



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 51

P380/16

OPINION OF LORD ARMSTRONG

In the petition of

A I WALGATE & SON

Petitioner

against

SCOTTISH NATURAL HERITAGE

Respondent

**Petitioner: Burnet; Gillespie Macandrew LLP**

**Respondent: Findlay, Garrity; Harper Macleod LLP**

28 March 2017

**Introduction**

[1] The petitioner owns an upland stock farm, named Corsehope Farm, near Heriot, Midlothian. In the management of that estate, the petitioner has a requirement to control a number of predator or pest species, including crows and magpies. The farm is adjacent to land owned by Raeshaw Farms Limited. The respondent has overall responsibility for general licences under the Wildlife and Countryside Act 1981 (“the 1981 Act”). Such licences permit the control of a number of pest species which would

otherwise be prohibited under the 1981 Act. The petitioner held three such general licences. In about October 2014, the respondent published a document: *General Licence Restrictions, Framework for Implementing Restrictions* (“the Framework”). By decision, dated 4 November 2015, under reference to the Framework, the respondent restricted the use of the petitioner’s general licences. The effect of the restriction was to prohibit the use of the general licences, between 13 November 2015 and 12 November 2018, on the land owned by the petitioner, and the other land contiguous with it owned by Raeshaw Farms Limited. Subsequently, by decision dated 1 February 2016 the respondent refused an appeal by the petitioner against the decision of 4 November 2015. The petitioner seeks reduction of the decisions dated 4 November 2015 and 1 February 2016.

[2] By decisions of the same date, the respondent restricted the use of general licences held by Raeshaw Farms Limited. These decisions were in broadly the same terms as those affecting the petitioner, were based on the same evidence, and had an equivalent effect. Like the petitioner, Raeshaw Farms Limited, also sought reduction of the decisions affecting it, by way of judicial review. The two cases were heard together.

### **The Legislation**

[3] Section 1(1) of the 1981 Act, *inter alia*, makes it a criminal offence to kill, injure or take any wild birds. The effect of section 16 of the Act is to exempt from section 1 anything done in accordance with the terms of a licence granted by the appropriate authority (the respondent). In particular, the section provides for such exemption for particular purposes such as the conserving of wild birds (section 16(1)(c)), or the prevention of serious damage to livestock, foodstuffs for livestock, or crops (section 16(1)(k)).

[4] Section 16(5)(a) provides that, subject to the terms of subsections (5A) and (6), a licence granted under the foregoing provisions of the section may be, to any degree, general or specific.

### **The Framework**

[5] The Framework which constitutes the respondent’s policy on the implementation of restrictions in relation to general licences, includes the following terms:

“General licences represent a relatively ‘light-touch’ approach to regulation, allowing persons to carry out activities without the need of applying for a specific licence. The rationale behind imposing a restriction on the use of

General Licences is that light-touch regulation should not apply in situations where the regulator has lost trust or confidence.”;

#### “Application

The procedure will only apply to General Licences 1, 2 and 3 which are granted for the following purposes:

General Licence 1: To kill or take certain birds for the conservation of wild birds.

General Licence 2: To kill or take certain birds for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables and fruit.

General Licence 3: To kill or take certain birds for the purpose of preserving public health, public safety and preventing the spread of disease.

Accordingly General Licences 1-3 now include the following wording: ‘SNH reserves the right to exclude the use of this General Licence by certain persons and/or on certain areas of land where we have reason to believe that wild birds have been taken or killed by such persons and/or on such land other than in accordance with this General Licence’.

While the wording provides for the exclusion of individuals, it is the intention that where SNH has robust evidence that wild birds have been killed or taken or where there is intention to do so other than in accordance with a licence, SNH will exclude the area of land on which such evidence is found from General Licences 1, 2 and/or 3.”;

#### “Evidence

Decisions to impose a restriction will only be based on evidence received from the Police of an offence under the Wildlife and Countryside Act 1981 having been committed in relation to wild birds and / or where the terms of General Licences were not being complied with.”;

“Examples of evidence recorded since 1st January 2014 which may be considered by SNH in any decision to impose a restriction include but are not limited to:

- Illegally killed birds being found on the land in question; ...”;

“The decision to restrict the use of a General Licence may be based on one or more pieces of evidence of this kind provided by Police Scotland to SNH and

will be made on a case-by-case basis. In making a decision each piece of evidence will be assessed against criteria including:

- The strength of evidence that those activities had been carried out by owners or managers of that land
- The number or frequency of such instances
- The actual or potential conservation impact of those activities;
- The age of the evidence.
- Any history of previous, similar instances.”;

“Recommendation to restrict

Evidence received by SNH from Police Scotland will be reviewed by SNH’s Licensing Manager. If, following that review, the Licensing Manager has reason to believe that wild birds have been killed and / or taken other than in accordance with the terms of a General Licence and considers that a restriction should be imposed, the Licensing Manager will recommend a restriction for SNH’s approval.”;

“The decision to restrict

Where no Response is received by SNH within 14 days from the date of the Notification, or where after considering any Responses that SNH continues to recommend a restriction, a restriction will be imposed. The Director of Operations will make the decision (in consultation with the Wildlife Operations Unit Manager and the relevant Area Manager) and notify the Affected Parties in writing of the decision to impose a restriction, the reasons for that decision, the land to which the restriction applies and the duration of the restriction (‘the Decision Notice’).”

