Michaelmas Term
[2024] UKSC 31
On appeal from: [2023] NICA 15

JUDGMENT

In the matter of an application by Noeleen McAleenon for Judicial Review (Appellant) (Northern Ireland)

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
16 October 2024

Heard on 25 June 2024

Appellant
Hugh Southey KC
Sarah Minford BL
(Instructed by Phoenix Law (Belfast))

1st Respondent
Peter Coll KC
Gordon Anthony BL
(Instructed by Arthur Cox (Belfast))

2nd and 3rd Respondents
Tony McGleenan CBE KC
Maria Mulholland BL
(Instructed by Departmental Solicitor's Office (Belfast))

LORD SALES AND LORD STEPHENS (with whom Lord Lloyd-Jones, Lord Briggs and Lady Simler agree):

1. This appeal is about the exercise of discretion by a court which is invited by a claimant to conduct a judicial review of decision-making by a regulator in relation to a regulated activity, where the regulator alleges that the claimant has an adequate alternative remedy such that judicial review should be refused. In this case, the regulated activity is the maintenance of a waste disposal site.

2. The appellant (Ms McAleenon) seeks to bring judicial review proceedings against public bodies which have regulatory functions in relation to that activity, claiming that they have not taken appropriate action to prevent harmful chemical gases and noxious smells escaping from the site. But the public bodies maintain that judicial review should be refused because Ms McAleenon has adequate alternative remedies, in that she could herself launch a private prosecution against the owner of the site or could bring a nuisance claim against them in private law. That defence was rejected by the High Court ([2022] NIQB 39), but on the regulators' appeal was accepted by the Court of Appeal ([2023] NICA 15). The Court of Appeal also referred to the fact that Ms McAleenon was able to complain to the Northern Ireland Public Services Ombudsman ("the Ombudsman"). Ms McAleenon appeals to this court.

Factual background

3. At the material time Ms McAleenon resided at 17a Barleywood Mill, Lisburn. This property is within the area of Lisburn and Castlereagh City Council ("the LCCC") and is in the vicinity of Mullaghglass Landfill Site ("the Site").

4. The Site opened in 2006. It is occupied and operated by Alpha Resource Management Ltd ("Alpha").

5. Ms McAleenon claims that from early 2018 she and her family have been affected by unpleasant and disturbing odours coming from the Site. She says that she has experienced unpleasant physical symptoms which are attributable to inhalation of the noxious fumes from the Site, including headaches, nausea and stomach problems. She also says that members of her family visiting her, including her grandchildren, experienced similar symptoms as a result of the fumes. The consequences of this situation for Ms McAleenon include being unable to enjoy her garden, being forced to

remain inside with all the windows and doors firmly shut, and concerns about her mental health since she feels like a prisoner in her own house.

6. Other people who live close to the Site have complained about odours and fumes coming from it. One resident complained to her local authority, Belfast City Council ("BCC"), and to the Northern Ireland Environment Agency ("the NIEA") about the odours and the risk to her children's health. As a result, on 27 April 2021 BCC served an abatement notice on Alpha in exercise of its powers under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 ("the 2011 Act").

7. Alpha brought a judicial review claim to challenge that notice. BCC opposed the application on the basis that Alpha had a suitable alternative remedy pursuant to section 65(8) of the 2011 Act, which provides for a right of appeal on the merits to the magistrates' court against an abatement notice. Scoffield J upheld that objection at first instance and refused leave to bring the judicial review claim [2021] NIQB 122. His decision was upheld by the Court of Appeal (Keegan LCJ and Treacy LJ): [2022] NICA 27 ("*Alpha Resource Management*"). However, BCC later decided to withdraw the abatement notice in the face of Alpha's appeal on the merits to the magistrates' court.

8. There are two relevant regulatory regimes which cover the operation of the Site. First, a local authority such as the LCCC has regulatory powers under the 2011 Act in relation to nuisances occurring in its area. In addition, by virtue of section 70 of that Act ("section 70") a citizen who complains that there is a nuisance within the meaning of the Act emanating from land in the vicinity of their property may bring a private prosecution. Secondly, the NIEA regulates the Site pursuant to the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 (SI 2013/160) ("the 2013 Regulations") by grant of a permit to which conditions are attached, with associated powers of enforcement. Ms McAleenon contends that the Northern Ireland Department of Agriculture, Environment and Rural Affairs ("the Department") also has regulatory responsibilities pursuant to the 2013 Regulations.

9. Ms McAleenon decided to instruct solicitors who had already begun to act for other residents who had complaints about the Site. Pre-action letters were written on her behalf in late January 2021 to the LCCC, the NIEA and the Minister of the Department requesting each of them to exercise their respective powers to take action to require Alpha to manage the Site more effectively and to eliminate the odours and fumes which affected Ms McAleenon's property. Further letters dated 22 February 2021 were written on her behalf to each of the LCCC, the NIEA and the Department complaining that

hydrogen sulphide (H_2S) was being emitted from the Site and affecting her property in a manner which gave rise to significant risk to health.

