



Neutral Citation Number: [2022] EWCA Civ 26

Case No: C5/2021/1315

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE FORDHAM
CO/2453/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2022

Before

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between:

**THE QUEEN (on the application of MATHEW
RICHARDS)**

Respondent

- and -

THE ENVIRONMENT AGENCY

Appellant

WALLEYS QUARRY LIMITED

**Interested
party**

Mr Timothy Mould Q.C. and Ms Jacqueline Lean (instructed by the Environment Agency)
for the **Appellant**

Mr Ian Wise Q.C., Ms Catherine Dobson and Mr Will Perry (instructed by Hopkin Murray
Beskine) for the **Respondent**.

Mr David Hart Q.C. and Mr Thomas Beamont (instructed by CMS Cameron McKenna
Nabarro Olswang LLP) for the **Interested Party**

Hearing dates: 14 and 15 December 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 17 January 2022.

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the proper approach to be taken by a court to allegations that an environmental regulator, in this case the Environment Agency, is acting in a way which is incompatible with rights derived from Articles 2 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).
2. In brief, the background is that the interested party, Walleys Quarry Limited (“the operator”) operates a landfill site in Staffordshire (“the landfill site”). The appellant is the Environment Agency. It has statutory responsibility for regulating the landfill site. From some time in late 2020, increasing complaints were made about hydrogen sulphide gas coming from the landfill site. The appellant took various steps to address those complaints. Those steps included arranging with the operator that it would cap areas of the landfill site to prevent landfill gas emissions and instal improved infrastructure to extract and then destroy landfill gas. The appellant required the operator to submit a revised risk assessment and landfill management plan and it was reviewing those at the time of the hearing of this claim. It also established monitoring stations to collect data about the level of emissions and sought advice from Public Health England (“PHE”). PHE gave its fourth advice on the assessment of the acceptable level of hydrogen sulphide emissions on 5 August 2021.
3. The respondent to the appeal is Mathew Richards. He was the claimant in the court below. Mathew is a five-year-old boy with severe health problems. He was born prematurely and has developed lung complications including bronchopulmonary dysplasia. Mathew’s mother was concerned that the levels of hydrogen sulphide emissions were preventing his recovery and would lead, ultimately, to the development of chronic obstructive pulmonary disease. The very real concern was that the hydrogen sulphide emissions would result in reducing Mathew’s life expectancy unless the level of emissions was addressed. Further, it was claimed that the emissions led to Mathew, and others in the community, having to live in unbearable conditions as a result of the odours coming from the landfill site.
4. A claim for judicial review was issued on Mathew’s behalf on 15 July 2021 alleging that the appellant, as the body with statutory responsibility for the regulation of landfill sites, had failed to take all reasonable steps within its powers to address the level of hydrogen sulphide emissions emanating from the landfill site. It was alleged that this amounted to a breach of the obligation in Article 2 of the Convention to protect the right to life of the respondent and the obligation in Article 8 to respect for the private and family life and the home of the respondent.
5. Fordham J (“the Judge”) did not grant any remedy in relation to the claim that the appellant was acting in breach of its obligations under Articles 2 and 8 of the Convention as at the time of the hearing in August 2021. The Judge did grant a declaration, based on his reading of the PHE advice, as to what the appellant must do in order to comply with its legal obligations. The declaration was in the following terms:

“In order for the Environment Agency to comply with its legal obligations, the Agency must implement the advice of Public Health England as expressed in the Fourth PHE Risk Assessment

(published 5 August 2021), by designing and applying and continuing to design and apply such measures as, in the Agency's regulatory judgment, will and do effectively achieve the following outcomes in relation to emissions of hydrogen sulphide from Walleys Quarry Landfill Site: (1) the reduction of off-site odours so as to meet, as early as possible and thereafter, the World Health Organisation half-hour average (5PPB); and (2) the reduction of daily concentrations in the local area to a level, from January 2022 and thereafter, below the US EPA Reference Value (1PPB) as the acceptable health-based guidance value for long-term exposure.”

6. The appellant appeals against that order. First, it contends that the Judge erred in deciding that such a declaration was justified and appropriate. In particular, it contends that it was for the appellant, as the statutorily appointed and expert regulator, to determine what further actions were required to return hydrogen sulphide emission levels at the locality of the landfill site to acceptable levels within an acceptable time scale, having regard to relevant guidance and the advice from PHE. There was no evidence that the appellant was failing to address those responsibilities. In the circumstances, it contends that the Judge erred by making the declaration that he did. Secondly, the appellant contends that the Judge erred in granting a declaration where there was no finding of any past or current breach of the appellant's obligations. In the absence of any established unlawful act by the appellant, it contends that there was no proper basis upon which the Judge could grant the declaration that he did. Further, the declaration in effect required the appellant to achieve particular outcomes by particular times in circumstances where the assessment of risk might change and where there was no evidence before the court that the outcomes were capable of being achieved in the way, and within the timescale, prescribed by the declaration.
7. The respondent cross-appealed. He contends that the Judge had, in fact, found that the appellant was in breach of its obligations under Articles 2 and 8 of the Convention at the time of the hearing and should, therefore, have granted a declaration to that effect. Alternatively, if the Judge had not found there was, a breach of Articles 2 or 8 of the Convention, he was wrong in failing to do so.
8. As the parties wished to have early notification of the court's decision, we announced on 17 December 2021 that we allowed the appeal, dismissed the cross-appeal and set aside the declaration for reasons to be given in writing later. These are my reasons for joining in that decision.

