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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NOELEEN McALEENON FOR JUDICIAL REVIEW

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Hugh Southey QC and Sarah Minford (instructed by Phoenix Law) for the Applicant
Gordon Anthony (instructed by Arthur Cox) for the first Respondent
Tony McGleenan QC and Maria Mulholland (instructed by the Departmental Solicitor's Office) for the second and third Respondents
Stewart Beattie QC and Simon Turbitt (instructed by Carson McDowell) for the first Notice Party
Denise Kiley (instructed by Belfast City Council Legal Services Department) for the second Notice Party

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HUMPHREYS J

Introduction

[1] Alpha Resource Management Limited ('Alpha'), the first notice party to these proceedings, owns and operates a landfill site at Mullaghglass near Lisburn in Co Antrim ('the site'). The applicant for judicial review resides in the Milltown estate, close to the site, within the Lisburn and Castlereagh City Council ('LCCC') district.

[2] In these proceedings, the applicant seeks to challenge the alleged failures by LCCC to conduct proper investigations into complaints of nuisance odour pursuant to its statutory duties.

[3] In addition, the applicant challenges alleged failings on behalf of the Northern Ireland Environment Agency ('NIEA') and the Department of Agriculture, Environment and Rural Affairs ('DAERA') in relation to the fixing of emission guideline values, limits or standards for the permit under which the site operates.

[4] The applicant says that all the respondents have failed to act appropriately to secure abatement of the nuisance which has interfered with her right to family and private life secured by Article 8 of the European Convention on Human Rights ('ECHR').

[5] The applicant's case has undergone significant revision and refinement during the course of the proceedings, claims in relation to breach of Article 2 ECHR and various other statutory duties having been abandoned.

The Applicant's Evidence

[6] The applicant lives 1.25 miles from the site. She states that she has been plagued by nuisance odour emanating from the site since it opened in November 2006. She describes this as being a rotten egg smell which occurs very regularly. She ascribes her headaches, runny nose, watering eyes and nausea to the noxious odour. As a result, the applicant says she is forced to seal herself indoors and is unable to enjoy her garden which has had an adverse effect on her mental health. This situation has been exacerbated by the Covid-19 pandemic. In order to attain some respite from the smell, the applicant stays at a different property over the weekends

[7] Other local residents have made similar complaints. Mairead Connolly lives in the Mount Eagles area which is within the Belfast City Council ('BCC') district. The site sits within the district of LCCC but is only some 550 metres from the boundary with the BCC district. She has deposed to her experience of the odour emanating from the site and her particular concerns about the health of her children. Ms Connolly was involved with officials from BCC and NIEA and this led to an abatement notice being served by BCC on 27 April 2021. Despite this, she states that no improvement has occurred.

[8] The court has also had the benefit of affidavit evidence from other residents who recount their experiences with the noxious odour and the impact which it has had on their family lives and wellbeing.

[9] Following the first instance decision in *R (Mathew Richards) v Environment Agency* [2021] EWHC 2501 (Admin), the solicitors acting for the applicant made contact with Dr Ian Sinha, a consultant respiratory paediatrician based at Alder Hey Children's Hospital in Liverpool. Dr Sinha had provided expert evidence to the court in the *Richards* case. At his suggestion, a survey was carried out by way of a questionnaire sent to residents of the area and he prepared an expert report based in part on the data contained in the survey.

[10] Dr Sinha's areas of particular expertise are childhood asthma and neonatal lung disease. Without examining any of the children living in the area or visiting the site, Dr Sinha concluded:

> "The air pollution from the landfill site is harmful to the respiratory system of the children living nearby. By potentially suffering irreparable airways damage, these children are at risk of diseases such as Chronic Obstructive Pulmonary Disease (COPD) … I would conclude the landfill site is (i) a threat to both the current and future health of these children, and (ii) a threat to life because this increases the risk of premature death."

[11] Dr Sinha is also able to identify hydrogen sulphide (H_2S) as the primary air pollutant and deposes to the levels of same as being "clearly significant", sufficient to cause lung damage and reduction of life expectancy.

[12] Following the service of evidence on behalf of the respondents from Dr Cromie of the Public Health Agency ('PHA'), Dr Sinha provided a response document. It states:

> "Dr Cromie concludes that the levels of H_2S are within recommended limits but I would disagree with this. He concludes … that the measured levels locally are *'incapable of causing a physical health effect'*, but I do not think this is a justified statement.
>
> Dr Cromie feels that there is no widespread health impact of the landfill site on the community, but I would argue that there is no evidence to justify this claim."