## **The Documentation**

[6] The chronology of the decision-making process, in relation to the position of the petitioner, was as follows:

11 June 2015	The respondent issued a notice of intention to restrict the use of General Licences on Corsehope Farm, in terms of which it was stated that evidence had been provided by Police Scotland of offences in relation to the illegal use of traps for the purpose of taking wild birds on Corsehope Farm, and that the decision had been taken on the basis of that evidence and the past
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	history of offences and intelligence recorded in the area.
24 June 2015	By letter, solicitors acting for the petitioner adopted the terms of the response on behalf of Raeshaw Farms Limited, dated 24 June 2015, and confirmed that the high land comprising part of Corsehope Farm was managed by Raeshaw Farms Limited, but that its rights over that ground had been suspended pending resolution of the matter.
30 June 2015	By letter, the respondent confirmed that the petitioner's letter of 24 June 2015 was treated as the petitioner's response to the notice of intention, and set out the extent of the available evidence in an appendix;
13 July 2015	By letter, the petitioner confirmed that it still awaited the provision of further information in response to the letter of 24 June 2015, and asserted that the respondent was penalising it simply because of its ownership of the land which was managed by Raeshaw Farms Limited on its behalf;
4 November 2015	The first decision letter by the respondent's Director of Operations, stating that it had been made on the basis that the evidence provided by the police was "sufficiently robust to convince me that wildlife crimes in relation to wild birds had been committed on your property.";
19 November 2015	By letter, the petitioner appealed the decision of 4 November 2015;
8 December 2015	Revised version of letter, dated 19 November 2015;
1 February 2016	The second decision letter by the respondent, refusing the petitioner's appeal.

## **The Submissions**

[7] Counsel for the parties adopted their written notes of argument, which I have taken into account, together with the oral submissions made at the bar.

## The Submissions for the Petitioner

[8] Counsel for the petitioner adopted the submissions presented on behalf of Raeshaw Farms Limited to the extent that they were referable to the position of the petitioner, *viz.*:

### (a) *Ultra Vires*

[9] In terms of section 16(6) of the 1981 Act, licences issued under section 16(2) or (3) must specify the area on which wild birds may be killed. In the absence of such express provision in respect of licences granted under section 16(1), the proper construction of the 1981 Act was that licences granted under section 16(1) could not be subject to such geographical restriction. Had it been the intention of Parliament to confer a general power of geographical restriction, the terms of the legislation would have reflected that. The petitioner's general licences were issued under section 16(1). In these circumstances, the respondent had no power to impose the geographical restrictions put in place by the decisions under challenge.

### (b) *Unreasonableness*

#### (i) INADEQUATE REASONS

[10] In circumstances where, under the heading "Background", it was stated in the Framework that light-touch regulation should not apply in a situation where the regulator had "lost trust or confidence", the only proper or reasonable interpretation was that the situation to be considered was that where the regulator had lost trust or confidence in the owners or managers of the land concerned, or their gamekeeping staff.

[11] It was therefore incumbent on the respondent, in setting out its decisions, to state in whom trust or confidence had been lost and, particularly in what was a context involving criminality, on what basis. It was striking that neither decision met that test, in either respect, either in the generality or in relation to any individual, either expressly or by inference.

[12] Criticism was directed towards the terms of the recommendation for restriction, appended as Annex 3 to the respondent's letter of 30 June 2015. The evidence relied upon was inspecific and unconvincing *viz.*:

### **“Evidence of offences**

On 8 May 2014 a police search was undertaken following the discovery of a buzzard thought to have been poisoned c. 12 months earlier and previous persecution incidents (see history below).

The search found a number of set spring-traps attached to a small homemade cage containing a live pigeon. This was found in a small wood adjacent to the Estate on land owned by Corsehope Farm but kept by Raeshaw Estate. Skeletal remains of other birds of prey were found nearby and near a crow cage trap registered to Raeshaw Estate. A gamekeeper was found in possession of homemade traps identical to the one used to hold the pigeon.”;

### **“Previous intelligence/cases**

2009 – Several poisoned birds (Red Kite and Buzzards) and baits found on estate. Insufficient evidence to charge an individual.

2011 – Satellite tag of a hen harrier stopped working over Raeshaw Estate.

2013 – Dead buzzard found adjacent to Estate. Bird had been shot but died from ingesting pesticide.

2014 – The estate reported damage on the setting of crow traps by unknown persons.”

[13] Against the requirements for “robust” evidence, and assessment of evidence against stated criteria, including “The strength of evidence that those activities had been carried out by owners or managers of that land”, the reasons given included the following:

“In this case there is a considerable history of offences or suspected offences on Raeshaw Estate, who carry out pest control on the higher ground at Corsehope Farm. Similarly this history, and the evidence of this particular incident (identical traps being found in the position of one of the keepers), strongly implicates the involvement of those persons responsible for managing the estate.

On this basis I believe that we do have good evidence of crimes and that those are, on the balance of probabilities, likely to have been carried out by persons responsible for managing Raeshaw Estate and the adjacent land at Corsehope Farm. I therefore feel that we cannot have confidence that those persons can operate under the terms of a General Licence and therefore that the use of General Licences on that land should be restricted.”

[14] On that basis, the process of restriction had been initiated not by concern in relation to individual keepers but rather in relation to the managers of the estate. The strength of the evidence leading to that conclusion was not apparent. Apart from the police search of 8 May 2014, the only evidence since 1 January 2014 had been intelligence provided by the estate.

[15] In each of the two subsequent decisions under challenge, the unsupported accusations against the estate managers, set out in the recommendation, were apparently dropped. In particular, the decision notice of 4 November 2015 included the express statement "Please note that this restriction does not infer responsibility for the commission of crimes on any individuals".

[16] Neither decision indicated a link between the loss of trust or confidence and the estate management. More than that, neither decision employed the phrase "loss of trust or confidence".

[17] In these circumstances, the respondent's decisions failed to follow the stated rationale of the decision-making process which was required if restrictions of general licences were to be implemented. On that basis, the decisions were unreasonable.

## (ii) ILLOGICALITY

[18] In circumstances where the object of the licensing system was to promote the conservation of wild birds, the decisions lacked logic, since their effect, by removing the control of predators, was to frustrate conservation. It would have been open to the respondent to put in place a system of monitoring of the operation of the general licences, rather than the exclusion put in place by its decisions.

[19] Further, the removal of the petitioner's right to use its general licences could have no deterrent effect in respect of the commission of wildlife crime.