THE LEGAL FRAMEWORK

Regulation of landfill sites

9. The appellant is a body established by section 1 of the Environment Act 1995. Facilities such as the landfill site cannot be operated except under a permit granted by the appellant pursuant to the Environmental Permitting (England and Wales) Regulations 2016 (“the Regulations”): see regulations 12, 13 and 32 of the Regulations. The appellant has the power to revoke a permit, or to serve an enforcement notice requiring the operator to take steps to comply with a condition of a permit, or to suspend a permit (see regulations 22, 36 and 37 of the Regulations). It has power to arrange for steps to

be taken to remedy the effects of pollution where it considers that there is a risk of serious pollution as a result of the operation of a facility (see regulation 57 of the Regulations).

The appellant's obligations under the 1998 Act

10. Section 6(1) of the Human Rights Act 1998 ("1998 Act") provides that it "is unlawful for a public authority to act in a way which is incompatible with a Convention right". An "act" includes a failure to act. Section 7 of the 1998 Act provides that a person "who claims that a public authority has acted (or proposes) to act" in a way made unlawful by section 6 may bring proceedings. Section 8 of the 1998 Act provides, so far as material, that

“(1) In relation to any act (or proposed act) of a public authority which a court finds is (or would be) unlawful it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”

11. The two relevant Convention rights in the present case are Articles 2 and of the Convention. Under the heading "Right to life", Article 2(1) of the Convention provides that:

“(1) Everyone’s light to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of sentence of a court following his conviction of a crime which the penalty is provided.”

12. The scope of the obligation has been considered in a number of decisions of the Supreme Court and the European Court of Human Rights. For present purposes, and this is not intended as an exhaustive analysis, the obligation has been recognised as imposing a negative duty to refrain from taking life save as provided for in Article 2(2) of the Convention and a positive duty to investigate deaths for which the state might be responsible. In addition, there is a positive obligation to protect life in certain circumstances. This latter obligation includes a duty on the state to put in place a legislative and administrative framework to provide an effective deterrent against risks to life (often referred to as the "framework duty"). It also includes a positive obligation where the authority knows of a real and immediate risk to life to take measures within the scope of its powers which, judged reasonably, it might be expected to take to avoid the risk. See generally the observations of Lord Dyson JSC in *Rabone v Pennine Care NHS Trust* [2012] AC 72 especially at paragraph 12.

13. In the context of the regulation of industrial processes or dangerous activities which give rise to a real and immediate risk to life, the obligation (the framework duty) encompasses, in summary, the need to have regulations dealing with the licensing, setting up, and operation of the activity which, amongst other things, makes it compulsory for those concerned to take practical measures to safeguard citizens against the risks inherent in such activities. See, generally, the decision in *Budayeva v Russia* (2014) 59 EHRR 2 at paragraphs 129 to 132. In relation to the positive obligation to take such steps, within the powers of the authority concerned, which are judged

reasonable to address any risk, the following general principles are set out in paragraphs 134 to 136 of the judgment, and repeated in substance in other cases (footnotes omitted):

“134. As to the choice of particular practical measures, the Court has consistently held that where the state is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation. There are different avenues to ensure Convention rights, 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.

135. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation states enjoy, as the Court has previously held, in difficult social and technical spheres.....

136. In assessing whether the respondent State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities’ acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved.”

14. Article 8 of the Convention provides that:

“1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

15. The exercise of functions involving the regulation of activities which cause industrial pollution may need to be assessed by reference to Article 8 of the Convention. The pollution must directly affect a person’s home, or family or private life, and must attain a certain minimum level of severity if it is to fall within the scope of Article 8(1) of the Convention. The assessment of the minimum severity is relative and depends on all the circumstances of the case including the intensity and duration of the nuisance and its physical or mental effects. 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*).

THE FACTS

The Problem of Landfill Gases at Waste Disposal Facilities

16. The presence of landfill gas at waste disposal facilities is a recognised problem. The sources of landfill gas, and the methods for dealing with them, are explained in the witness statement of Mr Browell, who is the senior advisor for the appellant on landfill gas. In brief, landfill gas is the product of anaerobic digestion of biodegradable waste deposited at landfill sites. Anaerobic digestion involves a complex series of biological and chemical reactions by which micro-organisms or bacteria break down biodegradable waste in the absence of oxygen, and generate gas. Landfill gas consists mainly of methane and carbon dioxide. It may also include small amounts of other gases (referred to as trace components) such as hydrogen sulphide. This gas is produced by the biological reduction of sulphates within waste such as gypsum in plasterboard. Under the anaerobic conditions present in landfill sites, bacteria can degrade sulphate-bearing waste in a process which gives rise to hydrogen sulphide and other products. Hydrogen sulphide is extremely toxic and malodorous.
17. There are various methods of addressing the risks presented by landfill gases. Operators have been prohibited from disposing of gypsum and other sulphate containing waste at landfill sites. Landfill gas can also be managed through a combination of containment and extraction. A landfill site is lined with impermeable materials and, once filled, can be capped with impermeable layers to prevent gas being released to the atmosphere. Wells may be drilled into the waste and connected to pipes which extract landfill gas for burning in engines to generate electricity or to destroy the gas.