[13] Central to Dr Sinha's findings is the harm potentially caused by low-level chronic exposure, an issue he describes as "the pivotal and crucial aspect of the *Richards* case." In relation to the guidance as to safe levels of exposure, Dr Sinha extracts and relies upon the following table:

WHO air quality guidelines	**ATSDR-MRL**	**US EPA RfC**
30 minute (average) 7 µg/m³ (5 ppb) Based on odour annoyance **24-hour (average)** 150 µg/m³ (107 ppb) Based on eye irritation in humans	**Intermediate (up to 1 year)** 30 µg/m³ (20 ppb) Based on lesions of the nasal olfactory epithelium in rats	**For assessment of lifetime exposure** 2 µg/m³ (1 ppb) Based on lesions of the nasal olfactory epithelium in rats

[14] This table requires a little explanation. Column 1 represents the guidelines from the World Health Organisation. According to it, 7 µg/m³ (or 5 parts per billion), on average, over a period of 30 minutes will cause 'odour annoyance'. Exposure at the level of 150 µg/m³ (or 107 parts per billion), on average, over a 24 hour period will lead to eye irritation. The United States Agency for Toxic Substances and Disease Registry ('ATSDR') has set out a 'Minimum Risk Level' ('MRL') for exposure of up to one year of 30 µg/m³ (20 parts per billion). An MRL is an estimate of the daily human exposure to a hazardous substance that is likely to be without appreciable risk of adverse non-cancer health effects over a specified duration. The US Environmental Protection Agency ('EPA') has set a Reference Concentration ('RfC') for lifetime exposure of 2 µg/m³ (1 part per billion). This is defined as:

> "An estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population … that is likely to be without an appreciable risk of deleterious effects during a lifetime."

[15] It should be noted that, in fact, 2 µg/m³ is equivalent to 1.4 ppb.

[16] On this analysis, Dr Sinha concludes, the long term average levels of H_2S at Mullaghglass should be below 1 ppb. He states:

> "PHE [Public Health England] have deemed that 1 ppb should be the limit for H_2S when people in England are exposed to the gas for anything over 365 days … The outcome of the Richards case was that the Environment Agency had to ensure that the Walleys Quarry landfill site reduced the levels of H_2S to 1 ppb within a matter of months and, notably, this was not disputed when the case was heard in the Court of Appeal."

[17] In a further response document, prepared following the service of evidence from Alpha, Dr Sinha continues the theme in relation to the Richards litigation, asserting:

> "Judge Fordham agreed with me that landfill emissions did pose a threat to Mathew's human right to life, and he ruled that levels of H_2S should be urgently brought to one part per billion (1 ppb), as per recommendations of Public Health England (PHE – now UK Health Security Agency [UKHSA], as they felt levels above this may be hazardous to the long-term health, and indeed life expectancy, of children."

[18] The assertion provides the cornerstone to Dr Sinha's evidence which is that children should not be subjected to higher levels of pollution in Northern Ireland than are permitted to pertain in England. Despite robust challenge from other experts, Dr Sinha's opinion in relation to the harm being caused to children in the area remained unchanged.

[19] It is noteworthy that the paediatrician actually treating one of the children who lives close to the site has found no causal link between emissions and symptoms. No medical evidence at all has been forthcoming which makes such a causal link. It is no doubt for this reason that the Article 2 aspect of this case was not pursued.

[20] The applicant also relies on evidence from Dr David Dickerson, an environmental consultant with experience in the field of monitoring and control of air pollution. He concludes:

(i) The topography of the site is likely to encourage the phenomenon of cold drainage flow in certain conditions, allowing odorous air to be carried to the settlements below;

(ii) NIEA had overlooked this phenomenon in its investigations;

(iii) The levels of H_2S suggested that gypsum from plasterboard may have entered the site;

(iv) The results of testing in 2021 ought not to be relied upon;

(v) The Jerome portable monitor will not detect H_2S at levels below 3 ppb;

(vi) Between 2019 and 2021 there was a very significant increase in the level of odour complaints around the site which can only be due to greater concentration of H_2S being released from the site.

The Evidence of the First Respondent

[21] The Environmental Health Manager of LCCC, Sally Courtney, has sworn an affidavit addressing the claim that it has failed to comply with its obligations under section 64(b) of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 ('the 2011 Act'). In broad terms, she avers:

(i) LCCC has worked closely with NIEA and BCC in investigating complaints;

(ii) LCCC has carried out monitoring and site visits;

(iii) None of the evidence has led officers to conclude there has been a statutory nuisance and therefore no enforcement action has been taken;

(iv) The situation remains under review and any further complaints will be investigated accordingly.

[22] Ms Courtney asserts that the "primary responsibility for monitoring the site rests with the NIEA." On this basis it is said that LCCC has directed the applicant, and other complainants, to the NIEA.