[20] Further still, the effect of the decision had a disproportionate impact on the petitioner. Although it would be open to the petitioner to apply for specific licences, the administrative burden of operating such licences was considerably more onerous. The effect of the decisions, to put in place the need to rely on specific licences, was to be characterised as a sanction imposed on the petitioner by the respondent.

[21] Additionally, in the highly charged context of wildlife conservation and associated crime, the effect of the decisions was to stigmatise the petitioner.



[22] Reasons must be intelligible, adequate and such as not to give rise to substantial doubt as to the basis of the decision on the principal important controversial issues (*South Bucks District Council & anr v Porter (No.2)* (2004) 1 WLR 1953, at paragraph 36). The common law had developed beyond the uniform application of the rigid test of irrationality previously thought applicable under the *Wednesbury* principle. The nature of judicial review in every case depended on context. Administrative decisions should be subjected to more rigorous examination according to the gravity of the issues to be determined (*Kennedy v Charity Commission* [2014] UKSC 20, at paragraphs 51 and 52).

[23] In summary, the respondent had lost sight of the need for a proper basis in fact before taking action against the petitioner. There had been a failure to follow the stated rationale of the decision-making process, as indicated by the Framework. No sufficient intelligible reasons had been given. No adequate consideration had been given to the issue of loss of trust or confidence. The effect of the decision was illogical and had a disproportionate impact on the petitioner. The decisions were unreasonable.

(c) *Natural Justice*

[24] The standards of fairness, in the exercise of administrative power, were not immutable and were dependent on the context of the decision. Where fairness required the opportunity to make representations, the person affected should be informed of the gist of the case which he had to answer (*Regina v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560D-G). He must know what evidence has been given and what statements have been made affecting him (*Kanda v Government of the Federation of Malaya* [1962] AC 322, 337-8).

[25] In a context which involved the issue of criminality, the need for openness and transparency in the decision-making process was important. The petitioner had requested further information in relation to the evidence relied upon by the respondent, but had not been provided with it.

[26] Following the notice of intention, issued on 11 June 2015, the petitioner had sought such further information by letter, dated 24 June 2015, by which specific calls were made for greater detail in relation to the available intelligence, the real evidence, and details of the witnesses. Although the respondent's answer, by letter dated 30 June 2015, indicated the extent of the evidence made available by the police, no attempt had been made by the respondent to obtain greater specification. Appendix A to the letter indicated the extent of the available evidence but was, in effect, only a summary of the

available evidence which was not sufficient to allow any meaningful assessment of the evidence itself.

[27] The petitioner had been able to respond to the evidence relied upon, but had been unable to test it, or to assess the possibility of alternative explanations for what had been found. The petitioner had been unable to test the assertion that the skeletal remains found were indeed those of raptors.

[28] In failing to seek further specification in relation to the evidence, as requested, the respondent had failed to take into account the context of the matter, and had confused policy considerations with the need for proper assessment of the basis of the case for restriction. There had been a failure to balance the need for fairness in the decision-making process, insofar as the petitioner was concerned, against the desired aim of securing protection for wildlife. The respondent had given no justification for its failure to disclose further information, in circumstances in which it would have been reasonable to expect the respondent to request and obtain further information in relation to the specific factual basis on which the decision was to be made.

[29] Because that had not been done, the petitioner had been denied the opportunity to investigate the case against it, and was unaware of the specific factual basis on which the decisions had been made. In the whole relevant context, the failure to disclose further specification amounted to a failure of natural justice.

*(d) Legitimate Expectation*

[30] In all legitimate expectation cases, whether substantive or procedural, three practical questions arose. The first question was to what had the public authority, whether by practice or by promise, committed itself; the second was whether the authority has acted or proposed to act unlawfully in relation to its commitment; the third was what the court should do (*R ex parte Bibi v Newham London Borough Council* [2002] 1 WLR 244, at paragraph 19).

[31] In circumstances where the respondent had purported to act under the process set out in the Framework, but had failed to follow its requirements, the decision should be reduced.

[32] The Framework expressly outlined the approach to be followed when implementing restrictions on the use of general licences. In the event, the commitment to proceeding on the basis of robust evidence had been disregarded. Reliance had been

placed on intelligence rather than on evidence. The referable date of 1 January 2014, relevant as the temporal point from which recorded evidence was to be taken into account, had been disregarded. Evidence had not been assessed against the criterion of “The strength of evidence that these activities had been carried out by owners or managers of that land”. Although the recommendation to restrict had been reviewed, the respondent had not “continued to recommend a restriction” in the sense that the recommendation itself, or more precisely the stated justification for it, had not been continued. The basis of the recommendation, that is, that crimes were, on the balance of probability, likely to have been carried out by persons responsible for the managing of Raeshaw Estate, was not reflected in the decisions which followed the petitioner’s response to the notification.

[33] In these circumstances, in which the indicated process had not been followed, the petitioner was entitled to the reasonable expectation that a restriction would not be imposed. On that procedural basis, the petitioner’s legitimate expectation had not been met.

[34] Further, on the basis that the decisions were vulnerable to reasons-based criticisms, the petitioner’s legitimate expectations, in relation to substantive matters, had not been met.

[35] In addition to adopting the submissions presented on behalf of Raeshaw Farms Limited in the associated case, counsel for the petitioner made the following additional submissions, specifically in relation to the position of the petitioner.