The Landfill Site

18. The landfill site is at Walleys Quarry, in Silverdale in Newcastle-under-Lyme. It is operated under a permit first granted in 2005. That permit was subsequently varied and allows the operator to deposit 400,000 tonnes annually of certain specified types of defined waste at the landfill site. Gypsum and other high sulphate-bearing waste can only be deposited in cells where no other biodegradable waste is accepted: see paragraph 2.6.5 of the permit. The operator is required to collect landfill gas and control the migration of such gas in accordance with an approved landfill management plan. The appellant can require the submission of a revised plan for approval: see paragraph 2.9 of the permit. Paragraph 3.3 of the permit requires that emissions “from the activities shall be free from odour at levels likely to cause pollution outside the site.....”.

The Problems at the Landfill Site

19. From a time in late 2020 onwards, complaints were received about foul-smelling odours coming from the landfill site. The principal cause of the odours was hydrogen sulphide

gas. The emissions give rise to a strong, foul-smelling odour like the stench of rotten eggs. It can cause irritation to the eyes, sickness, headaches, vomiting and other symptoms. The effect of the hydrogen emissions on those living in the area are summarised in the judgment below at paragraphs 17 to 18. I deal below with the effects on the claimant, Mathew, who is, of course, a young child with a particular vulnerability arising out of his medical needs.

20. The level of complaints was high. We were told that there had been about 45,000 complaints in a period of some months in 2021, more than the number of complaints made about all other such facilities in the country combined.

The steps taken to address hydrogen sulphate emission at the landfill site.

21. The appellant recognises that there is a real problem with emissions of hydrogen sulphide in the locality of the landfill site. Ms Dennis was an installations technical leader employed by the appellant and was part of the team dealing with the regulation of the landfill site. In her witness statement, Ms Dennis explained that the increased level of hydrogen sulphide within the landfill gas at the landfill site was likely to come from waste from waste transfer stations. During the processing of waste at these waste stations, gypsum may not have been properly separated from other waste and may have been broken down and mixed with the other waste. Ms Dennis explains that it is likely that poorly treated waste containing gypsum-bearing particles mixed with other biodegradable particles have been deposited at the landfill site. As these have degraded, the level of hydrogen sulphide within the landfill gas has increased.
22. Ms Dennis set out the steps taken by the appellant to ensure proper treatment of waste at waste transfer stations. These included spot checks at waste transfer stations and landfill stations to ensure gypsum waste is correctly managed. Operators are required to inspect waste arriving at facilities and to report problems to the appellant. The operator in this case is required to have procedures within its management system to ensure that only permitted waste is accepted. Following the receipt of complaints, acceptance of waste at the landfill site was voluntarily suspended in March 2021. Ms Dennis, and other officers of the appellant, provided advice on the operator's pre-acceptance and acceptance procedures for waste. The acceptance of waste at the landfill site resumed in May 2021. Approximately 12 loads of waste had been rejected by the end of July 2021 following checks which identified plasterboard within the waste, or for other reasons.
23. Ms Dennis states in her witness statement that she is confident that no gypsum-bearing material which could exacerbate the production of hydrogen sulphide within the landfill gas has been deposited at the landfill site since the resumption of the acceptance of waste in May 2021. She considered that the material deposited since May 2021 has the capability to dilute the concentration of hydrogen sulphide and can also be utilised to improve the landform of the site to allow for additional temporary and ultimately permanent capping and restoration of the site. As such, the appellant's officers considered that suspension of the deposit of waste at the site would be counter-productive to the aim of securing the diminution in the concentration of landfill gas at the landfill site.
24. Ms Dennis explains that the focus of the appellant has been to control the potential for landfill gas to be released from the waste already deposited at the landfill site. The

solution is considered to be the improvement of the effective control and management of landfill gas through capping greater areas of the surface of the landfill site, enhanced extraction infrastructure and sufficient capacity to treat the extracted landfill gas.

25. Ms Dennis set out the actions taken by the operator following advice, guidance and the use of enforcement powers by the appellant. They included raising levels of material within significant areas of cell 1 of the landfill site to the levels required for restoration and the permanent capping of that area. On 23 March 2021, odour was detected in this area and an enforcement notice was served on the operator requiring it to instal capping on a defined area in cell 1 and temporary capping of an area in cell 2 by 30 April 2021. That was done. More than 50 other points where landfill gas was escaping were identified and capped. Thirteen additional wells were sunk in February and March 2021 at an area identified as a priority, and other wells sunk later, to enable additional amounts of gas to be extracted for disposal. Other steps were taken including changes to the landfill gas pre-treatment infrastructure. Further improvements were also planned which included further additional temporary capping to be installed in August 2021. The appellant required the operator to submit a revised and updated landfill gas risk assessment and landfill gas management plan by 31 July 2021. That was done and the appellant was reviewing those documents at the time that Ms Dennis made her witness statement (6 August 2021) and at the time of the hearing before the Judge (18 to 20 August 2021).
26. Ms Dennis confirmed that the appellant had considered both the suspension of the acceptance of waste at the landfill site and the revocation of the permit. Neither was considered appropriate as neither would address the central problem of the landfill gas generated by waste already deposited at the landfill site.

