequent events

16. On 5 March 2014 the IEP presented its Report on the "Pilot Badger Culls in Somerset and Gloucestershire" to the Secretary of State. In that report they concluded that:
 - a. **Effectiveness** – controlled shooting had failed to remove the target of at least 70% of the pre-cull badger population; it was extremely likely that controlled shooting had removed less than 24.8% in Somerset and less than 37.1% in Gloucestershire.
 - b. **Humaneness** – It was extremely likely that between 7.4% and 22.8% of badgers that were shot at were still alive after five minutes and therefore at risk of experiencing marked pain. The Panel was concerned at the potential for suffering that these figures implied.
 - c. **Safety** – The Panel was confident that controlled shooting, when carried out in accordance with Best Practice Guidance, posed no threat to public safety even in the presence of local protest.
17. In the light of the IEP's concerns over the effectiveness and humaneness of controlled shooting and in accordance with their terms of reference, the Panel made a number of recommendations as to how changes could be made to improve standards of effectiveness and humaneness. At paragraph 10.6.3 it was stated that:

"If culling is continued in the pilot areas, or in the event of roll-out to additional areas, standards of effectiveness and humaneness must be improved. Continuation of monitoring, of both effectiveness and humaneness, is necessary to demonstrate that improvements have been achieved. In addition, such monitoring should be independently audited."
18. On 3rd April 2014 the Secretary of State made a statement to the House of Commons on bTB and published the Government's Strategy for achieving TB-free status for England.

19. The Strategy summarised in one document a variety of measures designed and necessary to tackle bTB, including cattle measures, addressing the reservoir of disease in wildlife (including the use of both vaccination and culling of badgers) and the development of new techniques.
20. As to culling, the Secretary of State stated that:
 - a. there would be no wider roll-out of the policy this year to new areas;
 - b. but, as envisaged, planned and announced from the outset, there would be continuation of the licensed culls in Somerset and Gloucestershire for the remaining three years of the four-year period;
 - c. these licensed culls would continue with improvements in place as had been recommended by the IEP in its report dated 5 March 2014.
21. The Secretary of State considered that the work of the IEP provided “high quality information” which could be used to plan a second year of culling. It was stated that, as recommended by the IEP, an independent audit of the monitoring of the effectiveness and humaneness of the culls would take place. The monitoring protocols and results for the culling in 2014 were to be made publicly available. However, there would no longer be evaluation of the results of the culling by an IEP.

The present claim

22. By this claim, issued on 19th May 2014, the Trust seeks judicial review of the Secretary of State’s decision to continue culling badgers in Somerset and Gloucestershire and to hold open the possibility of a wider roll out of the badger cull. The single ground of challenge is that the Defendant had given an unqualified and unequivocal assurance that, as long as she had in real contemplation the 'rolling out' of culling (that is, its extension beyond the pilot areas in Somerset and Gloucestershire), she would keep in place the IEP and would not extend culling beyond the two pilot areas unless either (a) the IEP had concluded that culling by controlled shooting was safe, effective and humane; or (b) the Defendant had at least taken into account an evaluation made by the IEP (at the end of the second or any subsequent season in the two pilot areas) as to the safety, effectiveness and humaneness of culling by controlled shooting.
23. Permission to seek judicial review was granted on the papers by Hayden J on 30th June 2014. The substantive hearing took place before Kenneth Parker J on 21st August 2014. By his judgment handed down on 29th August 2014 Kenneth Parker J dismissed the claim, holding that the Trust had no legitimate expectation of the nature alleged. He refused permission to appeal, as did Underhill LJ on the papers; but at an oral hearing Maurice Kay LJ granted a renewed application for permission.

Substantive legitimate expectation

24. The requirements for establishing a substantive legitimate expectation are no longer controversial. There must be a representation or promise which is clear, unambiguous and devoid of relevant qualification (per Bingham LJ in *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Limited* [1990] 1 WLR 1545 at 1569,

approved by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453). Laws LJ said in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [43] that there must be a “specific undertaking”, directed at a particular individual or group, by which the relevant policy’s continuance is assured.