[36] The petitioner’s position was to be considered separately from that of Raeshaw Farms Limited. Although on a correct interpretation of the Framework, there required to be a loss of trust or confidence in persons, based on evidence post 1 January 2014, in order to justify any restriction, the effect of the decisions was to restrict the whole area of land owned not only by Raeshaw Farms Limited, but also by the petitioner. The decision had been made, principally in relation to concerns about Raeshaw Farms Limited, and the petitioner had been drawn into the process unnecessarily. No distinction had been made between the petitioner and Raeshaw Farms Limited. No distinction had been made between the land owned by the petitioner and that owned by Raeshaw Farms Limited, and no reason had been given as to why it was necessary to include the whole area of the petitioner’s land in the restriction. It was significant that the decision letters, dated 1 February 2016, in respect of the petitioner and Raeshaw Farms Limited, each imposed the same restriction on the land of both. The respondent had not treated the petitioner and Raeshaw Farms Limited separately, as they ought to have done, and had failed to consider the impact of the decisions on each party

separately. Both decisions were made on the basis of the same evidence. There had been confusion in the decision-making process as to whether what was under consideration was matters concerning persons or matters concerning land.

[37] The land owned by the petitioner comprised two distinct but adjacent areas, being, first, an area of low ground to the north-east of the farm, and, secondly an area of high ground which was kept by the Raeshaw Estate and which included, at its southern extremity, George Wood, to which reference was made in the notice of intention as the location where, during the police search of 8 May 2015, there were found spring-traps surrounding a small cage containing a live pigeon and also, nearby, the skeletal remains of what were said to be birds of prey. The effect of the decisions under challenge was to place restrictions on persons and land. Since the low land comprising part of Corsehope Farm was used for commercial livestock farming, there was no justification, in any event, for extending the restriction to that area.

[38] Insofar as the evidential requirements of the Framework were concerned, the case against the petitioner could not have been assessed on the criterion of “The strength of evidence that these activities had been carried out by owners or managers of that land”, as there was no evidence to link the petitioner to the activities of concern. In that regard, it was significant that in the operative decision, dated 1 February 2016, relating to Raeshaw Farms Limited, it was stated:

“Accordingly, there is no requirement for SNH to link killing or taking to a particular individual when considering whether or not to exclude a particular piece of land (although the strength of evidence in support of such a link is relevant in considering a restriction).”

In contrast, in the equivalent decision relating to the petitioner, the words in parentheses were omitted. That was consistent with the analysis that there was no real link or suspicion to suggest that, unlike the position in relation to Raeshaw Farms Limited, the petitioner was connected with criminal activity.

[39] The notices of intention, dated 11 June 2015, sent to the petitioner and Raeshaw Farms Limited, both indicated that the decision was taken on the basis of the available evidence and the past history of offences and intelligence recorded on the affected land.

[40] In response, the letter of 24 June 2015, sent to the respondent on behalf of the petitioner, stated (1) that the high ground of Corsehope Farm was kept by Raeshaw Farms Limited, (2) that the petitioner had been unaware of the gravity of the allegations

until receipt of the notice of intention, and (3) that the petitioner had suspended Raeshaw Farms Limited's rights over the high ground.

[41] In response to that, the letter sent by the respondent to the petitioner, dated 30 June 2015, which was in nearly identical terms to that of the same date sent to Raeshaw Farms Limited, included, at Annex 3, a recommendation for restriction which was specifically in relation to Raeshaw Estate. The recommendation cited four instances of previous intelligence/cases, all of which were referable to Raeshaw Estate, and the only reference to the petitioner was, in the last paragraph, that the crimes of which there was evidence were, on the balance of probabilities, likely to have been carried out by persons responsible for managing Raeshaw Estate and the adjacent land at Corsehope Farm. That indicated that the recommendation was made not on a consideration of the position of the petitioner, but rather on a consideration of the position of Raeshaw Farms Limited. The consideration had not been in relation to the managers and owners of Corsehope Farm, but rather to the land owned by the petitioner which was kept by Raeshaw Farms Limited.

[42] Similarly, the decision dated 1 February 2016, in relation to the petitioner, repeated the evidence in relation to Raeshaw Farms Limited, set out in the recommendation for restriction. The terms of the decision indicated that it was accepted that there was no direct link between the petitioner and evidence of criminality. The statement in the decision that "... there is no requirement for [the respondent] to link killing or taking to a particular individual or body corporate when considering whether or not to exclude a particular piece of land ...", was at odds with the stated criterion in the Framework by which evidence was to be assessed: "The strength of evidence that those activities have been carried out by owners or managers of that land". In the case of the petitioner, there was no evidence of any such link.

[43] In the decision, no account was taken of the different use of land as between the high ground and low ground comprising Corsehope Farm. It was stated that "... we have reached the view that the continued use of light-touch regulation in the form of the General Licences is not effective on the land on which that evidence has been found.", without recognition that the land concerned was the high ground, comprising part of Corsehope Farm, which was kept by Raeshaw Farms Limited. In that regard, no consideration was given to the distinction between the petitioner and Raeshaw Farms Limited.

[44] In light of these failures, the appropriate course was to reduce the decisions in their entirety, or to reduce them insofar as they related to land owned by the petitioner,

or to reduce them insofar as they related to the low ground comprising part of Corsehope Farm.

### **Submissions for the Respondent**

[45] The provisions of section 16 of the 1981 Act conferred a broad discretion on the respondent, which was not limited by other statutory measures. The broad nature of that discretion was fundamental to consideration of the case. That was so because of the full and broad nature of the licences under consideration, and the fact that, subject to the requirements of administrative law, the relevant decision-making process was not subject to particular requirements to have regard to particular matters. In that context, what was to be taken into account, in relation to the circumstances impacting on a licence under consideration, in particular, in relation to whether a move from light-touch regulation to a more controlled approach was appropriate, was a matter of judgment for the respondent.

[46] Insofar as the question of *vires* was concerned, it was accepted that the terms of section 16(5A) and (6), requiring the specification of the relevant area for the purposes of licences granted under section 16(2) and (3), were specific, but there was nothing in their terms to limit or restrict the broad terms of section 16(5)(a), *viz*:

- “(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;”

[47] It was significant that in respect of the three general licences held by the petitioner, in each case the terms and conditions set out in the licence included the following:

- “5. SNH reserves the right to exclude the use of this General Licence by certain persons and/or on certain areas of land where there is evidence to suggest that a wild bird or birds have either been killed, injured or taken where there has been an attempt to do so other than in accordance with a licence, or where General Licences are being misused.”

