

Case Study - Badgers and the Bern Convention: Challenging UK Policy via an International Convention

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Abstract

The Convention on the Conservation of European Wildlife and Natural Habitats, otherwise known as the 'Bern Convention', is an international agreement requiring contracting parties to protect listed wildlife species to include the European badger. In 2019 I worked with Advocates for Animals, the Born Free Foundation, the Badger Trust, and Eurogroup for Animals in submitting a joint complaint to the Convention's Secretariat. We cited a number of breaches of the Convention surrounding badger culling as a significant part of bTB policy in England. It is hoped that this complaint (when it progresses later this year) will support a change in policy by applying pressure on the UK Government to effectively pursue alternative bTB policy measures. This article summarises the legislative framework in this context, and some of the grounds pursued.

Introduction

Badger culling as part of the UK strategy to tackle bovine tuberculosis ('bTB') has sparked controversy and debate since the 70s. This is due to a misplaced view that the species is a significant host of bTB and thereby poses a threat of transmission to farmed cattle.

More recently in 2011 the UK Government announced the introduction of wide scale culling of badgers in England.¹ The number of cull licences has been increasing since 2013. Licences have also been expanded in scope and geographic location, particularly in 2017 where a

supplementary licence policy was introduced. Policy requires that the (estimated) badger population of each licenced cull area is reduced by at least 70% through each cull, which is not an insignificant figure.²

Many wildlife protection and animal welfare organisations oppose the policy, on the basis that badger culling is unscientific, ineffective and inhumane. They instead advocate for the implementation of humane, evidence based policies to effectively reduce bTB in cattle.³

In recent developments, the 'Godfray Review' of 2018, a report commissioned by the Government and intended to review England's current strategy for control of bTB, concluded that the threat of badgers infecting cattle with TB is "modest," and suggested policy focus on alternative approaches such as biosecurity measures on farms and improved cattle testing.⁴

In this connection, the Government published a response in March 2020, entitled "Next steps for the strategy for achieving bovine tuberculosis free status for England."⁵ This report indicates a positive change in direction, in suggesting a gradual phase out of badger culling and

1 The Government's policy on Bovine TB and badger control in England 2011, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69463/pb13691-bovinetb-policy-statement.pdf

2 Guidance to Natural England on licensed badger control... (available at: https://consult.defra.gov.uk/bovine-tb/supplementary-badger-disease-control/supporting_documents/Consultation%20Document.pdf)

3 Such as Born Free: <https://www.bornfree.org.uk/badger-culling> and the Badger Trust: <https://www.badgertrust.org.uk/cull> (last accessed 14.05.20)

4 Bovine TB Strategy Review October 2018, 'Godfray Review', available at: <https://www.gov.uk/government/news/review-of-governments-bovine-tb-strategy-published>

5 Available at: <https://www.gov.uk/government/publications/a-strategy-for-achieving-bovine-tuberculosis-free-status-for-england-2018-review-government-response>

proposing measures to licence a cattle vaccine against bTB within 5 years, along with proposals for stricter risk-based trading and biosecurity measures, to reduce the spread of infection.

However, this report does not rule out badger culling entirely. In fact, it provides for culling to be extended in some areas, and indeed to continue in 'High Risk' and 'Edge' areas "where needed over the next few years." The report further emphasises the idea that badger culling has been effective in controlling bTB, a claim that remains to be substantiated according to organisations such as Born Free and the Badger Trust. UK policy has therefore not substantially changed.

For these reasons the challenge grounds set out in our 2019 Bern complaint, as summarised below, still stand.

It is also briefly noted from a broader animal welfare perspective, that whilst the Government focuses on the development of a badger vaccination alongside a cattle vaccination, this would be expected to inflict further suffering on animals in laboratories in search of a vaccine. A focus on cattle biosecurity and risk-based trading measures, or rather eliminating beef and dairy farming (if such action were even possible in the current environment) for example may seek to avoid this.

Legal Framework

Badgers are protected from persecution in the UK. The Protection of Badgers Act 1992 (the Badgers Act)⁶ which extends to England, Scotland and Wales, prohibits the deliberate killing, injuring or capturing of a wild badger (or attempt to do so), and interfering with badger setts. Section 1 in particular makes it an offence to willfully kill a badger without licence, attaching criminal penalties (of up to 6 months or a fine).