The Monitoring at the Landfill Site

27. The appellant has also taken steps to monitor the level of hydrogen sulphide gas emissions. Two mobile monitoring facilities were installed in March 2021 and a further two in April 2021. They produced data from March 2021 to the end of June 2021 and the monitoring is continuing. The appellant took advice from PHE on the risk presented by the level of hydrogen sulphide emissions revealed by the data obtained.

The Advice from PHE

28. There are four reports from PHE. They assess the risks posed by exposure to hydrogen sulphide in the short, medium and long term by reference to whether the levels are above certain guideline risk levels.
29. By way of preliminary observation, all four reports confirm that the previous monitoring data available for July 2017 to 14 February 2018 and 15 January 2010 to 25 June 2019 showed levels of hydrogen sulphide which were well below the guideline levels used by PHE to assess risk arising from long-term exposure to hydrogen sulphide. Those levels of exposure would not, therefore, have been expected to cause any significant effects on health in those periods in 2017 to 2019. There were no data to indicate that the level of emissions of hydrogen sulphide in 2020 was above levels suggesting unacceptable long-term exposure. The Judge proceeded on the basis that the problem of long-term exposure emerged in 2021 (see paragraph 32(6) of the judgment). The advice of PHE was, therefore, concerned with whether the level of

emissions in 2021 were above any relevant, acceptable short-term or medium-term levels of exposure in 2021, and the position in relation to long-term exposure.

30. All four reports confirm that the monitoring data show that the level of hydrogen sulphide gas in the atmosphere in the vicinity of the landfill site exceeded the levels assessed by the World Health Organisation (“WHO”) as giving rise to short-term (that is, over a 30-minute average) exposure to odour during the monitoring period. That would be likely to give rise to significant complaints of odour nuisance and could cause temporary symptoms including headaches, nausea, dizziness, watery eyes, stuffy nose, irritated throat, coughing or wheezing. The percentage of time when levels exceeded the guidelines was 6% at one monitoring station, 9% at a second, 12% at a third and 31% at a fourth. The first two reports recommended that all measures be taken to reduce the off-site odours from the landfill site as those odours could affect an individual’s wellbeing. The third report “strongly” recommended that course of action. The fourth report again strongly recommended that all measures be taken to reduce off-site odours from the landfill site and added that that should be done “as early as possible”. The monitoring data also showed that, on two days in March 2021, the levels exceeded a further set of WHO guidelines, the 24-hour guideline. Exposure to concentrations of hydrogen sulphide above those levels could lead to eye irritation and other health effects.
31. All four reports stated that the levels of hydrogen sulphide had not exceeded the levels considered acceptable for medium-term exposure, that is exposure for between 14 and 364 days.
32. In relation to long-term exposure, the first three reports referred to two different guideline levels for assessing the acceptability of the levels of hydrogen sulphide for long-term exposure. One fixed an acceptable level of lifetime exposure as being a hydrogen sulphide concentration of 7 parts per billion (that is, 7PPB). These are referred to as the OEHHA guidelines. The second, the US Environmental Protection Agency levels (“USEPA”), set a level of acceptable lifetime exposure as being a hydrogen sulphide concentration of one part per billion (1PPB). None of those three reports made any recommendations in relation to any need to reduce long-term exposure.
33. The fourth report from PHE, published on 5 August 2021, referred to one guideline level for assessing long-term exposure, namely the USEPA guidelines. The fourth report concluded that the data up to the end of June 2021 showed exposure of the population around the site which was above the levels acceptable for long-term exposure. It included, for the first time, a recommendation that all measures be taken to reduce the concentration of hydrogen sulphide in the local area to levels below the health-based guidance values used to assess long-term exposure. The reports and guidelines are considered in the judgment of the Judge at paragraph 32, especially at 32(4)-(6) and (7)-(10).

Mathew Richards’ Medical Condition

34. Mathew’s medical condition, and the Judge’s assessment of the evidence relating to Mathew’s respiratory condition is set out fully in the judgment of the Judge at paragraphs 6 to 7, and 19 to 27. The position can be summarised briefly here.