10. A further round of letters was sent in March and April 2021 complaining that there had been a failure by the LCCC to conduct proper investigations into the complaints about emissions from the Site and failures by the NIEA and the Department to act in compliance with Ms McAleenon's Convention rights under article 8 of the European Convention on Human Rights (right to respect for private and family life - "article 8") as given effect by the Human Rights Act 1998 ("the HRA") by omitting to take appropriate regulatory enforcement action in relation to the Site. The NIEA and the Department did not send substantive replies. The LCCC responded to say that Ms McAleenon's complaints had been referred to the NIEA for it to consider whether and what action to take and that the LCCC was investigating her complaints as well.

11. Ms McAleenon was not satisfied with this response. On 21 May 2021 she commenced judicial review proceedings against the LCCC, the NIEA and the Department. On 25 June 2021 the LCCC wrote to her solicitors to say that, since the purpose of her proposed judicial review proceedings was to bring the nuisance to an end, there was a suitable alternative remedy available to Ms McAleenon in the form of a private prosecution under section 70.

12. On 14 September 2021 Scoffield J granted leave on the papers for Ms McAleenon to bring her judicial review claim and, amongst other directions, the judge directed, pursuant to Order 53 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980, that Alpha should be a notice party. After leave was granted, the NIEA and the Department also contended that Ms McAleenon had a suitable alternative remedy available to her, either in the form of a private prosecution under section 70 or a civil action for common law nuisance. They made an application to set aside the grant of leave on this basis, which came before Humphreys J on 14 February 2022. After debate at that hearing, the NIEA and the Department said they would not press the point at that stage, but instead would rely on the alternative remedy defence at the substantive hearing, along with other defences. Accordingly, Ms McAleenon's claim for judicial review proceeded to a full hearing.

13. Up to this point, Ms McAleenon's claim had been pleaded in wide terms which followed the claim in similar judicial review proceedings previously brought in England in relation to harm allegedly suffered by an asthmatic child living in the vicinity of a landfill site at Walleys Quarry in Staffordshire, which had succeeded at first instance: *R (Richards) v Environment Agency* [2021] EWHC 2501 (Admin). However, shortly

before the hearing before Humphreys J that decision had been overturned on appeal: [2022] EWCA Civ 26; [2022] 1 WLR 2593 ("*Richards CA*"). It was accepted that the Environment Agency had a duty under section 6 of the HRA to act compatibly with an individual's Convention rights (in that case, their rights under article 8 and article 2, the right to life), but on a correct application of the jurisprudence of the European Court of Human Rights (in particular, its judgment in *Fadeyeva v Russia* (2005) 45 EHRR 10 – "*Fadeyeva*") that duty was considerably less demanding than had been suggested in the judgment at first instance, and on the facts the claim was dismissed.

14. A case management review of Ms McAleenon's judicial review claims took place before Humphreys J on 23 February 2022. At that hearing the implications of *Richards CA* were debated and Ms McAleenon undertook to amend her claim to reflect the legal principles set out in that authority.

15. On 2 March 2022 Ms McAleenon served her amended claim in line with the undertaking given to the court. By the amended claim she alleged that the LCCC (i) had failed to conduct proper investigations pursuant to section 64(b) of the 2011 Act into complaints about the odour coming from the Site, with the result that it failed to recognise it as a nuisance for the purposes of the 2011 Act in relation to which an abatement notice should be issued, and (ii) had also thereby infringed her rights under article 8. She alleged that the NIEA and the Department (i) had failed to review and revise the permit for the operation of the Site under the 2013 Regulations, including by failing to determine and assess the best available techniques which Alpha ought to use at the Site to prevent the emission of noxious fumes and odours, and (ii) had also thereby infringed her rights under article 8.

16. In each case, the first limb of Ms McAleenon's claim was a conventional public law complaint by which she sought orders and declarations the effect of which would be to compel the respective defendants to reconsider decisions they had already made and to take action in relation to the regulation of the Site. The second limb, alleging infringement of article 8, was relied upon to reinforce her claim for such orders and declarations, but also in order to claim compensation pursuant to the HRA.

17. The LCCC, the NIEA and the Department defended the claim on the merits. The NIEA and the Department also maintained a defence based on the availability of an alternative remedy, primarily in the form of a private prosecution pursuant to section 70.