[23] Nonetheless, the evidence reveals that a number of investigatory steps have been taken in relation to Mullaghglass. The applicant registered a complaint on 31 December 2019 in relation to an "extremely bad smell." At that time she was referred to the NIEA, whom it was understood had been involved in issues relating to the site previously. No further contact was received from the applicant until her pre-action letter was sent on 12 April 2021.

[24] A report was received from a different complainant in early January 2021 which led to a site meeting between Mr McLaughlin of LCCC and representatives of NIEA, BCC and Alpha. This was followed by a meeting between Mr McLaughlin, local residents and elected representatives. The month of January 2021 saw some 41 complaints come forward.

[25] Throughout 2021 weekly meetings took place between LCCC and NIEA at which complaints were discussed and the NIEA provided briefings on its inspection and permit compliance programme. This information was shared with councillors at subsequent LCCC meetings.

[26] In March 2021 Ms Courtney sent letters and odour diaries to complainants. The information gleaned from these diaries was intended to supplement the work of NIEA and guide any next steps. Later that month a communication was sent to all complainants in relation to the work done to wells at the site to attempt to minimise the odour. Further regular meetings also took place with residents and their representatives.

[27] Between 26 April and 30 June 2021, 46 daily odour monitoring visits were carried out by LCCC officers. In July 2021 LCCC received a copy of the report prepared by Tetra Tech, consultants engaged by NIEA. On the basis of the evidence available, which included the residents' odour diaries as well as the findings of the monitoring exercises, LCCC concluded that there was no statutory nuisance. Complaints reduced during 2021 as did the frequency of monitoring.

The Evidence of the Second and Third Respondents

[28] The evidence of Colin Millar, Principal Scientific Officer in the NIEA, explains that the site is operated by Alpha pursuant to a permit issued by NIEA under the

Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 ('the 2013 Regulations'), the current version of which is dated 12 December 2021. The site was first authorised for use as a non-hazardous landfill site in 2006.

[29] The case advanced by Mr Millar, in summary, is that NIEA has found no justification for taking any enforcement action against Alpha in respect of odour emanating from the site. The NIEA has regularly undertaken monitoring of the site in order to ensure compliance with the terms of the permit. There is in place an Odour Management Plan ('OMP') to prevent or minimise the escape of odour, the most recent version of which is dated 1 April 2021. The permit states:

> "1.1.6 The Operator shall undertake a daily inspection of the site for compliance with the conditions of this Permit. The inspection shall include … gas … and…odour.
>
> 4.4.1 Emissions from the activities shall be free from odour at levels likely to cause annoyance outside the site, as perceived by an Authorised Officer of the Chief Inspector, unless the Operator has used appropriate measures, including, but not limited to, those specified in any approved odour management plan, to prevent or where that is not practicable to minimise odour."

[30] The presence or emission of odour is therefore recognised and does not, of itself, amount to a breach of condition. The measures prescribed by the OMP include monitoring, the installation of landfill gas infrastructure, capping and covering, checking of waste, record keeping and investigation. Technical Guidance Note H4, published by the Environment Agency in England ('EA'), addresses Odour Management. It refers to the 'FIDOR' method of assessing the seriousness of pollution, this being an acronym for:

- Frequency of detection
- Intensity as perceived
- Duration of exposure
- Offensiveness
- Receptor sensitivity.

[31] Mr Millar's affidavit records that between September 2020 and November 2021 some 1092 complaints were received, from 423 complainants, in respect of odour claimed to be emanating from the site. The most significant number of complaints occurred in January 2021. From his perusal of the records, Mr Millar can find no record of a specific complaint made by the applicant to NIEA prior to the issuing of pre-action correspondence

[32] Following the initial NIEA inspection in September 2020, various works have been undertaken by Alpha, including:

(i) The reduction in the size of the working face;

(ii) The installation of additional gas well infrastructure;

(iii) A change of daily cover; and

(iv) Extension of odour monitoring and masking.

[33] NIEA has engaged in odour assessment across 18 different locations and this involves both 'sniff' testing and the use of a Jerome monitor. The findings from the monitoring include:

(i) Background levels of H_2S in Antrim and Newtownards were found to be comparable to levels detected near the site;

(ii) No significant levels of H_2S were detected during cold flow drainage conditions in December 2021;

(iii) When H_2S was recorded near the site, it was within the 5ppb WHO guideline.

[34] Mr Millar also deposes to the engagement between NIEA, LCCC and BCC, as well as with the PHA.

[35] Mr Millar has been in contact with representatives of the EA in relation to the regulation of Walley's Quarry. He was advised that there is no condition in the permit for that site which requires air quality to meet any specific standard in relation to H_2S. Equally, the EA was unaware of any landfill site in England subject to such a requirement. The February 2022 EA "Plan to reduce hydrogen sulphide emissions" at the quarry reveals that the EA sought advice from the UKHSA which was that there should be a reduction to meet the WHO 30 minute odour annoyance average and the US EPA lifetime value. As a result of this recommendation, the EA has required the operator of that site to implement measures as quickly as possible.