25. In *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1 a group of taxi drivers had agreed to move the location from which they operated, in reliance on assurances by a minister that they would not be “under the control or management” of the Public Transport Service Corporation. Lord Dyson JSC, giving the majority judgment of the Board, said at [30]:

“As regards whether the representations were “clear, unambiguous and devoid of relevant qualification”, the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, at [56]: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made. The words “management” and “control” are ordinary English words whose meaning is well understood. The members of the Association had been controlling and managing their own affairs. They knew that they were being asked to move to a facility which was owned by PTSC. In that context, they would reasonably have understood the representations as reassuring them that they would be able to continue to control and manage their own affairs if they moved. Managing their own affairs would include not having to satisfy anyone else (still less a rival) that they were fit and proper persons who required a permit for the use of the facilities and not having to pay a fee each time they made an exit journey. The fact that there might have been some uncertainty as to precisely what management entailed does not mean that the representations were not clear and unambiguous. They were certainly devoid of any relevant qualification.”

26. *Paponette* demonstrates that a representation may be clear, unambiguous and devoid of any relevant qualification even though some details are missing, or some terms are not defined with the precision to be found in a competently drafted commercial contract. But it is not authority – and Mr Wolfe did not suggest that it is – for any dilution of the requirements laid down by Bingham LJ in *MFK Underwriting*.

Construction of the December 2011 Policy

27. Mr Wolfe relies not only on the terms of the Policy itself but on earlier and later documents. It is convenient to start by considering the Policy. Although the document must be read as a whole, the oral argument before us concentrated on the passages cited above.
28. Mr Wolfe places emphasis on the absence of a comma after “initially” in paragraphs 5.4 and 6.1. He submits that since Natural England grants licences for four years, the

“pilot” period must be for four years, subject to earlier termination if culling is rolled out more widely. Accordingly, he says, the Policy on its proper construction means that the IEP will remain in place throughout the period of the “pilot”.

29. The interpretation of documents is, as Mr Wolfe accepted, often a matter of impression. I read the words “piloted”, “piloting”, “pilots” and “pilot” in the passages quoted from the Policy as clearly referring to the six week period of culling (limited to Somerset and Gloucestershire) in the first year only. Particularly in paragraphs 5.42 and 7.5, the reference seems to me so clearly to be to a single year rather than four years (or up to four years) that I do not consider there is any ambiguity. But even if I am wrong about that and the references are ambiguous, that does not get the Claimant home under the principles in *MFK Underwriting*.
30. I accept, as the judge did, that both paragraph 5.4 and paragraph 7.5 say that the culling policy would only be rolled out more widely if the evaluation of the pilot confirmed that culling using controlled shooting could be carried out effectively, safely and humanely; and that the IEP’s report on the pilot scheme points to significant shortcomings in two of these three respects. But that is a different point. Nowhere does the Policy indicate a role for the IEP beyond evaluation of the initial six week period; still less is there any clear, unambiguous and unqualified assurance to keep the IEP in place for a longer period. It would have been very straightforward to have given one, for example by adding to the end of the sentence from paragraph 7.5 above referring to the Panel words such as “who will continue their work in subsequent years until the policy is either rolled out more widely or abandoned”. But no such words were inserted.
31. Accordingly, like Kenneth Parker J, I do not accept that any of the passages in the Policy give an assurance of any continuing role for the IEP after it had overseen the monitoring of, and evaluated the results from, the six week period of culling in the two areas of the pilot scheme in the first year. As the judge observed, “this is not a case where the court should be tempted to read into the Policy assurances which cannot be fairly extracted from the express language used by the policy-maker in an important policy document.”
32. The Policy may be said to be characterised by a tone of optimism as to the likely success of the pilot scheme in the first year. By contrast, paragraph 20 of the Guidance does expressly contemplate failure, or at least difficulties. It is striking that there is no mention in that paragraph of a continued role for the IEP. I appreciate that the Guidance is addressed to Natural England but nevertheless if it had been the intention to keep the IEP in place for longer than the time of evaluation of the results of the pilot I would have expected this paragraph to address the question of what continuing advice or assistance they could provide.