18. There was what Humphreys J described as a "proliferation" of expert reports filed as evidence in the case. Ms McAleenon filed evidence from Dr Ian Sinha, an

expert in childhood asthma and neonatal lung disease whose evidence had featured in the *Richards* case in relation to Walleys Quarry, and from Dr David Dickerson, an environmental consultant with experience in the field of monitoring and control of air pollution. The LCCC filed an affidavit from Ms Sally Courtney, its Environmental Health Manager, who explained the steps the LCCC had taken to investigate complaints about the Site, including reviewing a report by independent consultants, Tetra Tech Ltd, which concluded that there was no evidence of unlawful harmful emissions from the Site. The NIEA and the Department filed an affidavit from Mr Colin Millar, the Principal Scientific Officer of the NIEA, to explain the steps the NIEA had taken to monitor emissions at the Site to ensure compliance with Alpha's operating permit and the steps taken to investigate complaints, including by instructing Tetra Tech, an expert chemist, Keiron Finney, of Exea Associates Ltd, and Dr David Cromie, a consultant in public health, to compile reports. Mr Millar explained that on the basis of these investigations the NIEA had concluded that there was no risk of serious impact on the environment or on public health sufficient to trigger enforcement action. Alpha filed expert evidence from three further experts.

19. In his judgment, Humphreys J dismissed the alternative remedies defence: paras 86-93. He observed (para 92) that the case concerned the public law issues of regulation and enforcement, whereas any private prosecution in the magistrates' court under section 70 would centre on the issue of whether a nuisance has been caused; whilst there is an overlap between the two questions the two kinds of litigation have quite different purposes; and went on, "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".

20. Humphreys J dismissed Ms McAleenon's claim on the merits. He found on the evidence that the LCCC had taken reasonable steps to investigate the emissions from the Site, including setting up monitors and seeking evidence from residents and from independent experts. On the basis of the information it had assembled, the LCCC had reached a rational conclusion that there was no significant threat to health and that Ms McAleenon's house was not sufficiently affected as to constitute a statutory nuisance. There had been no breach of the section 64 duty to investigate. Similarly, the licence for the Site included a provision in relation to odour and imposed obligations on Alpha as operator of the Site to monitor and take measures in relation to this; the NIEA and the Department had investigated the complaints about the Site and were entitled to conclude that there was no proper basis to impose further obligations in that regard. The article 8 claim was rejected in respect of each defendant on the basis that they had concluded on the basis of expert evidence obtained and considered by them that the levels of H_2S emissions were not such as to require enforcement action; that conclusion had been

reached following the exercise of due diligence by the defendants and proper consideration of the competing interests, and there had been no manifest error of appreciation on their part such as would justify interference by the court.

21. Ms McAleenon appealed and the LCCC, the NIEA and the Department cross-appealed in relation to the judge's ruling that she did not have an effective alternative remedy in the form of bringing a private prosecution against Alpha in the magistrates' court. The NEIA and the Department also maintained that the judicial review proceedings were academic because the Site is now closed and ventilation wells there have been capped.

22. After consideration of the papers, the Court of Appeal decided to take the cross-appeal first without hearing oral argument on Ms McAleenon's appeal on the merits of her claim. The Court of Appeal allowed the cross-appeal on the issue of suitable alternative remedies, with the result that the appeal also fell to be dismissed. However, it dismissed the contention that the judicial review proceedings were academic, saying (para 62) that there was still a potential risk that gas produced from the earlier landfill could escape from the Site, and the court was not in a position to determine whether the capping of the wells would provide a permanent solution.

23. The Court of Appeal held that there were suitable alternative remedies open to Ms McAleenon in the form of a private prosecution in the magistrates' court under section 70 and also in the form of a claim for the tort of nuisance in the County Court or the High Court, both of which were capable of giving her the relief she required, if she were able to prove her case, namely permanent abatement of the nuisance she alleged was created by the dumping of materials at the Site. Insofar as Ms McAleenon wished to complain about the conduct of the regulators, the Court of Appeal called attention to her right to complain to the Ombudsman (paras 57-58): the suggestion was that such a complaint constituted a suitable alternative remedy in relation to that aspect of her claim.

24. The Court of Appeal was concerned by the position in relation to the expert evidence in the case. It referred to significant conflicts of evidence between the experts instructed by Ms McAleenon and those instructed by the defendants and Alpha and commented "how difficult it is for a court to reach a concluded view on different expert opinions without the court being able to see and hear those opinions being challenged and tested in court": para 30. At para 38 it said that in the absence of the expert evidence on either side being tested in court (that is, by cross-examination) "it would be

imprudent to reach a concluding view on whether the Site is operating unlawfully and/or emitting H_2S which has the potential to harm those living in the immediate vicinity".

25. The Court of Appeal referred (para 40) to commentary in Lewis, *Judicial Remedies in Public Law*, 6th ed (2020), para 9.121 (endorsed in *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin)) that:

> "If there is a dispute of fact not capable of being resolved on the documentary evidence, and no cross-examination is allowed, the courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof. As the onus is on the claimant to make out his case for judicial review, this means that in cases of conflict on a critical matter which are not resolved by oral evidence and cross-examination, the courts will proceed on the basis of the defendant's written evidence."