[36] Mr Millar stresses a number of differences between Mullaghglass and Walley's Quarry. The latter is located in an area of high residential density; there were some 45,000 complaints within a short period; the monitoring revealed sustained levels of H_2S around 200 $\mu g/m^3$ for a period of months in 2021. None of these conditions were present at the site at Mullaghglass.

[37] In May 2021 NIEA engaged the services of a third party company, Tetra Tech, to carry out an analysis of emissions at and near the site. The highest level of H_2S which it recorded at the site boundary was 1.73 $\mu g/m^3$. It has also instructed Keiron

Finney, of Exea Associates, a Chartered Chemist with an expertise in landfill gas to prepare a report for the purposes of these proceedings. He concludes, in summary:

(i) The monitoring data does not show elevated levels of H_2S;

(ii) There are elevated levels of H_2S within the gas collection system;

(iii) The permit holder is using appropriate techniques to manage emissions from the site, including capping, daily cover and gas collection wells.

[38] Evidence has also been adduced from Dr David Cromie, a consultant in public health employed by the PHA. He has visited the site and met with officials from NIEA and Alpha as well as considering the affidavit evidence and the expert reports. In his opinion, and accepting that a number of people have experienced varying degrees of malodour, any physical health impacts have not been caused by emissions from the site.

[39] During the course of the hearing, the court was provided with a further report into the cold flow drainage phenomenon, with testing having been carried out on various dates between December 2021 and March 2022. The figures produced show levels of H_2S ranging between less than 3ppb (when nothing is picked up by the Jerome monitor) up to a high of 7.2ppb. It is noted that levels similar to these have been detected in ambient air in other parts of Northern Ireland. The conclusion is that cold flow drainage is unlikely to occur to any measurable extent at the site.

[39] NIEA has concluded that there is no risk of serious impact on the environment or public health, in light of the evidence, sufficient to trigger enforcement action. Equally, it has formed the opinion that the operation of the site does not involve an imminent risk of serious pollution.

The Evidence of Alpha

[40] The evidence of Alpha included an affidavit from a director, Aidan Mullan. He explains that the site is coming to the end of its natural life and is likely to cease accepting landfill later this year. Following that, extraction of landfill gas will continue and this is used to generate electricity. He also stresses that the infilling of household 'black bin' waste is a vital public service.

[41] Mr Mullan details the steps taken by Alpha on the site in relation to odour management pursuant to the OMP, and asserts that at all times Alpha has used best available techniques ('BAT'). Mr Mullan also deposes to the engagement which he and other members of staff have had with NIEA and LCCC and references the findings by NIEA that the site is being operated in full compliance with the permit.

[42] Alpha takes particular issue with the assertion, unsupported by any evidence, that gypsum has been accepted at the site.

[43] Adrian Thompson, Chartered Waste Manager, was instructed by Alpha as an expert witness. He carried out odour assessments at the site throughout 2021. On two occasions out of 40 surveys was an odour attributable to the site detected. These were classified as very faint, transient and intermittent and would not, in Mr Thompson's opinion, give rise to a statutory nuisance. He also found no breach of the conditions of the permit. He also stresses that there are several other potential sources of odour in the vicinity of the site which are likely to contribute to the background levels of H_2S.

[44] The court has also had the benefit of expert reports and affidavits from Robert Gregory and Sir Colin Berry, both of which take issue with the evidential basis for and the analysis of the experts instructed on behalf of the applicant.

The Legislative Framework

[45] Section 63 of the 2011 Act defines 'statutory nuisances' as including:

> "(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance."

[46] Section 64 of the 2011 Act provides:

> "It shall be the duty of every district council—
>
> (a) to cause its district to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 65 or 66; and
>
> (b) where a complaint of a statutory nuisance is made to it by a person living within its district, to take such steps as are reasonably practicable to investigate the complaint."

[47] Section 65(1) provides that where a district council is satisfied that a statutory nuisance exists, or is likely to recur, it shall serve an abatement notice imposing a requirement to abate the nuisance or carry out works or take such steps as may be necessary. Section 65(8) gives the right to any person served with an abatement notice to appeal to a court of summary jurisdiction.

[48] In terms of enforcement, the section goes on to say:

> "(9) A person on whom an abatement notice is served who without reasonable excuse contravenes or fails to

comply with any requirement or prohibition imposed by the notice shall be guilty of an offence.

(12) Subject to subsection (13), in any proceedings for an offence under paragraph (9) in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance."