35. Mathew is five years old. He was born on 11 February 2016. He lived with his family until August 2019 at Galingale View, in Silverdale, about 200 metres east of the landfill site. Since then he has lived with his mother and grandmother at Victoria Close, Silverdale, and then with his mother at Victoria Street each being about 400 metres northwest of the landfill site.
36. Mathew was born prematurely at 26 weeks. As a result, he developed lung complications, namely bronchopulmonary dysplasia. He required oxygen assistance following his birth for two years and was poorly for the first three years of his life. He has other medical conditions. Dr Samuels, a consultant paediatrician, reviewed Mathew's condition on 23 April 2021 when he was five years old. Dr Samuels gave his opinion in a letter, noting that Mathew had had a good long period with his chest remaining healthy during lockdown but in the last couple of months his chest had been bad as a result of sulphurous fumes emanating from a local landfill site.
37. Mathew was then assessed by Dr Sinha, a consultant paediatrician at the Alder Hey Children's Hospital in Liverpool. His report is dated 4 July 2021 and there is an addendum to that report dated 22 July 2021. He explains that children born prematurely have fragile lungs which do not work effectively because of immaturity in structure and function. He described Mathew's early treatment. He records that Mathew has bronchopulmonary dysplasia which has lifelong consequences. The management of that condition involves promoting lung growth to compensate for the problems of prematurity. Dr Sinha's report says that Mathew's respiratory health has been poor to date. He considered that problems of airway inflammation, resulting from exposure to hydrogen sulphide, would cause further long-term damage to Mathew's respiratory system. He considered that would lead to adult illness and premature mortality. His evidence was not disputed and was accepted by the Judge: see paragraph 7 of the judgment. The Judge also heard oral evidence from Dr Sinha, and an expert instructed by the interested party. He records that the experts were in agreement that Mathew is at risk of developing chronic obstructive pulmonary disease unless he recovers. Dr Sinha's evidence was that there was a window of opportunity for recovery of three to five years and that, in order to recover, Dr Sinha considered Mathew needed clean air above all: see paragraph 21 of the judgment. More generally, the Judge recorded a summary of the evidence of the effects of odour on the community, including Mathew and his family, at paragraphs 16 to 18 of his judgment.
38. A copy of Dr Sinha's report and addendum report was provided to the appellant. It sought advice from PHE. As appears from the witness statement of Mr Coetzee, a consultant in communicable disease control employed by PHE, the information provided in Dr Sinha's report and addendum report did not lead PHE to change its risk-assessment approach or the health based guidance values it used to assess potential risks to health.

THE CLAIM

39. On 15 July 2021, Mathew issued a claim for judicial review against the appellant. The claim challenged what was described as the appellant's ongoing failure to comply with its positive obligations under Article 2 and/or Article 8 of the Convention and its common law obligations. The date of the decision was said to be 7 July 2021 (which is, in fact, the date of the appellant's reply to the pre-action protocol letter sent by the respondent's solicitors on 17 June 2021).

40. The first ground of challenge was that the appellant had a positive obligation to safeguard Mathew's right to life under Article 2 of the Convention. The duty was said to arise from the fact that the operator was operating a dangerous industrial activity, namely the landfill site, and that the continuing release of dangerous quantities of hydrogen sulphide gas gave rise to a real and immediate risk to Mathew's life. The claim relied upon the 4 July 2021 report provided by Dr Sinha. It claimed that the appellant knew of that risk as it had been provided with Dr Sinha's report. The claim contended that the appellant had failed to take the measures within the scope of its powers that it might have been expected to take to avoid the risk to Mathew by the emission of dangerous quantities of hydrogen sulphide.
41. The second ground alleged that the appellant had breached the respondent's right to respect for his private and family life and his home guaranteed by Article 8 of the Convention. The claim contended that the emissions of hydrogen sulphide from the landfill site directly and seriously affected Mathew and that the adverse effects had attained the necessary minimum level, relying again on the evidence of Dr Sinha and also Mathew's mother. It claimed that the appellant was in a position to evaluate the pollution risk and take adequate measures to prevent or reduce it. The claim contended that the appellant was in breach of its obligation under Article 8 of the Convention as it had not taken adequate and reasonable steps to protect Mathew's and the community's rights under Article 8 of the Convention.
42. There was a further ground of claim alleging breach of obligations imposed by the common law. The Judge did not uphold that ground of claim. There is no appeal in relation to the common law duties. They do not feature in this appeal and there is no need to mention them further.
43. The final relief or remedy sought included:
 - (1) A declaration that Mathew's rights under Articles 2(1) and 8 of the Convention had been violated;
 - (2) A mandatory order that the appellant take appropriate and adequate steps to remove the risk to Mathew's health posed by emissions of hydrogen sulphide from the landfill site.
44. On 15 July 2021, the respondent also made an application for urgent consideration. The claim had included an application for interim relief in the form of a mandatory order requiring the appellant to exercise its power under regulation 37 of the Regulations and suspend the permit to operate the landfill site until the operator had taken steps to ensure that no further gypsum-based or biodegradable waste was accepted at the landfill site. The urgent consideration application requested that the application for interim relief be considered at a hearing within 14 days.
45. On 16 July 2021, the Judge considered the claim and the application for urgent consideration and ordered an oral hearing on 23 July 2021. On that day, having heard from counsel for the respondent and the appellant, the Judge ordered that the application for permission to apply for judicial review, and the substantive hearing of the claim if permission were granted, be considered at a hearing on 18 and 19 August 2021. The Judge did not grant interim relief and we were told that an expedited hearing of the claim was considered preferable. The Judge granted permission for the claimant to rely

on Dr Sinha's report of 4 July 2021 and the addendum report. The Judge also fixed a timetable for the filing of evidence and other material. The appellant was required to file its written evidence by 12 noon on Friday 6 August 2021.