It said (para 42) that in Ms McAleenon's judicial review claim, following this approach and given the lack of consensus between the experts, "the only course a court could take would be to accept the expert evidence filed on behalf of the [defendants] who did not have the onus of proof", which would mean that "the whole basis of the appellant's case is fatally undermined"; but stated "[w]e consider that this would be an unsatisfactory way of resolving the contentious scientific debate put before this court".

26. These observations were important background for the Court of Appeal's conclusion on the issue of suitable alternative remedies. The Court of Appeal considered that what was called for was a resolution of the evidential disputes between the expert witnesses. This led it to say (para 57) that an inquiry by the Ombudsman with access to all the evidence "would be better suited to resolving difficult issues of expert evidence than a judicial review application". At para 59 it pointed out that cross-examination of expert witnesses would have occupied considerable court time and emphasised that "it is not possible in a judicial review application, nor is it desirable to try and resolve contentious disputes of fact". Moreover, there had in fact been no application for cross-examination of experts.

27. At para 60 the Court of Appeal opined that Ms McAleenon "wanted primarily to prevent noxious gases escaping from the Site" because of the harm she alleged they did to her and her family; in the light of this it found that "[h]er complaint about the regulator(s) was very much a secondary one … which has been used as the excuse to

commence more complex judicial review proceedings against the regulators rather than proceeding directly against the alleged tortfeasor(s) [ie Alpha] who it is alleged were responsible for the nuisance". Having identified Ms McAleenon's objective in this way, the Court of Appeal said (para 61):

> "We are satisfied that either civil proceedings in the County Court (or High Court) or statutory nuisance proceedings before the Magistrates' Court offered a much better means for the appellant to achieve her desired goal, namely the cessation of the alleged toxic emissions from the Site and compensation for such injuries and inconvenience as she and her family may have sustained. Either process will be fairer because the court will be able to weigh up the evidence, especially the expert evidence, and come to a considered conclusion. The appellant, if she succeeds, will be granted relief that will abate the alleged nuisance, and in civil proceedings, will ensure she receives such compensation as the court assesses are due to her and her family. This will be calculated on the basis of expert medical witness evidence and of its ability to link the alleged ill effects apparently suffered by those in the vicinity to the emission of noxious fumes from the Site."

28. The Court of Appeal therefore concluded (para 63) that Ms McAleenon had an alternative remedy either under section 70 or by bringing a common law claim for the tort of nuisance and "there is no further utility in judicial review proceedings" (it did not refer in this part of its judgment to a complaint to the Ombudsman as a further alternative remedy). At paras 69-70 it repeated and applied guidance given by the Lady Chief Justice in *Alpha Resource Management*, paras 11-20, regarding the principle that permission to seek judicial review should be refused if there is a suitable alternative remedy. At para 73 the Court of Appeal concluded that the alternative remedies available to Ms McAleenon under section 70 and in a common law claim for nuisance would provide her "with the relief she required if her claims are correct, namely cessation of the alleged nuisance on the Site"; each of them "offered her the opportunity of obtaining relief against the alleged wrongdoer" and "offered the prospect of a court being able to determine various issues which were the subject of contested expert evidence"; and each of them "was direct, almost certain to be less complex, almost certain to be cheaper and certainly more effective."

29. At para 74 the Court of Appeal stated that Ms McAleenon's claim was unsuited to the judicial review procedure, primarily because of the disagreement between the

expert witnesses and because "it is simply impossible for any court to reach a final conclusion on that contentious, but untested expert evidence" in judicial review proceedings; in the absence of cross-examination of the experts (which no party had applied for) a court dealing with such a claim "would have no option" but to follow the approach set out at para 25 above, which would mean that it could not be satisfied that the Site created a nuisance or a real risk to the health of those living in the vicinity; however, to dispose of a case like Ms McAleenon's in this way would not be "either fair or just".

30. Ms McAleenon now appeals to this court. Mr Hugh Southey KC submits on her behalf that the Court of Appeal was wrong to dismiss her claim on the basis that she had suitable alternative remedies available to her. He supports the Court of Appeal's holding, in line with that of the judge, that Ms McAleenon's claim cannot be regarded as academic. The conclusion, Mr Southey says, ought to be that the case should be remitted to the Court of Appeal to consider whether Ms McAleenon's claim for judicial review was properly dismissed by the judge on the merits.

31. Mr McGleenan KC, for the NIEA and the Department, submits that the Court of Appeal was right to hold that Ms McAleenon's judicial review claim should fail on the grounds that she had suitable alternative remedies available to her in the form of a private prosecution under section 70 and a common law claim for nuisance and also on the ground that her claim was academic. Mr Peter Coll KC, for the LCCC, supports these arguments and also submits that Ms McAleenon's claim should fail on the grounds that she had a suitable alternative remedy available in the form of a complaint to the Ombudsman.