Such actions can however be permitted by licence granted under Section 10 of the Act. Relevant to culling activities for example, licences can be granted for the purpose of preventing the spread of disease within an area specified. These licences are granted by Natural England

(the designated body)⁷, and they require that certain conditions are attached. A designated area for the cull must be specified (the 'control area'); permitted cull methods must be stipulated, such as cage trapping and/or specified fire-arm type; along with a list of authorised persons to carry out the cull.⁸ Where cull licences are breached, Natural England, as the authorising body, has discretion as to whether to modify or revoke said licence. Further, where police have reasonable suspicion that culling is taking place without a licence, there may be a prosecutable offence under the Badgers Act.

Badgers are provided similar protections under the Wildlife and Countryside Act 1981⁹ which implements the 1992 EU Habitats Directive.¹⁰ The 1981 Act provides protections from certain killing methods such as the use of snares. However, penalties are higher under the Badgers Act.

Whilst badgers, as wild species, fall outside of the Animal Welfare Act 2006, they are also provided protection from acts of cruelty or deliberate harm under the Badgers Act¹¹ as well as the Wild Mammals (Protection) Act 1996.¹²

Previous national challenges

A number of judicial review actions have been brought against the Secretary of State for Environment Food and Rural Affairs (and Natural England). Each challenge requested that the High

7 Natural England is authorised to grant licences by the secretary of State under s.78 of the Natural Environment and Rural Communities Act 2006, available at: <https://www.legislation.gov.uk/ukpga/2006/16/section/78>

8 Guidance to natural england:licences to kill or take badgers for the purpose of spread of bovine TB under section 10(2)(a) of the protection of badgers Act(May 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710537/tb-licensing-guidance-ne.pdf?fbclid=IwAR2ipl7tqf_E-gM1MgQzAEQJbP-p2r6hzoh8JyFcNkWvj3tVXnpocyrfygGl

9 s11(1) and Schedule 6, available at <https://www.legislation.gov.uk/ukpga/1981/69/contents> (Extends to England, Scotland and Wales), and as amended by Schedule 6ZA, the Humane Trapping Standards Regulations 2019 available at: <http://www.legislation.gov.uk/uksi/2019/22/schedule/made>

10 Directive 92/43/EEC, available at https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

11 s2, available at: <https://www.legislation.gov.uk/ukpga/1992/51/contents>

12 Available at: <https://www.legislation.gov.uk/ukpga/1996/3/contents>

6 Available at: <https://www.legislation.gov.uk/ukpga/1992/51/contents>

Court review the legality of a decision surrounding the badger cull policy.

For example, in 2012 the Badger Trust challenged Government policy to issue licences to farmers and landowners without geographic limits,¹³ and in 2014 challenged the absence of independent monitoring throughout the culling process by Natural England.¹⁴

More recently, scientist Tom Langton argued that the public consultation process leading to supplementary badger culling in 2017 was inadequate. Langton also challenged Natural England for breaching species assessment requirements under the Conservation of Habitats and Species Regulations 2010, thereby resulting in potential adverse ecological impacts of the cull on other species.¹⁵

These challenges failed. This was largely due to the reluctance of the Court to arbitrate between conflicting scientific arguments, even where the credibility of the science relied upon is called into question. There is also a high threshold to meet. There needs to be an irrational, illegal, or procedural error finding for courts to interfere with a decision on a judicial review challenge. Where judicial review is successful however, it has the potential to substantially overhaul the current Government policy.

In Wales, in *Badger Trust v Welsh Ministers*,¹⁶ the Court of Appeal ruled that a cull capable of achieving no more than a trivial reduction in bTB was not lawful under Section 21 of the Animal Health Act 1981. Whilst this finding is not clearly linked to the current Welsh bTB policy not to cull badgers, it might have had some influence.

International obligations

¹³ R (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1904 (Admin)

¹⁴ The Queen (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs and Natural England [2014] EWHC 2909 (Admin) <https://www.judiciary.uk/wp-content/uploads/2014/08/badger-trust-judgment-29-8-2014.pdf>

¹⁵ R (on the application of Langton) v Secretary of State for the Environment, Food and Rural Affairs and Natural England [2018] EWHC 2190 (Admin), [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2190.html&query=\(CO/4848/2017\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2190.html&query=(CO/4848/2017))

¹⁶ *Badger Trust v Welsh Ministers*, EWCA Civ 807 [2010], <http://www.bailii.org/ew/cases/EWCA/Civ/2010/807.html> (13 July 2010)

The UK has made commitments to protect wildlife and habitats under a number of international agreements. For example, the 1992 UN Convention on Biological Diversity, which broadly requires that species conservation measures are integrated into policy where possible.¹⁷

Of specific application to the UK badger, are protections provided under the Convention on the Conservation of European Wildlife and Natural Habitats,¹⁸ also known as 'the Bern Convention.'