THE JUDGMENT

46. The judgment is a long and complex document. It should be read in its entirety. For present purposes, the principal findings and conclusions can be summarised as follows.
47. First, the Judge did not accept the opinion of Dr Sinha that there should be zero tolerance of any emissions of hydrogen sulphide or his opinion that there were no levels of hydrogen sulphide emissions which could be considered to be "safe". However, the Judge considered that Dr Sinha's evidence that exposure to current levels of hydrogen sulphide was significantly impairing Mathew's current health was not dependent on Dr Sinha's views on the need for zero tolerance of hydrogen sulphide emissions (see paragraphs 23, 24 and 27 of the judgment). The Judge did not accept the evidence of Professor Berry for the interested party that all the various guideline values being used were precautionary and there was no basis for linking Mathew's respiratory condition to hydrogen sulphide exposure (see paragraphs 23 and 27 of the judgment).
48. Secondly, the Judge regarded the fourth report containing advice from PHE, which was published on 5 August 2021, as significant (describing it as "a beacon"). He drew attention to the fact that it fixed one guideline level, the USEPA level of 1PPB, for the purpose of assessing acceptable levels of long-term or lifetime exposure to hydrogen sulphide (see paragraphs 32 and 33 of the judgment).
49. Thirdly, the Judge found that there was a real and immediate risk to life in Mathew's case as there was a substantial and significant risk of Mathew's life expectancy being reduced by Mathew developing chronic obstructive pulmonary disease as a result of exposure to current levels of hydrogen sulphide (see paragraphs 53 to 56 of the judgment). That is one of the necessary requirements that must be met as part of the process of establishing a breach of Article 2 of the Convention. There is no appeal against this finding.
50. Fourthly, the Judge found that the levels of hydrogen sulphide gave rise to adverse environmental pollution that had a direct effect on Mathew's home, and his family and private life and which attained the relevant minimum level of severity by reason of its intensity and duration and the physical and mental effects it caused (see paragraph 57 of the judgment). These are necessary requirements which must be met as part of the process of establishing an interference within the meaning of Article 8(1) of the Convention. There is no appeal against this finding.
51. The Judge regarded his findings as "triggering", as he described it, a positive operational duty on the part of the appellant which would require it to take appropriate steps to address the risk. The Judge dealt with the requirements of Articles 2 and 8 in this regard together under the heading "What does Compliance with the Positive Operational Duties Require?"
52. Fifthly, the Judge accepted that the appellant would comply with its obligations under Articles 2 and 8 of the Convention if it took steps which in its judgment were effective to implement the advice contained in the fourth report provided by PHE (see paragraphs

58 to 59 and, especially, the first three sentences of paragraph 60). That included the recommendation that the off-site odour levels should be reduced below the levels in the WHO 30-minute guidance as early as possible and the recommendation that the long term exposure levels be reduced to 1PBB with effect from 1 January 2022.

53. Sixthly, the Judge went on to find that not only would it be sufficient for the appellant to implement the advice, it was “necessary” for it to do so. That is, the Judge considered that the appellant was legally required to implement that advice, with the implication that it would be in breach of its obligation under either Articles 2 or 8 or both if it did not do so within an appropriate timescale. In order to understand the Judge’s reasoning it is helpful to set out the material parts of paragraph 60 his judgment in full:

“60.... I have set out (see [32(5)] and [(10)] above) what it is that the Fourth PHE Risk Assessment is advising. I accept that the EA would discharge its legal obligations if and insofar as it takes the action which—in its judgment—will be effective to implement that advice. In my judgment, it is not a question of this being sufficient, but also of this being necessary, to discharge the EA’s legal obligations. The EA’s pleaded defence convincingly submits that it is “appropriate for the EA to have relied on the advice from PHE as the responsible national body for public health and for protection from public health hazards”. PHE, as the relevant state public health body, has been asked to conduct an assessment and give advice. It has done so. It has identified what it considers to be the appropriate health-based levels of hydrogen sulphide. It—and the work which it has adopted and applied—has done so, having regard to the need to protect the human health of all those who are exposed, including children and all those vulnerable to hydrogen sulphide. In those circumstances, reference to the Convention on the Rights of the Child would not take matters further. The identification of appropriate health-based levels is of real significance in securing practical and effective health safeguards. As has been seen, in *Fadeyeva* there were maximum permissible limits (at [49]), which had been identified in and through the Russian legislation, as limits above which the Russian legislative authorities had assessed that “pollution becomes potentially harmful to the health and well-being of those exposed to it“ (at [87]) and “might endanger the health of those living nearby” (at [132]). The breach of the positive operational obligation in *Fadeyeva* was because “the polluting enterprise at issue operated in breach of domestic environmental standards” and (at [133]):

“there is no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels”.

This, in my judgment, is a clear encapsulation of what is sufficient—but also necessary—for the EA to do in the present

case. The phrase “acceptable levels” in the present case is the one used by PHE and Dr Coetzee. What is needed is the design and application of measures which are effective to reduce the emissions to those acceptable levels. It is PHE’s clear and published advice, by reference to identified health-based standards, which would satisfy the need to approach the problem with due diligence (*Fadeyeva* [128]). *Fadeyeva* is not the only case to provide a helpful reference-point. In *Lopez Ostra* the Spanish authorities had identified “permitted levels”, above which hydrogen sulphide emissions “could endanger the health of those living nearby”, and the NTI had reported that exceedances of those values could endanger health. In *Oneryildiz*, a committee of experts had written a report and the Environment Office had given advice, making a recommendation, which the state authorities decided not to implement, but rather to resist. There were also relevant recommendations in *Budayeva*, which were not adopted and implemented. Likewise, to fail to adopt the clear advice and recommendations of PHE, referable to protective and precautionary health-based standards identified as appropriate by PHE, would be to fail to comply with the positive operational duty. Only recognition, acceptance and implementation of PHE’s advice—through the design of effective measures to achieve the outcomes in PHE’s advice—could satisfy the positive operational duty given the real, anxious and evidenced health concerns relating to Mathew, a vulnerable child.