The Legal Framework

(a) The 2011 Act

32. Section 63 of the 2011 Act defines "statutory nuisances" as including "any … smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance." Section 64 imposes a duty on a 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 and (b) where a complaint of a statutory nuisance is made by a person living in its district, "to take such steps as are reasonably practicable to investigate the complaint".

33. Section 65(1) provides that where a district council is satisfied that a statutory nuisance exists it shall serve an abatement notice imposing a requirement to abate the nuisance or to take necessary steps. A person on whom such a notice is served who without reasonable excuse fails to comply with it is guilty of an offence (subsection (9)); but in proceedings for such an offence "it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance" (subsection (12)). Section 65(8) gives the right to any person served with an abatement notice to appeal to the magistrates' court.

34. Section 70 provides that a person aggrieved by the existence of a statutory nuisance may make a complaint to a court of summary jurisdiction (ie a magistrates' court) which may make an order requiring abatement of the nuisance and prohibiting its recurrence and may impose a fine. The court may order the defendant to compensate the complainant for any expenses properly incurred in the proceedings, but does not have a power to award damages more generally for loss suffered as a result of the nuisance.

(b) Common law nuisance

35. An action for the common law tort of nuisance may be brought by way of ordinary civil proceedings in the High Court or the County Court. The court has power to grant injunctive relief, requiring abatement of the nuisance, and to award damages for loss suffered.

(c) Article 8

36. The HRA gives effect in domestic law to the Convention rights derived from the European Convention on Human Rights, including those under article 8 (right to respect for private and family life and the home). Section 6(1) of the HRA imposes a duty on public authorities such as the LCCC, the NIEA and the Department to act in a way which is compatible with the Convention rights of individuals. By application of article 8, in certain circumstances state authorities may come under a positive duty to take steps to abate an environmental hazard which has a serious effect on the life of an individual: see *Fadeyeva* and the discussion in *Richards CA*. The state authorities have to strike a fair balance between the competing interests of the different private actors involved, and in doing so enjoy a margin of appreciation (*Fadeyeva*, para 96). In *Fadeyeva*, para 105, the European Court of Human Rights said:

> "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."

At para 128 the Court explained that part of its role was "to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests."

37. Where in breach of an obligation arising under article 8 a public authority fails to take action to address an environmental hazard, an individual who is affected may seek relief including an order requiring it to take appropriate steps to eliminate the risk posed and compensation by way of just satisfaction for infringement of their rights: section 8 of the HRA.

(d) Licensing of landfill sites under the 2013 Regulations

38. The 2013 Regulations prohibit the operation of a landfill site without a permit. Regulation 11 provides that when determining the conditions of a permit, the enforcing authority (here, the NIEA) shall take account of the general principles that the site must be operated in such a way that all appropriate preventative measures are taken against pollution, in particular through the application of best available techniques, and that no significant pollution is caused. Regulation 17 provides for review by an enforcing authority of the conditions of a permit.

(e) The Public Services Ombudsman Act (Northern Ireland) 2016

39. Section 5 of the Public Services Ombudsman Act (NI) 2016 ("the 2016 Act") gives the Ombudsman power to investigate complaints of a person who claims to have sustained an injustice in relation to alleged maladministration by certain categories of

public authorities, which include the LCCC, the NIEA and the Department. A report by the Ombudsman finding injustice entitles the complainant to apply to the County Court for damages or an injunction: section 52.

Analysis

(a) Judicial review of regulators

40. Judicial review is directed to examination of whether a public authority has acted lawfully or not. This means that the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. This may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B (Lord Diplock). Accordingly, it is for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only. (We leave aside cases where public law powers are conditional upon the existence of a fact which is to be determined objectively by the court itself, ie what is called a precedent fact).

41. Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.

42. Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting. (This is not to say that such procedures are not available in judicial review: cross-examination is available and will be allowed "whenever the

justice of the particular case so requires": *O'Reilly v Mackman* [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it).

43. There is no suggestion in this case that the LCCC, the NIEA and the Department have failed to comply with their duty of candour. They have given full accounts of what they did and of the information available to them. There is no doubt about the information available to the LCCC, the NIEA and the Department. It is on the basis of the information available to them that the lawfulness of their conduct is to be assessed.