The Bern Convention aims to protect wildlife and their natural habitats, particularly endangered and vulnerable wild animal species. The agreement was adopted by the Council of Europe (the 'COE') and has 51 members, including countries outside of the European Union.¹⁹

Article 2 of the Convention requires that contracting parties:

...take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.' [emphasis added]

This suggests that economic requirements are balanced against policies to maintain the population of species. Whilst further explanation is not provided in the Convention (or any of the guidance), an article assessing Norway's wolf policy²⁰ stated the following:

The formulation of Article 2 also indicates that conservation interests will outweigh economic and recreational interests in case of conflict (although ecological re-

¹⁷ Article 6, available at: <https://www.cbd.int/convention/text/>

¹⁸ Available at: https://www.naturaitalia.it/static/temp/allegati_natura_italia/biodiversita/accordi/Convenzione_di_Berna_EN.pdf

¹⁹ https://www.coe.int/en/web/conventions/recent-changes-for-treaties/-/conventions/treaty/104/signatures?p_auth=MODcPj4b (last accessed 14.05.20)

²⁰ Arie Trouwborst, Floor M. Fleurke & John D.C. Linnell 2017. Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd". 20(2) *Journal of International Wildlife Law & Policy*. Forthcoming – accepted for publication 7 February 2017



quirements are put on a par with “cultural requirements”). This is also in line with the Convention’s aims, which are limited to the conservation of wild flora and fauna and their habitats. Generally, the “object and purpose” of the Bern Convention would thus seem to dictate interpretations in favor of wildlife conservation rather than the contracting parties’ room for balancing conservation with other interests. To put it plainly, it appears to favor wild wolves over domestic sheep. Significantly, the population standard laid down in Article 2 constitutes an absolute minimum, as the Convention does not allow for exceptions in respect of Article 2.

As a contracting party to the Bern Convention since 1982, the UK agrees to take appropriate legislative and administrative measures to ensure the protection of Appendix listed species, and to regulate any exploitation in order to keep listed populations out of danger. In other words, exploitation of Bern Appendix listed species is

only permitted if the population level permits.²¹

Species are provided varying degrees of protection by way of Appendix. The European badger (scientific name: *Meles meles*) is currently listed under Appendix III of the Convention. This provides the species with various protections under Article 7. In authorising badger culling, Article 7 requires that the UK Government has regard to badger population numbers, as well as other impacted local species that are also Appendix listed species; and that supervising measures are in place (among other considerations).²²

The Bern Convention contains clear provision for organisations (and individuals) to bring complaints against a contracting party concerning

²¹ Paragraph 80, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

²² Paragraph 35, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

possible breaches of the Convention.²³ Complaints are addressed by the Convention's Secretariat, Standing Committee, and Bureau (where there is merit based on the submitted evidence), and provide opportunity for reply by the relevant contradicting party against whom the complaint relates.

A number of complaints have been made in relation to the UK's changing badger culling policy over the years, particularly in 2013 and 2014 relating to England, all of which have been rejected (at the time of writing).

In an attempt to reduce the number of complaints being rejected, the Secretariat produced guidance on interpretation, most recently in 2014.²⁴ This guidance sets out criteria that complainants must meet in order to be admitted for review.

2019 Bern Convention challenge

In July 2019 the Born Free Foundation, the Badger Trust, and Eurogroup for Animals, submitted a complaint to the Secretariat of the Bern Convention, citing a number of breaches of the Convention by the UK Government (specifically England). At the time of writing we await the Government's reply.

The complaint challenged the UK for failing to take appropriate legislative and administrative measures to ensure the protection of badgers (as Appendix listed species) and to regulate any exploitation of badgers in order to keep listed populations out of danger. We challenged the UK Government on a number of specific Grounds, based on duties under the Convention (and as supported by the 2014 guidance referenced above in particular).

The complaint focused on breaches of Articles 7 (and 8) of the Convention (as relevant to Appendix III species), and we argued that the UK's pol-

icy does not benefit from any exemptions under Article 9, as set out below. It also addressed the conclusions of the 2018 'Godfray Review' (addressed above).

We will briefly consider some of the complaint grounds.