54. Seventh, the Judge then considered what was the outcome of his assessment. He answered that in paragraph 64 of his judgment which, again, it is necessary to set out in full:

“64. What should the court do in the light of these conclusions? What is needed in this case is clarity. The position in law, as I have found it to be, can be stated as follows:

In order for the Environment Agency to comply with its legal obligations, the Agency must implement the advice of Public Health England as expressed in the Fourth PHE Risk Assessment (published 5 August 2021), by designing and applying and continuing to design and apply such measures as, in the Agency’s regulatory judgment, will and do effectively achieve the following outcomes in relation to emissions of hydrogen sulphide from Walleys Quarry Landfill Site: (1) the reduction of off-site odours so as to meet, as early as possible and thereafter, the World Health Organisation half-hour average (5PPB); and (2) the reduction of daily concentrations in the local area to a level, from January 2022 and thereafter, below the US EPA Reference Value (1PPB) as the acceptable health-based guidance value for long-term exposure.

I will grant a declaration in these terms. In my judgment, to do so is just and convenient and is in the interests of justice. It will provide the clarity, and the reassurance, which this case needs. It constitutes this court saying—as Mr Mould QC characterised it in argument—that in the light of all the evidence, it is critical to make clear that this outcome must be secured. It will secure practical and effective human rights safeguards. It will require pressing and ongoing action which will, in my judgment, make a very real difference so far as the air which Mathew (and his community) breathes is concerned. It will also recognise the important role played by PHE in identifying guidelines and outcomes, and the latitude which the EA has in assessing what steps are necessary and most appropriate, effectively to achieve these outcomes. Having granted that declaratory relief, I accept that it is not necessary—nor is it appropriate—for this court to say that there is a current breach by the EA of its legal obligations. I have made clear that I am not satisfied, on the evidence, that the EA has yet addressed its legal duties in the way that it must. But there is an obvious and pressing public interest imperative that it must do so, as a matter of urgency. It is well able to do so. It will doubtless publish its confirmation that, and how, it has done so. What matters from this court is clarity as to what the EA’s legal obligations are and what the EA must, in law, do. That puts the focus where it should be, in this urgent, “in the moment” (see [50] above), human rights case involving positive operational duties.”

55. The Judge refused liberty to the claimant to apply on notice for further or additional relief. He said that the judgment explained clearly what was needed and why and that the “substantive content of the positive obligation arises clearly from the Fourth PHE Risk Assessment” (see paragraph 67). In dealing with costs, he said that this at paragraph 68:

“In my judgment, the appropriate order for costs in all the circumstances of the present case is that the EA should pay one-third of Mathew’s costs, to be the subject of a detailed assessment if not agreed; and with a detailed assessment of Mathew’s publicly funded costs. I agree that the declaration stands as a practical and effective remedy, achieved by Mathew through bringing these proceedings, which justifies regarding Mathew as “the successful party”, as Mr Mould QC rightly recognises. On the other hand, Mr Wise QC—from first to last—steadfastly maintained two key destinations. First, he wanted a finding that the EA is in present breach of its obligations, a finding which I have declined to make (see [64] above). Secondly, he wanted an analysis from this court which accepted Dr Sinha’s “zero-tolerance” approach, which I have declined to adopt (see [27]–[31] above). Mr Wise QC did not moreover advance, as the substantive content of the obligation and remedial solution to this case, the PHE analysis (see [32]) and

the logic of implementing it, even when it loomed large at the hearing. On the contrary, it was the EA—through Mr Mould QC—who identified the importance of the Fourth PHE Assessment and implementation of its recommendations (at [59]). I agreed with Mr Mould QC’s Step (2), and that this provided the sufficient—and necessary—content for discharging the EA’s legal obligations (at [60]). It has been necessary and appropriate to make a declaration which achieves a practical and effective outcome for Mathew (at [64]). I interpose that—notwithstanding the dual premise on which it is based—it is a declaration which the EA evidently has difficulty accepting (see [70] below). Then there is the fact that I rejected (at [63]) Mr Mould QC’s Step (3) (at [62]). I have considered the way in which other contested issues were determined and their materiality. In all the circumstances—stepping back—the just and appropriate costs order, as an exercise of my judgment and discretion, is that the EA should pay one-third of Mathew’s costs. I add this. My evaluative judgment is not one which has been materially influenced in Mathew’s favour by Mr Wise QC’s reference to the legal aid position; but nor in the EA’s favour by Mr Mould QC’s reference to cost-caps in Aarhus claims. It is rather—in my judgment—the correct, just and proportionate order in all the circumstances of this case.”