44. With respect, the Court of Appeal fell into error in its assessment of the position in relation to the judicial review claim:

> (i) The Court of Appeal considered that it had to make definitive findings of fact about whether the offensive odours emanated from the Site, the concentrations of H_2S in the air and so forth, hence its reference to the comment in Lewis, op cit (para 25 above), about the onus of proof. But this is not correct. As is common when regulators have to decide whether to take action, the defendants were confronted with a situation in which there was a significant degree of uncertainty about these matters, which is precisely why they conducted investigations. The investigations did not eliminate all uncertainty, but reduced it to a level where the defendants considered that they could take a decision about how to proceed and determined it was not appropriate for them to take regulatory action. The question for the court was whether they had done enough to justify that decision in the light of all the circumstances, applying the usual rationality standard and (so far as relevant) the test appropriate for proportionality analysis in relation to article 8.
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> (ii) The Court of Appeal assumed that the reviewing court was faced with a choice between simply accepting the defendants' evidence, with the result that Ms McAleenon's claim would have to be dismissed, or allowing it to be challenged by way of cross-examination, which had not been sought. In other words, the judicial review claim, if pursued effectively, would have to involve a civil trial with oral evidence from experts on each side who would be subjected to cross-examination. This is not correct either. Arising from point (i) above, the correct approach for a reviewing court would have been to subject the information available to the defendants to critical analysis to see whether they could lawfully make the decisions they did on the basis of it. That exercise did not require oral evidence and cross-examination. To repeat the point, there was

> no factual dispute regarding the information available to the defendants which called for resolution. Nor was the reviewing court simply obliged to dismiss the judicial review claim in the absence of challenge to the defendants' expert evidence by cross-examination. Its role was to evaluate the quality of the information available to the defendants (including such information as Ms McAleenon put before them) in order to assess the lawfulness of their conduct. The model which the Court of Appeal thought was relevant, of a civil trial in which the court itself would have to determine the facts on the basis of the balance of probabilities, the onus of proof on particular issues, and cross-examination of witnesses, was simply inappropriate in this context.

45. The addition of the claim based on article 8 does not change this basic picture regarding the role of the reviewing court, even though the test for the lawfulness of the conduct of the defendants under section 6 of the HRA taken with article 8 is different from the test under general domestic principles of public law. In human rights cases brought against public authorities the court's role remains essentially one of review: *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, paras 27-28. Although sometimes there may be a requirement for the court to establish disputed facts for itself in order to determine the legal issue before it, this will not usually be the case and even when it is oral evidence and cross-examination will not necessarily be appropriate: cf *R (N) v M* [2002] EWCA Civ 1789; [2003] 1 WLR 562, a case concerning the forcible treatment of a mentally ill patient, at paras 36 and 39.

46. When the European Court of Human Rights has to decide questions which depend on assessment of facts, it does not hear oral evidence but rather considers whether the national authorities have proceeded on a sufficient evidential basis: see, eg, *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (in which a policy of prohibiting homosexuals from serving in the armed forces, said to be justified by likely deleterious effects on discipline, was found to be in violation of article 8), at para 88 ("The Court recognises that it is for the national authorities to make the initial assessment of [whether a measure is necessary in a democratic society, in accordance with article 8(2)], though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court") and para 105 (the government had failed to offer "convincing and weighty reasons", as would have been necessary to justify the policy). A domestic court called on to consider the application of article 8 in relation to regulatory authorities will adopt the same approach.

47. In the light of this, when considering the article 8 claim in a context like the present the margin of appreciation to be afforded to the relevant authorities in evaluating the position will be significant. The wider the margin of appreciation, the easier it will

be for the authorities to justify their conduct as lawful and in accordance with article 8. In *Smith and Grady* the margin was comparatively narrow; in *Fadeyeva* and in *Richards CA* the margin was held to be wide.

48. The mistakes made by the Court of Appeal affected its assessment regarding the availability of a suitable alternative remedy for Ms McAleenon. The Court of Appeal's assumption that Ms McAleenon's judicial review claim would in principle require resolution by the court of contentious disputes of fact and cross-examination of experts, as in an ordinary civil action or in criminal proceedings, but for which the judicial review procedure was ill-suited, led it to hold that a civil claim for nuisance or a private prosecution under section 70 would better meet her objectives and would be fairer in terms of enabling the court to weigh up and resolve the disputes between the experts: paras 59-61 and 74.

49. However, in our judgment, this was not the relevant comparison. Ms McAleenon brought a judicial review claim against the defendant regulators in order to compel them to fulfil the public law duties to which she maintained they were subject, for which claim the judicial review procedure was well adapted and appropriate. The fact that she could have brought other proceedings, of a different nature (a nuisance claim or a private prosecution), directed against another party (Alpha), in which different issues would arise and in light of which different procedures would have been required to be followed to resolve those issues did not show that she had a suitable alternative remedy with regard to the claim she did wish to bring, which was to challenge the conduct of the defendant regulators.