In that regard, it was significant that the evidence relied upon, of the finding of a pigeon in a cage surrounded by traps, where there were bird skeletons nearby, was not disputed. The proper interpretation of that evidence was that wildlife offences had

been committed by someone, or that there had been attempts to do so, and that the estate might be involved, notwithstanding that there was no evidence sufficient to implicate the owners or managers of the estate or any particular individual.

[48] The effect of the decisions under challenge was that the use of general licences on Corsehope Farm was excluded for a period of three years. Notwithstanding that, it was open to the petitioner to apply for specific licences. Specific licences could be issued for specific reasons, subject to specific conditions, and were restricted to specific locations. That regime allowed the respondent to impose a greater degree of control, which could include inspection visits to ensure that there was compliance with relevant conditions. It was accepted that the administration related to, and the operation of, a specific licence was more onerous than that of a general licence, but that reflected the change from light-touch regulation to greater control. It was not accepted that the requirement to rely on a specific licence constituted a penalty.

[49] The Framework was a lawful policy which had not been, and was not, the subject of challenge. Against the background of concern to reduce wildlife crime, the phrase “loss of trust or confidence” was properly construed as a reference to loss of trust or confidence that the light-touch regulation referable to the use of general licences was working. In that regard, there was no need for the identification of a particular individual who might be responsible for the loss of trust or confidence. That was apparent from the terms of the Framework and the terms of general licences, which expressly provided for the exclusion of the use of a general licence on a specific area of land where there was reason to believe that wild birds had been taken or killed on that land other than in accordance with the general licence.

[50] The decision of 1 February 2016 was the operative decision and resulted from a full reconsideration of the whole circumstances. It was accepted that the basis of that decision was different from that of the initial recommendation, but it was appropriate that that should have been the case. That was consistent with the appeal process and the exchanges of correspondence between the parties.

[51] Although it was correct to state that the case involved a criminal context, in the sense that there was evidence which suggested that wildlife crime had been committed, there was no finding by the respondent that any offence had been committed by the petitioner, and accordingly the context was not comparable with that of a criminal process.

[52] On the issue of the adequacy of the reasons stated, reference was made to *Co-Operative Group Ltd* [2016] CSOH 88, at paragraph 42:

“The test which therefore had to be applied was whether the reasons given were proper, adequate and intelligible and were such as to leave the informed reader and the court in no real and substantial doubt as to the reasons for the decision. In determining whether this test was met the reasons given required to be read fairly, in good faith and as a whole without an unduly legalistic or critical approach. They required to be read in a down to earth manner, not as if the decision notice was a legal instrument, and as if read by a well-informed reader who understood the principal controversial issues in the case.”

On that approach, the stated reasons met the standard of the requisite test.

[53] As to the challenge that the decision was illogical, although there was a superficial attraction to the petitioner’s submission in this regard, the true position was that in the operation of a licensing regime, it was indeed logical, where apparent criminality was detected, to impose tighter control by encouraging applications for specific licences. The reality was that managers of land would take the appropriate steps to protect their livestock. Where it was necessary to control predators or pests, that would be achieved by the operation of specific licences. The grant of specific licences imposed more control rather than less, and was an appropriate and proportionate response to the available evidence.

[54] In response to the submission that there had been a breach of natural justice, it was relevant to note that in exercising discretion, a public body, when acting fairly and in good faith, was not bound to treat the decision-making process as though it was a trial (*Board of Education v Rice* [1911] AC 179, 182).

[55] Subject to the requirement on it to act in good faith, the manner in which the decision-making process was conducted was a matter of discretion for the respondent. Evidence had been obtained from the police which had been apparently credible. The petitioner had been given a fair opportunity to contradict it. There was no requirement on the respondent to go further than that. In particular, there was no requirement on it to seek further information from the police. Reference was made to the case of *Doody*, *supra*, at page 560F:

“[4] An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.” ;

and at page 560H-561A:



“...it is not enough for [the respondents] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision-maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.”

[56] In the context of the evils that lead to particular legislation, a decision-maker should investigate the credentials of those who make application to them and can and should receive information from the police or any other reliable source. Applicants must, however, be given the chance of answering such information, but in that context a decision-maker may not be bound to disclose every detail. An applicant must be given sufficient indication of the objections raised against him such as to enable him to answer them (*Reg. v Gaming Board for Great Britain ex parte Benaim and Khaida* (1970) 2 QB 417, 431A-G).

[57] In that context, substantial fairness and natural justice did not necessarily require the disclosure of precise evidence or sources of information. It could be achieved through disclosure of the substance of the case to be met, provided there was an opportunity for that case to be answered.

[58] The respondent had been entitled to rely on the police evidence. Although the petitioner had asked for details of the bird carcasses, there was no duty incumbent on the respondent to provide more than the information it had. In circumstances in which it was permissible to rely on hearsay evidence, the respondent was entitled to rely on the police identification of the birds concerned.

[59] In relation to the challenge to the quality of the evidence relied upon, and the respondent's assessment of it, it was relevant to note that where the existence or non-existence of a fact was left to the judgment and discretion of a public body, and that fact involved a broad spectrum ranging from the obvious to the debatable to the just conceivable, it was the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power (*Puhlhofer and another v Hillingdon London Borough Council* [1986] 1AC 484, 518). Against that background, in the exercise of the administrative task before it, in circumstances in which neither criminal liability nor personal responsibility was being determined, the respondent had a wide discretion. It was accepted that, of course, the petitioner had legitimate expectations arising from the terms of the Framework, but in making the

decision which it did, the respondent had adhered to the rationale and the criteria of the policy.