[49] The 2013 Regulations were made pursuant to Article 4 of the Environment (Northern Ireland) Order 2002 ('the 2002 Order') which itself was amended to implement Directive 2010/75/EU on industrial emissions. Article 8(1) of the 2002 Order defines 'environmental pollution' as:

"pollution of the air, water or land which may give rise to any harm."

[50] In turn, Article 8(2) defines 'harm' as:

"(a) harm to the health of human beings or other living organisms;

(b) harm to the quality of the environment;

(c) offence to the senses of human beings."

[51] The 2013 Regulations prohibit the operation of, inter alia, a landfill site without a permit and regulation 11 states:

"(1) When determining the conditions of a permit, the enforcing authority shall take account of the general principles set out in paragraph (2);

(2) The general principles referred to in paragraph (1) are that installations and mobile plant must be operated in such a way that—

(a) all the appropriate preventative measures are taken against pollution, in particular through the application of BAT; and

(b) no significant pollution is caused."

[52] 'BAT' stands for 'best available techniques' and is defined by regulation 3 as meaning:

> "the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole."

[53] Regulation 17 is concerned with the review of permit conditions and states:

> "(1) Enforcing authorities shall periodically review the conditions of permits and may do so at any time.
>
> (2) Without prejudice to paragraph (1), a review of a permit under this regulation shall be carried out where—
>
> (a) the pollution caused by the installation or mobile plant covered by the permit is of such significance that the existing emission limit values of the permit need to be revised or new emission limit values need to be included in the permit;
>
> (b) substantial changes in BAT make it possible to reduce emissions from the installation or mobile plant significantly without imposing excessive costs;
>
> (c) the operational safety of the activities carried out in the installation or mobile plant requires other techniques to be used; or
>
> (d) it is necessary to comply with a new or revised environmental quality standard."

[54] Section 6 of the Human Rights Act 1998 ('HRA') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right and section 7 entitles a person to bring proceedings against a public authority, or rely on the Convention right in legal proceedings, but only if she is or would be a victim of the unlawful act.

[55] Article 8 of the ECHR provides that everyone has the right to respect for private and family life, home and correspondence. By Article 8(2), interference by a public authority within the exercise of this right is prohibited unless it is in accordance with law and necessary in a democratic society.

The Grounds for Judicial Review

[56] Following the submission of the significant volume of evidence summarised above, and a number of case management hearings, the applicant's grounds for judicial review distilled to the following:

(i) LCCC failed in its statutory duty under the 2011 Act by failing to investigate complaints;

(ii) NIEA and DAERA failed to comply with their duties under the 2013 Regulations in failing to review the permit and/or ensure that some guidance is adopted in relation to H_2S;

(iii) The impact of the pollution is such to engage the applicant's Article 8 rights and the respondents have failed to approach the matter with due diligence, to provide information and to set standards to ensure compliance with Article 8.

[57] The applicant seeks relief to, inter alia, quash decisions of the respondents and to compel LCCC to undertake investigation and to serve an abatement notice. In addition, damages are sought pursuant to section 6(1) of the HRA.

The Statutory Duty Claim against LCCC

[58] It is common case that LCCC, as the local district council, is under a duty to investigate a complaint of statutory nuisance made by a person living in its district, pursuant to section 64(b) of the 2011 Act. Equally, it is clear that a statutory nuisance may be created by a smell emanating from business premises. Where a council is satisfied that a statutory nuisance exists, section 65 imposes a duty to serve an abatement notice.

[59] The section 64(b) duty is couched in terms "to take such steps as are reasonably practicable to investigate the complaint." Thus whilst there is a statutory duty, the council is entitled to determine the means by which this duty is satisfied. The legislative provision recognises that there may be different ways in which to comply with the obligation and there is therefore a discretion to be exercised. Any such discretion must be exercised in a manner consistent with the objects of the statutory duty but, provided it has been, can only be impugned on the grounds of irrationality.

[60] In this case, the applicant asserts that LCCC failed to comply with the duty because it "left responsibility for investigating complaints to the NIEA." It must be recognised that NIEA was the agency within DAERA tasked with the regulatory responsibilities under the 2013 Regulations. As a matter of law, it is not correct to say that this was the "primary responsibility", as asserted by Ms Courtney, but it is certainly a relevant factor when one considers the exercise of discretion by LCCC in respect of its section 64 duty. When faced with a complaint, it was entirely

reasonable to refer a complainant to the NIEA which had a parallel regulatory jurisdiction.