(b) The suitable alternative remedy principle

50. The forms of relief available in a claim for judicial review are discretionary (albeit the ambit of the discretion may in the event be very small or non-existent in the circumstances of a particular case). The availability of the judicial review procedure is likewise discretionary. A court may refuse to grant leave to apply for judicial review or refuse a remedy at the substantive hearing if a suitable alternative remedy exists but the claimant has failed to use it. As stated in *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] EWCA Civ 1716; [2017] 4 WLR 213, para 55, "judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective". If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review: *Kay v Lambeth London Borough Council* [2006] UKHL

10; [2006] 2 AC 465, para 30; *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154; [2016] 1 WLR 2625, para 19.

51. Where Parliament has enacted a statutory scheme for appeals in respect of certain decisions, an appeal will in ordinary circumstances be regarded as a suitable alternative remedy in relation to such decisions which ought to be pursued rather than having resort to judicial review: *Glencore Energy*, above, paras 55-58; *Watch Tower Bible & Tract Society*, above, para 19. Otherwise, use of judicial review would undermine the regime for challenging decisions which Parliament considers to be appropriate in that class of case. Therefore the Court of Appeal in *Alpha Resource Management* was correct to hold that Alpha was precluded by the suitable alternative remedy principle from seeking judicial review of the abatement notice issued against it: Parliament had provided for a right of appeal in section 65(8) of the 2011 Act in respect of such a notice.

52. However, in its judgment in the present case the Court of Appeal erred in holding that the reasoning in *Alpha Resource Management* is applicable in the circumstances of this case. There is no statutory right of appeal in relation to a failure by the defendant regulators to carry out their public law duties.

53. In a broad sense it is the case that, as the Court of Appeal said at para 60, Ms McAleenon wished to achieve the result that noxious gases would be prevented from escaping from the Site. That was her overall objective. However, there were different forms of legal proceeding available to her which might ultimately lead to that outcome, each giving rise to different issues and each with their own associated risks and costs.

54. Ms McAleenon was entitled to choose which claim she wished to bring. She was entitled to assess that her overall objective might best be promoted by ensuring that the defendant regulators did their job properly, as she saw it, and brought their more extensive resources to bear on the problem. It was not for the Court of Appeal to say that she could not sue them, because she could instead bring different claims against Alpha.

55. The Court of Appeal made an assessment of Ms McAleenon's objective in bringing her judicial review claim at too high a level of generality. The immediate objective of that claim is to seek to compel the defendant regulators to carry out what Ms McAleenon maintains are their public law duties as regulators, not to seek relief from Alpha. As a matter of principle, in civil litigation it is for a claimant to choose which form of claim to assert and against which party to assert it. The court then rules upon that claim; it has no role to say that the claimant should have sued someone else by

a different claim. The question of whether a claimant has a suitable alternative remedy available to them falls to be addressed by reference to the type of claim the claimant has chosen to bring and what relief they have sought against the particular defendant.

56. Viewed from that perspective, it seems clear that neither a private prosecution under section 70 nor a civil claim for nuisance against Alpha could be regarded as an alternative remedy in relation to Ms McAleenon's judicial review claim against the defendant regulators (still less a suitable one). Her complaint against them was that they were failing to comply with their public law duties, and those other types of action would neither address that issue nor give a remedy in relation to it.

57. The research of counsel for the defendant regulators threw up only one slender authority in support of the defendant regulators' argument, identified by the appellant's representatives, was produced: *R (Mooyer) v Personal Investment Authority Ombudsman Bureau Ltd* [2001] EWHC 247 (Admin). That case concerned a judicial review claim in respect of a decision by the Bureau in dismissing a complaint by the claimant against an insurance company which had stopped payment of benefits to him. Newman J held that the Bureau was not a body amenable to judicial review. He expressed the view, obiter (para 15), that if it had been amenable to judicial review the claim would have been refused because the claimant had an alternative remedy available, in that he could have sued the insurance company. As the judge indeed emphasised, the point did not have to be decided, and it does not seem to us that what he said is correct. We need say no more about it, because the context of the present case is different and the reasons we have given provide a full answer to the defendant regulators' submission.

58. Further points are relevant as well. The High Court granted Ms McAleenon leave to apply for judicial review on the basis that she had an arguable case against the defendants that they had breached their public law duties as regulators in relation to the Site. An important reason that regulators such as the defendants are given public law duties of the kind in issue in these proceedings is that they have a responsibility to act in the general public interest to ensure that landfill sites do not give rise to harmful pollution and nuisances which affect individual citizens. Protection of people like Ms McAleenon, as members of the public, is part of their remit. Publicly funded regulators are given the resources to take effective action where individual citizens may be unable to do so. It therefore cannot be a good answer for such a regulator to say in response to a judicial review claim to require it to carry out its duty in the public interest that the individual member of the public should take action themselves to address the problem. We endorse Humphreys J's observations at para 92 of his judgment (see para 19 above).