[60] The terms of the decision of 1 February 2016 made it plain that there had been taken into account all aspects of the decision-making process which had gone before it. It set out the relevant evidential requirements, which had been correctly applied. In particular, it noted correctly, in relation to the referable quality of evidence, that the question was whether or not the evidence of the killing or taking of birds was robust, rather than whether there was robust evidence that an individual was responsible. Whether there was such robust evidence was a matter for the respondent to judge. The available evidence met the requirement of the Framework in that regard. The decision letter set out the extent of the evidence and noted the criticisms of it made by the respondent. It set out the respondent's assessment of the available evidence and how it was taken into account.

[61] In relation to the submission concerning evidence relating to matters preceding 1 January 2014, it was to be noted that the Framework specifically required that in making a decision, each piece of evidence was to be assessed against criteria which included "Any history of previous, similar instances." On that basis, the respondent was entitled to take into account evidence relating to matters prior to 1 January 2014. In any event, the decision of 1 February 2016 indicated clearly that although such matters were taken into account, they had not been determinative, *viz.*:

"I have reconsidered the detail of the evidence of historic instances provided by Police Scotland for the purposes of this appeal. Whilst I accept that certain of those matters provide some helpful context in which the post-January 2014 evidence can be set, I do not consider that the evidence of history instance has a material bearing on the decision of whether or not to impose a restriction in this case.

I find that even if the historical evidence had not been provided, it would be appropriate for a restriction to be imposed in this case, on the basis of the post 1 January 2014 evidence."

[62] The decision dealt with each of the specific grounds of appeal. In particular, in relation to the issue of why the petitioner should be affected when the land referable to the evidence of wildlife crime was kept by Raeshaw Farms Limited., it stated the following:

"Neither the DOps nor I have determined that Raeshaw (or Walgate) is responsible for the offences of which evidence has been found. Nevertheless,

there is evidence and the evidence is such that we have reached the view that the continued use of light-touch regulation in the form of the General Licences is not effective on the land on which that evidence has been found. If the licensed killing and taking of wild birds is to continue on such land, then it requires to be done subject to tighter regulation in the form of an individual licence, subject to such conditions as SNH sees fit to impose, within its statutory power.

For the same reasons, the suspension of Walgate's arrangement with Raeshaw does not alter my decision that a restriction is justified. There is no determination that Raeshaw was responsible and it cannot be concluded that the suspension of their keeping activities on Corsehope will result in offences ceasing. In any event, Walgate could presumably lift the suspension at any time. I would add that the identity of the individual/s applying for an individual licence is plainly a relevant consideration in the consideration of such an application."

[63] In relation to the issue of whether the effect of the decision should be restricted to a smaller area, that is, only the part of Corsehope Farm comprising the high ground, the following was stated:

"In viewing the DOps decision I see that he did give consideration to imposing a restriction on a smaller area. Reflecting on the request from Corsehope Farm to limit their restriction to the higher ground, it was concluded that it should extend to the whole property on the basis that the owners retain a significant responsibility for land they own even if they agree to let shooting rights to others.

That a large area of your land is subject to this restriction is a matter that can be addressed through appropriate conditions of a licence obtained on application and issued to the individually named and responsible person(s).

I have reconsidered as part of this appeal the possibility of imposing a less extensive restriction. I find that the restriction proposed by DOps is justified in this case for the reasons set out above."

[64] The length of the decision reflected the content of the substantial note of appeal tendered on the petitioner's behalf. It was not the case that the decision-maker had dealt with the cases of the petitioner and Raeshaw Farms Limited together. The petitioner's position and the grounds of appeal raised by it, had been considered separately. The reasons stated were full and correctly addressed the issues raised by

the petitioner. Read as a whole, by an informed reader, the reasons stated as the basis for the decision were entirely adequate and dealt appropriately with all the substantial issues raised.

## **Discussion**

[65] The challenges made in this case are directed to decisions taken in pursuance of the respondent's stated policy as constituted by the Framework. That policy, which is not itself the subject of challenge, while reflecting the broad nature of the discretion conferred on the respondent by section 16 of the 1981 Act, sets out the matters to be taken into account by the respondent when determining whether a move from light-touch regulation, by the use of general licences, to a more controlled approach, is appropriate. The implicit assumption is that in the absence of the operation of general licences, land owners and managers of estates will seek to protect their interests by applying for specific licences.

[66] It is apparent that at the heart of the policy is the concern to deal with wildlife crime which involves *inter alia* the taking or killing of wild birds other than in accordance with general licences. Where there is a sufficiency of evidence indicating such criminality on the part of identifiable individuals, the control of the problem will be maintained by the authorities, in the form of prosecution. Against that background, it is reasonable to infer that the policy has been developed to deal with situations in which the evidence pointing to criminality is less than sufficient to merit criminal proceedings.

[67] In considering matters relating to the quality and quantity of evidence to be taken into account for the purposes of the Framework, and its assessment, it is appropriate to bear that distinction in mind. Thus, while it is correct to state that the decision-making process anticipated by the Framework has a criminal context, that is so only to the extent that it is the need to deal with perceived crime, or attempted crime, which underlies it. In what is essentially an administrative decision-making process, I attach little weight to any further comparison with criminal proceedings and the rigour applied to evidential matters in that context.

[68] It was suggested that, in the highly charged context of the public perception of wildlife crime, the restriction of the general licences could stigmatise the petitioner. While that may be so, any inference of criminality underlying such consequences could only arise from a misapprehension of the system of control in place, particularly in

relation to the petitioner, in respect of which, expressly, no imputation of criminality has been made.

[69] On a proper interpretation of the section, in particular, having regard to the use of the phrase “to any degree”, the terms of section 16(1) of the 1981 Act are sufficiently broad to allow the geographical restrictions on the petitioner’s general licences put in place by the decisions under challenge. The terms of section 16(5A) and (6), though specific in relation to their own application, do not limit or restrict the operation of section 16(5) in its application to general licences issued under section 16(1). Accordingly, the decisions under challenge are not *ultra vires* in that respect.

