

## **R (RSPB) v Natural England [2021] EWCA Civ 1637: Hen Harrier Brood Management Trial survives in the Court of Appeal**



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**30 November, 2021**

### **Case Note: Judgment of the Court of Appeal on 9 November 2021**

The Court of Appeal has handed down judgment in an appeal brought by the RSPB and Dr Mark Avery regarding the lawfulness of the grant of a licence by Natural England to “take and disturb” hen harriers for “scientific, research or educational purposes” pursuant to section 16(1)(a) of the Wildlife and Countryside Act 1981. The licence facilitated a scientific trial of hen harrier brood management in the northern English uplands.

Lang J had dismissed the judicial review claims made by the RSPB and Dr Avery, which were heard together, in 2019. The Court of Appeal upheld the High Court’s decision and dismissed the appeal on 9 November 2021.

### **Background**

The use of hen harrier brood management on the part of NE aims to address or, at least, ameliorate, the conflict between the hen harrier population and the grouse shooting industry. Hen harrier numbers have long been in serious decline and, as the judgment identifies, one of the main causes for breeding failure by hen harriers is persecution by gamekeepers or others working on driven grouse moors. The persecution involves illegally killing hen harriers or destroying or disturbing their nests or eggs in order to reduce the numbers preying on red grouse chicks so as to maximise the number of grouse available for shooting in the autumn.

Hen harrier brood management involves removing unfledged chicks and eggs from nests once they reach a certain density, rearing them in captivity and then releasing the fledged chicks into a suitable habitat. The rationale is that hen harrier eggs and chicks will be protected from persecution and, at the same time, the economic viability of the grouse moor will not be threatened due to a reduction in the predation of grouse chicks.

In 2015, NE recommended that a trial be undertaken of brood management. Following a Habitats Regulations Assessment, the first licence for the taking and disturbing of hen harriers was granted in January 2018 (with a second granted in 2020).

The HRA had identified that the scheme risked a potential decrease in breeding and juvenile survival of the hen harriers but the conclusion of the HRA was, having regard to the time limited nature of the trial and with appropriate conditions in place, no significant adverse effect on the integrity of the relevant SPAs could be ascertained.

s. 16(1A) of the 1981 Act requires that a licence may not be granted for scientific, research or educational purposes unless, as regards that purpose, there is no other satisfactory solution. A Technical Assessment of the trial concluded that there was no satisfactory alternative to undertaking the scientific trial to investigate the effect of brood management on hen harrier numbers.

## **Grounds**

In the Court of Appeal, two grounds were pursued.

Under ground one, both appellants argued that Lang J should have held that NE 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 they said that the licence was granted, namely, the conservation of hen harriers.

The Court below had held that consideration of alternatives 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. In other words, the limit of NE’s obligation was to consider whether there were other satisfactory solutions to the section 16(1)(a) scientific purpose rather than a broader conservation purpose under section 16(1)(c).

The RSPB had argued that diversionary feeding, which involves providing hen harriers with food supplies as alternatives to grouse chicks, was another satisfactory solution. It was a solution that was known to work, and was not a high-risk invasive scheme like brood management. Dr Avery had argued that NE failed to assess the alternative of effective enforcement of section 1 of the 1981 Act, i.e. prosecuting those persecuting the hen harriers.

Under ground two, the RSPB alone argued that Lang J ought to have held that the brood management in SPAs permitted under the terms of the licence would defeat certain of the conservation objectives for SPAs. This was said to be due to the internal displacement of hen harriers and the constraining of their population, thus adversely affecting the integrity of the site contrary to regulation 63 of the Habitats Regulations.

The RSPB also argued that the Court below should have found that NE failed to carry out a proper assessment of the effect brood management would have on the integrity of the SPAs.

## **The Court of Appeal’s Decision**

In respect of ground one, the Court of Appeal found that the Court below was correct to hold that the application was properly considered as one for permission to carry out a research project falling within section 16(1)(a), and not a conservation project under section 16(1)(c) with the effect that NE was required only to consider alternative solutions for that evidence-gathering process and not alternative conservation techniques.

The Court found that the structure and wording of s. 16(1) and (1A) of the 1981 Act “could not be clearer”

and that the purpose in respect of which other satisfactory solutions must be considered is the specific purpose for which the licence is sought. Further, the inclusion of “conserving wild birds” as a separate purpose (section 16(1)(c)) made it plain that conservation is not a necessary aspect of the other purposes.

The Court also rejected arguments from Dr Avery to the effect that, in finding that the consideration of alternatives was properly limited to the scientific purpose, NE had failed to read the relevant provisions of the 1981 Act in the context of Article 9 of the Wild Birds Directive and/or the broad objective of the relevant provisions of 1981 Act, namely to criminalise and prevent persecution of the kind used on the hen harriers.

With regard to ground two, the RSPB argued that Lang J’s approach to the HRA integrity test had been flawed because the concept of brood management was intrinsically unlawful. This was because it displaced hen harriers from their natural habitats whereas conservation objectives in the SPAs included maintaining the structure and function of the habitats and distribution of hen harriers in the SPAs.

The Court of Appeal held that brood management in SPAs is not designed to displace hen harriers from their natural habitats and the true intention was precisely the opposite, namely to reduce their persecution and increase their population. Given the wide dispersal of the species, the use of release sites at an average distance of 21km would not result in displacement. The contention that brood management in SPAs was inherently contrary to the integrity test was rejected.

The Court of Appeal further relied on the temporary nature of the trial and the fact that it was highly unlikely to involve many interventions in SPAs as bolstering its view that there was no basis on which NE could be criticised for reaching the conclusion that the trial did not fall foul of the integrity test.

This case demonstrates the limits of environmental enforcement mechanisms. Despite one of the main causes for the breeding failure by hen harriers being persecution and despite the killing of hen harriers and/or the destruction/disturbance of their nests constituting a criminal offence under s. 1 of the 1981 Act, the judgment makes clear that effective enforcement through the criminal regime has faced significant hurdles.

The judgment refers to difficulties in comprehensive surveillance of nests due to geographical challenges, difficulties in finding evidence that a crime has been committed rather than death or destruction by natural causes and, even where there is evidence of a crime, difficulties in identifying a perpetrator. It is the practical limitations of criminal enforcement that led Natural England to the investigation of alternative mechanisms to conserve hen harriers, including the brood management trial.

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