Other documents relied on

33. I turn to the other documents relied on by Mr Wolfe. The first is the July 2011 document “Bovine TB Eradication Programme for England”. The Claimant draws attention to the sentence in the Ministerial Foreword saying that:-

“If the decision is to proceed [with a policy of badger control], controlled shooting as a method of badger control would then

be piloted in the first year and if this is found to be humane and effective by an independent scientific panel of experts, only then would this policy be rolled out more widely. ”

34. Mr Wolfe rightly accepts that this does not amount to an express assurance that, if the first year results were unsatisfactory but the pilots nevertheless continued, the IEP would be retained. He submits, however, that the passage in the Foreword amounts to an undertaking that there would be “IEP underpinning for any decision to roll out”. I cannot accept this as a reasonable construction of the July 2011 Foreword even taken on its own. But in any event a policy document (in this case the December 2011 Policy) is not generally to be construed by reference to an earlier publication created for a different purpose, and Mr Wolfe did not succeed in persuading me that it should be in this case.
35. Next, reliance is based on correspondence sent on behalf of the Secretary of State in reply to a pre-action letter from the Claimant. On 6th January 2012 a letter from Defra’s legal department included this passage:-
- “We do not expect culling in these two pilot areas to begin before mid-August 2012 at the earliest. The monitoring and evaluation of the pilots will be overseen by an independent panel of experts. ... This panel will oversee the design of the data collection and its analysis and will report directly to Ministers following the conclusion of the first annual six week culling period in the pilot areas.”
36. As with the July 2011 Foreword, I do not read this letter as promising that the IEP would continue in office beyond an evaluation of the first year’s pilot cull. Even if it were a legitimate aid to interpretation of the Policy, which in my view it is not, it does not contradict nor cast doubt on the relevant passages of that document.
37. Our bundle included some extracts from *Hansard* reports of Defra Ministers answering questions in the House of Commons. Mr Wolfe did not suggest that these contained anything not found in the documents issued by Defra. I did not find them of assistance. The proper scope of *Pepper v Hart* [1993] AC 593 will no doubt be the subject of continued debate, but it would be extraordinary if something said in the hurly-burly of Question Time (in contrast with a formal Ministerial statement) were to be treated as satisfying the requirements for creating a substantive legitimate expectation.
38. Finally, Mr Wolfe points to paragraph 2 of the Summary Grounds of Defence (settled by Mr Eadie QC and Ms Grange) in the claim heard by Ouseley J, which state:

“The Secretary of State has decided that it would be appropriate to proceed on a precautionary basis. Accordingly, the policy will be piloted initially in two pilot areas in the first year (in 2012).....An independent panel of experts will oversee and evaluate the pilots and will report back to Government prior to any decision being made about whether the policy should be rolled out more widely.” [emphasis added]

39. Mr Wolfe relies on the inclusion of the two underlined words as amounting to, or at all events confirmation of, a promise that the IEP would remain in office until and unless a decision was taken to roll out a badger cull policy more widely. I do not regard this as an arguable interpretation of the pleading. In the paragraph just quoted the phrase “oversee and evaluate the pilots” plainly referred back to the first year pilot in Somerset and Gloucestershire, and the assurance, if there was one, was only that no decision on a wider roll-out would be taken until the Government had received the report of the IEP on the first year’s pilot culls.
40. It is therefore unnecessary to embark in this case on a discussion of the circumstances in which a substantive legitimate expectation may be created by something written or said in court by counsel for the decision-maker. For my part I do not see that the requirements could be any less rigorous than those established in *MFK*, with the addition of the need (at least in the case of an oral statement) to show that the client had authorised counsel to give the promise.