Ground: The Population of badgers is jeopardised by the culling policy

We argued that the measures undertaken by the Government for the exploitation of badgers jeopardises the population concerned, being a breach of Article 7 of the Bern Convention.²⁵ At the time of the complaint, over 67,000 badgers had been culled under licence since 2013, with an estimate of at least 40,600 additional badgers set to be killed each subsequent year.²⁶

Alongside culling, badgers face additional, and continuous, threats across the UK. These include persecution (such as badger baiting), property development, road deaths and climate change. For example, badger road deaths total approximately 50,000 per year in the UK²⁷, and illegal persecution totals approximately 10,000 deaths per year.²⁸ This creates a culmination of population pressures and illustrates that culling impacts cannot be viewed in isolation. Further, badger presence alone is not enough to keep the population out of jeopardy, and maintenance of their complex social groups is understood to be key to continued breeding. The untargeted 70% reduction policy fails to take these social groupings into account.

²⁵ In accordance with: p3-4, 2014 Guidance (available at: <https://rm.coe.int/1680746b6b>)

²⁶ As stipulated by the Government commissioned 2018 Bovine TB Strategy Review ('The Godfray Review'), on the basis that the current policy continues with (a minimum of) 10 new cull licences per year over the next 4 years (in accordance with current policy), p65, paragraph 6.31, available at: <https://www.gov.uk/government/news/review-of-governments-bovine-tb-strategy-published>

²⁷ Road Deaths Survey 2000-2001, The Mammal Society (available at: <https://www.mammal.org.uk/science-research/surveys/>); Note: the badger is reported to be the most common wild mammal killed on UK roads in 2019: <https://www.bbc.co.uk/news/science-environment-48886673> (last accessed 14.05.20)

²⁸ Point 9, Wildlife Crime report submitted to the UK Parliament by the International Fund for Animal Welfare, 2004: <https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/605/605weo7.htm>

²³ Also known as the case file system: <https://www.coe.int/en/web/bern-convention/monitoring> (last accessed 14.05.20)

²⁴ Guidance for Complainants; Admissibility of Complaints Related to Species Listed in Appendix III: the Badger (*Meles meles*) as a Model (2014), available at: <https://rm.coe.int/1680746b6b> and the Revised Standing Committee Resolution on the scope of Articles 8 and 9 of the Bern Convention (2011), available at: <https://rm.coe.int/16807461dd>

These concerns are in accordance with the Council of Europe's 2012 statement that "the (even if remote) possibility of local disappearance could definitely be in contrast with the philosophy of a convention which aims to conserve wild fauna."²⁹

Yet, at the time of the complaint, the issuance of cull licences were expected to continue through 2019 and beyond, in accordance with current policy.^{30,31}

As anticipated the Government has since confirmed that over 35,000 badgers were killed under culling licences in 2019, bringing the total number of badgers killed since 2013 to 102,349,³² and licences continue to be granted through 2020.

Ground: Failure to Monitor

In order to 'exploit' a protected species such as the badger, this must be monitored in accordance with Article 7 of the Convention.³³ We argued that the Government failed to put in place appropriate administrative and regulatory measures to ensure that the badger population is not in danger.

Only a very small proportion of badger culling activities have been monitored according to Government records. For example, the published cull numbers for 2018 showed that of the 20,637 badgers killed by 'controlled shooting,' only 89 incidents were monitored for compliance by Natural England (the responsible body),³⁴ totaling less than 0.5%. As well as evi-

dence of culling activity monitoring failings, the evaluation of culls as a monitoring tool has also been evidenced as inadequate. For example, post-mortem testing on badgers has not been a key part of the culling policy.

Ground: Impact on other protected species

We also argued that the Government failed to address the impacts of badger culling on other protected species in forming its policy; a further breach of Article 7 of the Convention.³⁵ This is despite increasing evidence that a range of species and habitats listed in both Appendix I and II of the Bern Convention may be directly or indirectly impacted by badger culling. For example, badger culling is found to increase fox numbers, which in turn threaten ground nesting birds and hares.³⁶

On the basis that the Government has breached Articles 7 (and 8), it must invoke an exception under Article 9. Where parties deviate from Article 7, they must be able to rely on certain circumstances, as set out in Article 9 of the Convention. This includes a permitted exception in order to "prevent serious damage to livestock", albeit only when there is no other satisfactory solution and where the action will not be detrimental to the survival of the population.

We argued that the Government failed to meet these exceptions.