[61] The evidence does not sustain the assertion that LCCC abrogated responsibility for investigation. In fact, the unchallenged evidence of Ms Courtney reveals that LCCC:

(i) Engaged in meetings with residents, BCC, Alpha and the NIEA;

(ii) Carried out its own monitoring;

(iii) Sent odour diaries to residents;

(iv) Considered the available evidence from independent experts;

(v) Reached a conclusion on the basis of the evidence that there was no statutory nuisance.

[62] The applicant seeks to argue that the evidence considered by LCCC was inadequate or sub-standard. The applicant may, of course, disagree with some of the findings and conclusions but it cannot be said that any of the evidence taken into account was immaterial, nor can it be said that the determination was lacking in logic or unreasonable in the classic Wednesbury sense. LCCC has, in fact, carried out an investigation which led to an entirely rational conclusion. There is no breach of the section 64 duty to investigate and the applicant does not begin to surmount the hurdle of demonstrating that the discretion was exercised irrationally.

[63] The claim of breach of statutory duty against LCCC therefore fails.

The Claim against NIEA and DAERA under the 2013 Regulations

[64] Properly analysed, this claim now resolves to the question of whether NIEA and DAERA are in breach of the 2013 Regulations by having failed to set some guidance or standard in relation to lifetime exposure to H_2S. It is asserted by the applicant that this ought to be fixed at 2µg/m³ or 1.4 ppb in accordance with the approach taken in England in relation to Walley's Quarry. Reliance is particularly placed upon the duties imposed upon enforcing authorities by regulations 11 and 17 in relation to the fixing and review of conditions in permits.

[65] The applicant says that the failure to set guidance represents a breach of the principle in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 where Lord Dyson said:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a

> lawful exercise of the discretion conferred by the statute … There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it." [para 35]

[66] *Lumba* was a case concerning the unlawful detention of foreign nationals pending deportation in which it emerged there was an unpublished government policy which amounted to a blanket ban on release prior to deportation. As such, the case centred on questions of the rule of law and access to justice. There is no unpublished policy at play which is relevant to this case. On the contrary, the permit under which Alpha operates the site is a publicly available document. It has a specific provision in relation to odour and the operator is obliged to monitor and take measures in accordance with the OMP. It does not contain a specific guideline figure for H_2S but the evidence demonstrates the steps which have been taken by the NIEA and Alpha in order to address the problems identified at the site. This situation could hardly be further from either the facts or the legal position which arose in *Lumba*.

[67] The only basis to challenge the lack of guideline figures in Alpha's permit is therefore Wednesbury unreasonableness. The enforcing authority is given a wide discretion by the 2013 Regulations which could only ever be impeached if exercised irrationally. There is no basis on the evidence in this case for such a conclusion. Indeed, the NIEA and DAERA have pointed to the readings for H_2S recorded in ambient air as a good reason not to impose such a requirement on an operator since it could prove impossible for the site, or indeed any site, to comply**.**

The Article 8 Claim

[68] In *Richards*, the claimant was a young boy with severe respiratory problems. The undisputed medical evidence was that exposure to H_2S would be harmful to him and cause adult illness and premature morbidity. The first ground of challenge in that case asserted that the EA had a positive duty to safeguard the claimant's life under Article 2 ECHR and the continuing dangerous emissions of H_2S presented a real and immediate risk to his life. It was claimed that the EA had failed to take measures it ought to have done to avoid the risk to the claimant. This is the important context in which that litigation proceeded. It is noteworthy that the instant case began life as an Article 2 claim but this has been abandoned since there is no evidence of a risk to life in this case.

[69] *Richards* also featured a claim of breach of Article 8 rights which is the only substantive Convention right relied upon in these proceedings. In order to sustain such a claim, the applicant must establish that she has 'victim' status for the purposes of section 7 of the HRA. By section 7(7), a person is a victim of an unlawful act:

> "only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

[70] In *Burden v UK* [2008] 47 EHRR 38 the applicants complained that English law requiring the payment of inheritance tax by an estate which was to be bequeathed to an unmarried sister breached their rights under A1P1 and Article 14. The applicants had not, at that time, suffered any pecuniary loss but the Grand Chamber held that the "real risk" one of them would be obliged to pay inheritance tax in the near future was sufficient to afford them victim status.

[71] In *Fadeyeva v Russia* [2007] 45 EHRR 10, the Strasbourg court held:

> "68. Article 8 has been invoked in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention. Thus, in order to raise an issue under Art.8 the interference must directly affect the applicant's home, family or private life.
>
> 69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Art.8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should be also taken into account. There would be no arguable claim under Art.8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.
>
> 70. Thus, in order to fall under Art.8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained."

[72] It is therefore incumbent upon the applicant to show both that there has been actual interference with her private and family life and that a certain level of severity has been reached. The applicant relies on her unchallenged accounts of the impact of the malodours on her life and the affidavits furnished by other residents in the area. There is also evidence of a significant level of complaints, sufficient to trigger investigation and action by NIEA and, notably, enforcement action by BCC.