The view of the IEP itself

41. The judge referred to the IEP’s Report, paragraph 3.6 of which stated:-

“The IEP’s remit was limited to advising on controlled shooting *over a 6 week period*. We were satisfied that the protocols agreed for the 6-week pilot calls were statistically robust and that the AHVLA had collected, during this period, the data needed to enable the Panel to formulate its advice...”
[emphasis added]

42. In construing the Policy and deciding whether it does or does not contain an unambiguous and unqualified representation that the IEP would have a role beyond evaluation of the first six weeks of culling, the view of the members of the Panel themselves could not be conclusive. But paragraph 3.6 of the Report does indicate that they considered their remit to be limited to advising on controlled shooting over a single six week period; and, as the judge noted, the introduction to the Panel’s report from its chairman bears the hallmark of a valedictory rather than an annual statement. I agree with Kenneth Parker J when he said that:-

“It appears to me to be incongruous for the court to read into the Policy the alleged representation, when the very body that is the central focus of the representation, the IEP, did not proceed on the footing that its remit extended beyond the initial period of culling, and did not envisage for itself any future participation.”

43. It follows from the above that I do not consider that the claimants have established that there was any clear, unambiguous and unqualified representation made by or on behalf of the Secretary of State as to any continuing role for the IEP beyond the first year of culling in the pilot areas.

Natural England

44. Even if there had been any such representation by the Defendant, there would have been additional difficulties in the Claimant's path because of the position of Natural England, which is a statutory body corporate and not a servant or agent of the Crown. As I have noted above, the 2006 Act obliges Natural England to comply with any directions given by the Secretary of State but is not obliged to follow guidance given by her, although it must have regard to such guidance. Natural England has been authorised (for a twenty year period beginning in 2006) to grant licenses to take and kill badgers for the purposes of preventing the spread of disease within a specified area. The Secretary of State has not given Natural England any directions with respect to the discharge of this licence-granting function but has issued guidance, which includes the advice that in all cases any culling once begun should continue annually for a minimum of at least four years.

45. Kenneth Parker J said on this point;

“I note that it is accepted that, even if the Badger Trust had the relevant legitimate expectation it would not be an expectation created by, or binding on, Natural England. Natural England would have been obliged to perform its duties as required by the applicable legislation and subject to any lawful guidance given by the defendant.”

The respondent's notice

46. The Secretary of State contended before the judge that even if the Badger Trust had a legitimate expectation in the terms claimed, she would be entitled to disregard it for reasons of public interest. Kenneth Parker J rejected that argument as “somewhat unreal”, saying that it would be very difficult to accept that the defendant could have given proper weight to a factor that had in effect been rejected on good grounds and which would have touched on a sensitive area of public policy. In the light of the view I take as to the main claim it is unnecessary to consider whether the judge was right on this point.

Conclusion

47. I would dismiss this appeal.

Lord Justice Christopher Clarke

48. I agree that the appeal should be dismissed for the reasons given by Bean LJ. In particular it does not seem to me that the references in the Ministerial Foreword and the Policy to piloting in the first year - this, in context, being the piloting referred to - and, if the culling was found to be humane and effective by an independent panel, only then rolling out the policy more widely, contained any clear, unambiguous and unqualified representation or promise that the IEP would be kept in place after the first year and that there would be no roll out without its imprimatur or at least without receipt of its advice. They seem to me concerned with the position at the end of the first year and devoid of assurance, certainly any unqualified assurance, as to the position of the IEP in subsequent years if there was no roll out at the end of the first.

Lord Justice Davis:

49. I agree that the appeal should be dismissed, for the reasons given by Bean LJ and also those given by Kenneth Parker J in the court below.