Ground: Failure to Satisfy Article 9 (General Condition): No Other Satisfactory Alternative

Further, in deciding to pursue badger culling as a measure to tackle bTB, the UK Government failed to choose, among possible alternatives, the most appropriate action, which would have the least adverse effects on the species while

²⁹ Meeting of the Bureau, 23 April 2012 (available at: <https://rm.coe.int/09000016807468c8>)

³⁰ See licenses authorised during 2019: <https://www.gov.uk/government/publications/bovine-tb-authorisation-for-supplementary-badger-control-in-2019> and the 32 licences granted through 2018: <https://www.gov.uk/government/publications/bovine-tb-authorisation-for-badger-control-in-2018> (last accessed 14.05.20)

³¹ For policy details see 2018 Guidance to Natural England: <https://www.gov.uk/government/publications/guidance-to-natural-england-preventing-spread-of-bovine-tb>

³² <https://www.brockbase.com/post/badger-trust-condemns-the-largest-destruction-of-a-protected-species-in-living-memory> (last accessed 14.05.20)

³³ In accordance with: p3-4, 2014 Guidance (available at: <https://rm.coe.int/1680746b6b>)

³⁴ p3, Summary of badger control operations during 2018, December 2018 (available at: <https://assets.publishing.service>

[gov.uk/government/uploads/system/uploads/attachment_data/file/765439/badger-control-monitoring-2018.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/765439/badger-control-monitoring-2018.pdf))

³⁵ In accordance with: paragraph 35, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoER-MPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

³⁶ For example, see: Trewby et al, 2008, available at: <https://royalsocietypublishing.org/doi/10.1098/rsbl.2007.0516> (last accessed 14.05.20)

solving the problem, thereby breaching Article 9 of the Convention.³⁷

This argument summarised scientific discussion questioning the efficiency of badger culling on bTB, and addressed the more viable and satisfactory alternatives to include measures focused on reducing cattle-to-cattle transmission. Of key concern was a survey which revealed that only 30% of farms in 'High Risk Areas' had taken any basic biosecurity steps to prevent bTB;³⁸ a reflection of Government failings to engage and support farmers with satisfactory action.

As well as choosing the most appropriate alternative in tackling bTB, the Government must be found to be objective and reasonable in reaching its policy decision, in accordance with the Bern Convention.³⁹ We took steps to challenge this, including addressing the lack of credible statistical analysis purporting to support the badger culling policy, and failure to provide a scientific basis for the supplementary culling other than the false position of keeping badger numbers down to a perceived level of control.

Reporting requirements under Article 9 of the Convention

Further, whilst reports must be submitted by the contracting parties of Bern every two years in connection with exceptions made under Articles 7 of the Convention, a freedom of information request revealed that this requirement had not clearly been met. Whilst the UK may have met its reporting obligations under this Convention through the separate reporting duty under the Habitats and Birds Directive Derogation System,⁴⁰ we put it to the Government to explain this in our complaint.⁴¹

³⁷ In accordance with: p3, point 7, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

³⁸ <https://www.fginsight.com/news/news/failure-to-improve-biosecurity-as-british-farmers-ignore-bovine-tb-advice-88895> and <https://www.fwi.co.uk/livestock/health-welfare/livestock-diseases/bovine-tb/5-ways-to-improve-tb-control-in-the-uk> (last accessed 14.05.20)

³⁹ In accordance with: p3, point 7, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

⁴⁰ https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

⁴¹ See para 3, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

The above is a brief summary of some of the grounds pursued in this complaint, which took into account the perspective of farmers as well as scientists and animal welfare NGOs, addressing the Government's failing to effectively tackle bTB in its policy.

Next steps

Our complaint was due to be considered at the last Bureau meeting in Strasbourg in April 2020. However, this has since been deferred to September on the basis that although the UK authorities have acknowledged the complaint, they have asked for a longer deadline in order to 'respond in a comprehensive manner.' As the complainant we are also permitted to submit additional evidence prior to this meeting.

In connected developments, despite calls by the Badger Trust and others to halt the badger cull in 2020 due to concerns surrounding Covid-19, including concern of an expected reduction in the monitoring of the culls, these culls are reportedly going ahead at the time of writing.

It is difficult to predict the outcome of the Complaint. As the agreement was formulated by the Council of Europe, the UK's duties arising under it will remain as they are (while a signatory) following our formal exit from the EU, removing this time pressure. We are hopeful of a positive outcome particularly on the basis of anticipated support from MEPs and their relevant Environment Ministries.