[70] I accept that the reference to loss of trust or confidence, as stated in the Framework, and characterised as its rationale, is properly to be construed as a reference to a situation where the regulator has lost trust or confidence that the system of light-touch regulation, referable to the use of general licences, is effective, rather than that trust or confidence has been lost in a particular individual or individuals. That interpretation is consistent with the stated policy which is that, in such circumstances, an alternative approach, involving greater control, should be substituted. It is not a necessary condition for recognition that the system in place is not effective that a particular individual or individuals should be identified as being responsible. In that regard, in the context of an insufficiency of evidence such as to justify prosecution, the Framework provides a mechanism whereby a decision to impose greater control can be justified, notwithstanding the possibility of a lack of evidence indicating the identification of any perpetrator of an indicated offence.

[71] That being so, I find that there was no requirement on the respondent to state in whom trust or confidence had been lost, and that the statement in the decision, dated 1 February 2016, to the effect that there was no requirement to link the killing or taking of wild birds to a particular individual, when considering whether or not to exclude a particular piece of land, was correct.

[72] In passing, I would add that it does not follow from the absence, in either decision under challenge, of the phrase “loss of trust or confidence”, that the criterion has been disregarded or ignored. On a fair reading of either decision, reflecting the approach summarised in the *Co-Operative Group, supra*, it is apparent that the facts set out and relied upon by the decision-maker, fulfilled the relevant test.

[73] For the petitioner, some emphasis was placed on what was described as the somewhat inspecific and unconvincing nature of the evidence relied upon, as set out at Annex 3 to the letter of 30 June 2015. That evidence included the finding, during a

police search on 8 May 2014, of a number of set spring-traps attached to a small cage containing a live pigeon. These particular facts appear not to have been challenged. The assessment of that evidence, in the context of the relevant history and other evidence identified, was a matter of judgment for the respondent, to be made having regard to the criteria set out in the Framework. In that respect, having regard to the proper interpretation of the stated rationale for imposing a restriction, that is, that there should be a loss of trust or confidence in the efficacy of light-touch regulation, rather than in any particular individual, I accept that the statement made in the decision of 1 February 2016, to the effect that the question was whether or not the evidence of killing or taking was robust, rather than whether or not there was robust evidence that a particular individual was responsible, was correct.

[74] Amongst the criteria against which evidence was to be assessed, in terms of the Framework, was “The strength of evidence that those activities had been carried out by owners or managers of the land”. For the reasons I have given in relation to the proper interpretation of the central rationale of the Framework, I do not accept that the existence of that criterion means that before a restriction could be put in place, there must necessarily be evidence, of acceptable strength, of such a link. That criterion was one of a number, set out in a non-exhaustive list, against which evidence was to be assessed, and, given the context of the decision-making process, in circumstances where the evidence is insufficient to justify prosecution, it could be readily understood that there might be no available persuasive evidence to that effect. In such a situation, the necessary decision would be legitimately informed by reference to the remaining criteria set out in the Framework, and, presumably, by others, appropriate in the particular circumstances of any given case.

[75] No doubt, if there was evidence of persuasive strength of such a link, that would weigh significantly in the decision, but on the analysis I have set out, the statements in the decision of 1 February 2016, to the effect that the Framework did not require direct evidence of criminality implicating a particular individual in order for a restriction to be imposed, and that the decision-maker found that there was no evidence of such a link in the case of the petitioner, were both consistent with the intended approach.

[76] The indication in the Framework, that what may be considered is examples of evidence since 1 January 2014, must be read together with the statement that amongst the criteria against which each piece of evidence will be assessed, is “Any history of previous similar instances”. Thus, in assessing the evidence available from the police search on 8 May 2014, as the primary basis for any consideration of a restriction, the respondent was entitled to have regard to the earlier instances listed in the recommendation for restriction under the heading “Previous Intelligence/Cases”.

[77] The decision of 1 February 2016 indicates that on the basis of the evidence available since 1 January 2014, it was unnecessary to consider the evidence of historic incidents, but that, nevertheless, that exercise had been carried out for completeness. On a fair reading of the decision letter, I find that consideration of the incidents prior to 1 January 2014 was not determinative.

[78] It is plain that the respondent's licensing manager considered, as set out in the recommendation to restrict, that there was good evidence of circumstances which, on the balance of probabilities, were likely to have been carried out by persons responsible for managing Raeshaw Estate and the adjacent land at Corsehope Farm, and equally plain that the assertion of criminality against that group was not repeated in either of the decisions under challenge. I am not persuaded, however, that those facts are indicative of a failure to follow the rationale of the Framework. That was suggested to be the case because of the statement in the Framework (under the heading "The decision to restrict") that a restriction will be imposed where, following response to the notice of intention, the respondent continues to recommend a restriction.

[79] I am satisfied that the absence in the decisions under challenge of the allegation made in the recommendation for restriction, against those responsible for managing the estate, is not significant. In particular, given the procedural history of the decision-making process, it is the decision of 1 February 2016 which is the operative decision, and therefore the decision principally under challenge. I accept that that decision was made on the basis of all the information available to that point, including the representations made on behalf of the petitioner. That being so, the decision of 1 February 2016 was made on consideration of a greater range of issues than was the recommendation to restrict, and in such circumstances it is fair to say that, although the effect of each was the same, the decision of 1 February 2016 was made on a basis different from that of the initial recommendation. As submitted for the respondent, that was appropriate, and consistent with the appeal process and the exchanges between the parties. In that regard, while the allegation of criminality directed towards the estate managers was not maintained, the material essence of the recommendation, that is, that on the basis of the available evidence there should be a restriction, was continued.