59. Judicial review is a comparatively speedy and simple process, involving significantly less time and cost than would be likely to be required for a trial in a private prosecution or in a civil claim in nuisance. Those procedures would involve calling witnesses and extended cross-examination which take time and involve cost and which are not necessary in judicial review. There is no good reason why Ms McAleenon should be expected to take on the additional burden associated with bringing such proceedings, in place of the comparatively less expensive course of bringing the judicial review claim she chose to bring against the defendant regulators. The Court of Appeal characterised her judicial review claim as "more complex" (para 60), but that is not correct. It is a straightforward public law claim which is apt to be addressed according to ordinary public law principles and procedures. Humphreys J did just that. As we have mentioned above, at para 44, the Court of Appeal erred in its understanding of what is involved in such a public law claim.

60. As regards a private prosecution under section 70, it is not a procedure which is capable of giving Ms McAleenon a remedy as extensive as that she was seeking in her judicial review claim. By her judicial review claim based on article 8 she sought not only relief in the form of compelling the defendants to take regulatory action to stop further emissions from the Site in the future, but also compensation for past losses. That is a perfectly legitimate and understandable part of her claim for relief. A court proceeding under section 70 would have no power to make an order that she be provided with compensation for past losses. Again, this shows that such a prosecution could not be regarded as a suitable alternative remedy when compared with judicial review.

61. Finally, as regards a civil claim for nuisance, although it would be capable of leading to an order that Alpha should pay Ms McAleenon damages for past losses, that is not the same as an order for compensation which she might obtain against the defendant regulators under article 8 of the European Convention on Human Rights. The quantum would be unlikely to be the same and the paying party would be different. If Alpha proved unable to meet an order against it, Ms McAleenon would be left without recourse against anyone else. It is not appropriate in a claim against a public authority for the authority to invite the court potentially to become embroiled in satellite issues involving an investigation into whether a third party might or might not be able to meet an order to pay damages made in different proceedings against it. Nor is it appropriate for the authority to seek to avoid its own liability to pay compensation by pointing to the possibility that someone else might have a concurrent liability to pay damages, and on that basis contend that the claim against itself should be blocked so that it cannot be made subject to any order at all.

62. We turn to consider Mr Coll's further submission that leave to apply for judicial review should have been refused or that relief should be withheld by reason that Ms McAleenon could have made a complaint to the Ombudsman. The Court of Appeal did not directly rely upon this as an answer to her claim, although it made observations which go some way to supporting Mr Coll's contention. Mr McGleenan did not rely on this point.

63. The general position is that the opportunity to complain to an ombudsman does not affect the right of an individual to bring a judicial review claim against a public authority: *R v Monmouth District Council, Ex p Jones* (1985) 53 P & CR 108 (a case concerning the local government ombudsman, but the reasoning is applicable to other ombudsman schemes). The role of an ombudsman is intended by Parliament to supplement control of public authorities by the courts through judicial review, not to replace it. This is made clear in the present context by section 21(1)(b) of the 2016 Act, which provides that the Ombudsman must not investigate "any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law", unless the Ombudsman is satisfied that it is not reasonable to expect the person aggrieved to resort to it (see subsection (3)(a)). Judicial review therefore has priority as against a complaint to the Ombudsman, so such a complaint does not constitute a suitable alternative remedy in the present case.

64. Having explained that Ms McAleenon was entitled to bring a claim against the defendants by way of judicial review to challenge their compliance with their public law duties, we should also make it clear that the validity or otherwise of that challenge falls to be judged according to conventional public law standards. The Court of Appeal considered (para 74) that it would not be "either fair or just" for Ms McAleenon's claim to be disposed of without a trial involving cross-examination of the expert witnesses and a resolution by the court of the disputes between them. We do not agree. She has chosen to bring a claim in public law and it is appropriate for that claim to be determined by reference to public law standards and in the conventional manner, without the need for oral evidence. That may well mean that Ms McAleenon faces difficulties if she is to succeed in her claim, having regard to *Fadeyeva* and *Richards CA*, as Humphreys J held. However, the merits of her claim were not addressed by the Court of Appeal on the appeal, and we say no more about this.

(c) An academic claim?

65. Finally, we address the further argument raised by the defendant regulators on their cross-appeal, that Ms McAleenon's judicial review claim should be dismissed on

the grounds that it is academic, because the Site is no longer receiving landfill waste and the wells on it have been sealed. This argument cannot be accepted. We agree with Humphreys J and the Court of Appeal that it should be rejected. There is no evidence to support the contention that just because the Site has now been closed and the wells sealed all risk of emission of harmful gases has been avoided. Issues regarding the proper management of such gases are likely to continue into the future.

Conclusion

66. For the reasons given above, we would allow this appeal. The Court of Appeal was wrong to dismiss Ms McAleenon's appeal on the basis of the suitable alternative remedy point. It should have considered whether she had good grounds of appeal against the decision of Humphreys J on the merits of her claim. The case should be remitted to the Court of Appeal for that to be done.