[73] A judicial review court is not the forum to examine the detail of the complaints in terms of intensity or duration or the causative effect of the emissions on the lives of the applicant and others. I am however quite satisfied on the evidence available that the applicant has met the minimum level of severity required to engage her Article 8 rights. I therefore find that she is a victim within the meaning of section 7 of the HRA.

[74] The key question to consider is whether the interference with the applicant's Article 8 rights is justified. The Court of Appeal in *Richards* described the task of the court thus:

> "A public authority responsible for regulating the activity will need to establish that its actions are justified within the meaning of Article 8(2) of the Convention. In broad terms, it will need to establish that the measures it has taken strike a fair balance between the interests of the individual and the community affected by the pollution and the legitimate interests recognised by Article 8(2). See generally *Fadeyeva v Russia (2007) 45 EHRR 10*. Again, in considering what is required of a public authority in this context, the European Court has said that it is not for that Court to substitute its view as to what is the appropriate policy in a difficult technical and social sphere, and it is not for that Court to determine exactly what should be done (see paragraphs 96, 104 and 128 of the judgment in *Fadeyeva*)."

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[75] The cited paragraphs from *Fadeyeva* read as follows:

> "96. However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the contracting states' margin of appreciation. There are different avenues to ensure "respect for private life", and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion "in accordance with the law" of the justification test cannot be applied in the same way as in cases of direct interference by the State.
>
> 105. It remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved

> with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Art.8, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.
>
> Indeed, it is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly in the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests." [para 128]

[76] The Court of Appeal in *Richards* was particularly critical of the judge at first instance who had determined that the EA was obliged to take steps, within a definite timeframe, to achieve a reduction in H_2S emissions to a specified level. This was described by Lewis LJ as:

> "… an error of principle on the part of the judge. It was not for the court to prescribe the standards that the appellant must accept nor to lay down a timetable within which prescribed actions must be taken … He acted in a way which was not required of him under the case law of the European Court and which, in truth, ran counter to the principles established by that case law." [paras 67-69]

[77] In light of this judgment, the applicant does not seek the type of relief which was contended for in *Richards*. The more nuanced case advanced is that the failure to prescribe some guidance or standards is itself an unlawful interference with the applicant's Article 8 rights since the respondents have failed to approach the matter with due diligence and to give proper consideration to competing interests.

[78] The key conclusion of each of the respondents is that the levels of H_2S emissions are not, on the evidence available and considered by them, such as to require enforcement action. The role of the court is to analyse whether this conclusion has been reached following due diligence and consideration of the competing interests, or whether there has been a manifest error of appreciation justifying interference by the court in these material considerations.

[79] It is apparent that the applicant would wish there to be in place some limit, standard or guideline by which the emission from the site would be measured. However, the evidence before me is to the effect that no landfill site in the United

Kingdom operates with a particular H_2S emission requirement or guidance figure in its permit. It is impossible to say that the failure to introduce such a figure into the permit for this site represents a manifest error of appreciation. The evidence before me indicates that the decision makers properly informed themselves of the position in relation to Walley's Quarry and drew valid and rational distinctions between that situation and the one prevailing at this site.

[80] Equally, the decision by LCCC not to instigate enforcement action by way of an abatement notice could not be characterised as the product of some failure of due diligence.

[81] The evidence which has been set out in some detail above points firmly in the opposite direction. The respondents have taken action in relation to the site. Significant infrastructure works have been carried out, independent testing and monitoring have been done, evidence sought and obtained from residents in the area, the phenomenon of cold flow drainage examined, new equipment purchased, contact made with and advice sought from the EA, PHA and UKHSA, meetings convened with all stakeholders and, ultimately, decisions reached on the basis of all the information generated through these processes.

[82] The applicant also criticises the lack of publicly available information and cites in support the case of *Tatar v Romania* (application no. 67021/01). The court stated:

> "In the context of the positive obligations arising from Article 8 of the Convention, the Court wishes to stress the importance of the public right to information." [para 113]

[83] In *Tatar*, it was observed that the public did not have access to surveys and studies which would have made it possible to assess the risk of environmental harm. In this case, by contrast, all the material relevant to the questions at issue is contained in public facing documentation or has been communicated to the various stakeholders through meetings.

[84] The approach of the respondents has been characterised by due diligence and a careful balancing of the competing interests at play. Applying the relevant tests from *Richards* and *Fadeyeva* it is not the court's job to substitute its view for what action may or may not have been taken by the public authorities. Once the court is satisfied that the matters were approached with the appropriate level of diligence, then any interference with Article 8 rights is justified and the claim of breach must fail.