[80] The assertion that the restriction of general licences, by exclusion of their use, had the effect of undermining the legislative intention, to protect and conserve wildlife, could have force only in circumstances in which no alternative measure was in contemplation. In that regard, I accept that, in reality, in such circumstances, the effect of such restriction is to encourage land owners and estate managers to apply for specific licences. The purpose of such licences is to maintain the legislative intention behind section 16 of the 1981 Act, but in a system subject to greater control. While it is correct

that the Framework does not embrace the possibility of alternative measures to restriction, the effect of the stated policy is that greater control is to be implemented in circumstances in which there has been a loss of trust or confidence that light-touch regulation is working. On that basis, the suggested illogicality of the decisions under challenge is an artificial concept. It is, no doubt, the case that the grant of a specific licence imposes a more onerous administrative burden on the licence holder, but that is consistent with the policy of the Framework, which is to institute greater control in appropriate circumstances. On that basis, the fact that in making the decisions under challenge, the respondent followed stated policy is not in itself a valid ground of criticism.

[81] In the particular circumstances of this case, I do not consider that a breach of natural justice arose by failure on the part of the respondent to disclose adequate particulars in relation to the evidence relied upon. The core facts concerning the set spring-traps, attached to a cage containing a live pigeon, were not challenged. It is not clear that the skeletal remains, said to be those of birds of prey, remained available at the time of the recommendation for restriction, or the subsequent notice of intention, dated 11 June 2015. In any event, as previously stated, the purpose of assessment of the evidence was to assess whether light-touch regulation was effective, rather than whether any particular individual was responsible for wildlife crime.

[82] Against that background, the respondent was entitled to rely on the evidence provided by Police Scotland, so long as the petitioner was informed of the substance of the case which it had to answer, and had the opportunity to make representations to contradict it (*Doody, supra*).

[83] The requirements of natural justice, in this context, are referable to the particular circumstances of any given case. In that regard, the respondent was entitled to exercise its discretion as to how the decision-making process should be conducted. In the particular circumstances of this case, I do not consider that, in determining not to seek further information from the police, the respondent exercised that discretion inappropriately. Although, plainly, the petitioner's request for further specification was refused, it does not follow that in the particular circumstances of this case the petitioner suffered prejudice thereby. The question at large was not whether the petitioner was responsible for wildlife crime but whether wildlife crime, or an attempt to commit it, had taken place on the land concerned. In that regard, I attach weight to the fact that the evidence of the caged live pigeon and associated spring-set traps was unchallenged.

[84] I am not persuaded that the respondent failed to consider the position of the petitioner separately from that of Raeshaw Farms Limited. In that regard, I do not



attach weight to the fact that it was expressly stated in the decision of 1 February 2016 that there was no direct evidential link between the petitioner and any identified criminality. For the reasons I have set out, the issue to be determined by the respondent was whether or not there was evidence on which reliance could be placed, to suggest that there was scope for loss of trust or confidence in the efficacy of the light-touch regulation in place. As stated in the decision of 1 February 2016:

“...the evidence relied upon by the DOps and reconsidered by me in this appeal, is not evidence ‘against’ Walgate: it is evidence of offences and/or of wild birds having been taken or killed other than in accordance with the General Licences.”

[85] Against the background of the terms of the Framework and the general licences, which expressly provided for the exclusion of the use of a general licence on a specific area of land where there was reason to believe that wild birds had been taken or killed other than in accordance with the general licence, the decision of 1 February 2016 stated:

“The combined evidence of the spring-traps surrounding a live pigeon contained within a small homemade cage and the evidence of skeletal remains of birds of prey found nearby, all on Corsehope, is evidence that wild birds have been taken or killed other than in accordance with the terms of the General Licences, on Corsehope.”

[86] I find that the decision of 1 February 2016 reflected the content of the note of appeal tendered on behalf of the petitioner and that, read properly, it indicates that the grounds raised in the note of appeal were considered separately from the position relating to Raeshaw Farms Limited.

[87] Accordingly, for these reasons, I am not persuaded that the operative decision under challenge was *ultra vires*, that there was a failure to follow the rationale of the Framework, that the decisions were illogical or disproportionate in their impact, that there was a breach of natural justice, or that there was a failure to meet the petitioner’s legitimate expectations.

[88] There remains the issue of the extent of the restriction imposed. In that regard, I am not persuaded that the reasons stated are adequate. Although the terms of the decision include reference to the issue raised by the petitioner in relation to the extent of Corsehope Farm to be affected by the restriction, the operative passage is brief and it does not involve consideration of the different land uses referable to the high ground, on the one hand, and to the low ground, on the other, or to the fact that the part of Corsehope Farm comprising the high ground, where the evidence informing the

decision was found, is significantly different in character from that of the low land, and was subject to a different management regime.

[89] The material passage in the decision is in the following terms:

“In reviewing the DOps decision I see that he did give consideration to imposing a restriction on a smaller area. Reflecting on the request from Corsehope Farm to limit the restriction to the higher ground, it was concluded that it should extend to the whole property on the basis that the owners retained a significant responsibility for land they own even if they agree to let shooting rights to others.

That a large of area of your land is subject to this restriction is a matter that can be addressed through appropriate conditions of a licence obtained on application and issued to the individually named and responsible person(s).

I have considered as part of this appeal the possibility of imposing a less extensive restriction. I find that the restriction proposed by the DOps is justified in this case for the reasons set out above.”

While that reasoning is a justification for including the high ground within the area of the restriction, it is not a reasoned basis for including the low ground within it. On that analysis, I find that in this regard, in determining that the low ground should be included in the area of the restriction, the respondent failed adequately to consider its distinct nature relative to the evidence on which reliance was placed.

## **Decision**

[90] For these reasons, I shall sustain the petitioner’s fourth and fifth pleas-in-law, repel the petitioner’s first, second, third and sixth pleas-in-law, repel the respondent’s second, third, fourth and fifth pleas-in-law, and order the reduction of the decision notices dated 4 November 2015 and 1 February 2016, to the extent that they purport to restrict the use by the petitioner of general licences issued under section 16 of the 1981 Act over the low ground comprising part of Corsehope Farm which was not kept by Raeshaw Farms Limited. I understand that ground to be that hatched in blue on the map, and as indicated on the schematic diagram, both together comprising No 19/22 of process.

[91] I reserve, meantime, all questions of expenses.