[85] The applicant's human rights claim against all the respondents is therefore dismissed.

Alternative Remedy

[86] Given my findings on the substance of the application for judicial review, it is not strictly necessary to address the respondents' contention that the applicant enjoys an alternative remedy. However, having heard argument on the issue I propose to consider it briefly.

[87] Section 70 of the 2011 Act provides that a court of summary jurisdiction may act on a complaint made by a person aggrieved by the existence of a statutory nuisance. By section 70(2):

> "If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises or, in the case of a nuisance within section 63(1)(j), in the same street, the court shall make an order for either or both of the following purposes—
>
> (a) requiring the defendant to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;
>
> (b) prohibiting a recurrence of the nuisance, and requiring the defendant, within a time specified in the order, to execute any works necessary to prevent the recurrence;
>
> and may also impose on the defendant a fine not exceeding level 5 on the standard scale."

[88] In *Botross v London Borough of Fulham* [1995] Env LR 217, it was held that proceedings brought under the equivalent statutory provisions in England & Wales were criminal in character and the relevant standard of proof was beyond reasonable doubt. The applicant points to the analogous position of a judicial review challenge brought against the Public Prosecution Service in relation to a decision not to prosecute. It has never been held, to the best of the court's knowledge, that the availability of a private prosecution represents an adequate alternative remedy to the public law challenge.

[89] It is well established that judicial review is a remedy of last resort and the existence of other potential remedies and avenues of redress is relevant to whether judicial review is available in any given situation. In *R (Watch Tower Bible) v Charity Commission* [2016] EWCA Civ 154, Lord Dyson said:

> "It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This

> principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal."

[90] In *R (Fisher) v Durham CC* [2020] EWHC 1277 (Admin) the claimant sought to judicially review an abatement notice which had been served on her under the English statutory provisions and was met with an argument that she had a suitable alternative remedy by way of a statutory appeal to the magistrates' court. It was observed in that case that the question of alternative remedy ought to be dealt with at the leave stage and, as a matter of discretion, Julian Knowles J determined that it would be in the interests of justice and the parties for him to decide the issues in the judicial review application rather than require the matter to be re-litigated in the lower court.

[91] I agree that, as a matter of principle, questions of alternative remedy ought to be considered at the leave stage. It would generally be a waste of time and money for parties to fully argue a case only to be told that alternative proceedings should be commenced or pursued in a different forum. The point was not taken at the leave stage in this case albeit that there was a belated application to set aside leave which was ultimately not pursued.

[92] The instant case concerns the public law issues of regulation and enforcement. Any proceedings in the magistrates' court would centre on the issue of whether a nuisance has been caused. Whilst there is an obvious overlap between the two questions, the two species of litigation have quite different purposes. In my conclusion, a member of the public with sufficient interest is entitled to hold regulators to account by pursuing any public law wrongdoing. It would be an unfortunate and unattractive position if a regulator could effectively be immune from suit in this sphere by reference to alternative proceedings in the magistrates' court.

[93] I am not therefore persuaded by the respondents' alterative remedy argument. It does not provide a basis either to refuse the application for judicial review nor would it have led to the court to decline to grant any particular form of relief. The applicant's right to proceed under section 70 of the 2011 Act is not affected by the outcome of these proceedings.

Expert Evidence in Judicial Review

[94] This was a case in which extensive expert evidence was furnished to the court and relied on, at least in part, by the parties. I would echo the comments of Treacy J in *Re Bryson Recycling* [2014) NIQB 9, at paras [112] – [117] in relation to the use of such evidence in judicial review proceedings. The extent to which expert opinion evidence assists the court in determining public law wrongdoing, particularly when such evidence was not available to a decision maker, is limited. I accept, however, in

cases alleging a breach of Article 8 rights that such evidence is admissible on the key issues of victim status and due diligence, as well as potentially going to the issue of irrationality.

[95] As a matter of case management, the court will expect practitioners to justify the instruction of experts and identify precisely the purpose of their evidence. By this route, the proliferation and detail of the reports which has occurred in this case could have been avoided.

[96] Whilst I have taken all the expert evidence in this case into account, I have found the 'desktop' approach adopted by Dr Sinha and Dr Dickerson, whose opinions were based largely on assumption and supposition rather than empirical factual data, to be of limited probative value. By way of example, the assertion in relation to the presence of gypsum at the site ought never to have appeared in an expert report without any evidential foundation. Equally, Dr Sinha should not have sought to bolster his opinion by reference to the outcome of the *Richards* case, at least without proper instructions as to the meaning and import of the judgment of the Court of Appeal.

Conclusion

[97] For the reasons set out, the application for judicial review is dismissed. I will hear the parties on the question of costs.