56. The order made by the court grants permission to apply for judicial review and for the admission of certain evidence. It does not record whether the claim is allowed or dismissed. It records the grant of the declaration in the terms set out in paragraph 1 above. It deals with costs.

THE APPEAL

57. The appellant appeals against the order granting the declaration set out at paragraph 3 above. There are two grounds of appeal, namely:
- (1) The Judge erred in deciding that judicial intervention was appropriate or justified and failed to follow or apply the principles established in the case law of the domestic courts and the European Court as to the respective roles of the court and the appellant as it was for the appellant, as the designated, specialist regulator, to evaluate and determine what further action needed to be taken to restore the level of emissions of landfill gas at and in the vicinity of the landfill site to acceptable levels within an acceptable timescale in the light of the guidance and recommendations made by PHE on the short and long-term levels of emissions that should be achieved to safeguard health. There was no evidence that the appellant had sought to avoid its responsibilities; rather the evidence was that the appellant had taken practical measures and would keep the need for further measures under review;
 - (2) The Judge erred in making the declaration in circumstances where there was no finding of past or current breach of the obligations imposed on the appellant. Consequently, there was no justification for a remedy.

Further, the declaration granted effectively required the appellant to achieve a mandatory outcome in a field of regulatory action that involved an assessment of risk and where the evidence did not establish that such outcomes were necessarily capable of being achieved in the terms declared.

58. The respondent has permission to cross-appeal on one ground namely:
- (1) Having found that the appellant had not complied with its obligations under Articles 2 and 8 of the Convention at the time of the hearing, the Judge erred in deciding it was not necessary or appropriate to declare that the appellant was in breach of its obligations. Alternatively, if the Judge had not found there was a current or present breach of the respondent's rights under Articles 2 or 8, he was wrong not to do so in light of his findings that the appellant had not complied with its obligations and in the absence of evidence from the appellant that it had done everything within its powers to avoid the risk to the respondent's life.

THE FIRST GROUND OF APPEAL – THE RESPECTIVE ROLES OF THE COURT AND OF THE REGULATOR

Submissions

59. Mr Mould Q.C., with Ms Lean, for the appellant, submitted that the appellant accepted that there was a serious problem with the levels of hydrogen sulphide emissions at the landfill site. It had accepted that it owed positive duties under Articles 2 and 8 of the Convention. Against that background, the task for the appellant was to identify the source of the problem and put in place such measures, within its powers, as would require the operator to take steps to reduce the level of hydrogen sulphide emissions to acceptable levels. The appellant had put in place a monitoring regime to obtain accurate data on the position at the landfill site and had sought advice from PHE as to the acceptable levels of emissions from the viewpoint of safeguarding health. It had already taken steps to require the operator to address the problem, as explained in the evidence filed on behalf of the appellant. It had required the operator to submit a revised risk assessment and landfill management plan by 31 July 2021. The evidence demonstrated that the appellant would continue to review the position in accordance with relevant guidance and legislation, including the advice from PHE (the latest advice being provided on 5 August 2021, one day before the appellant's evidence was due to be filed and less than two weeks before the start of the hearing in the court below). There was no evidence, or proper basis, upon which the court could infer that the appellant would disregard its obligations and no basis for inferring that the appellant would not do what it thought was required.
60. In those circumstances, Mr Mould submitted, the Judge had erred in deciding for himself what action was required, and within what timescale. He had sought to determine the appropriate levels of emissions and the timescale by which action should be taken to achieve those levels. That went beyond determining the claim which sought a declaration that, as at the date of the hearing, the appellant had failed to comply with its obligation under Articles 2 and 8 and where the respondent was no longer seeking a mandatory order (see paragraph 3 of the judgment). The approach taken by the Judge

was also contrary to the established case law of the European Court which recognised that the choice of measures is a matter for the relevant authorities and it was not for the court to determine what should be done (see *Budayeva* at paragraph 134, and *Fadeyeva* at paragraph 128). Further, the Judge wrongly treated this as a case where there was a breach because of the lack of information that the appellant had designed or applied effective measures (relying on paragraph 133 of the decision in *Fadeyeva*). There, however, the European Court drew an adverse inference from the failure of the state to provide any information about its policy about resolving the problem with emissions from a steel plant. The present case was different. The appellant had provided ample information about the steps it was taking but the Judge failed to evaluate those steps.

61. Mr Wise Q.C., with Ms Dobson and Mr Perry, for the respondent, submitted that the Judge was well aware of the principles established by the European Court and referred to them. This was a case where there was exposure to heightened levels of hydrogen sulphide which would shorten life expectancy. For good reasons, within his jurisdiction, the Judge's view was that it was just and convenient to set out the content of the obligation in the way he did (as permitted by section 8 of the 1998 Act). The Judge did not interfere with the margin of discretion available to the appellant. The declaration simply reflected the primacy of the evaluative judgments of others, namely the PHE as the body responsible for public health, and the appellant as regulator who recognised the need to implement PHE's recommendations. It was the appellant who had failed to point to evidence that it had yet addressed the need to implement the PHE's recommendations. The Judge was entitled to take the view that a failure to adopt the clear advice and recommendations of PHE would involve a failure to comply with the positive operation duty imposed on the appellant by Articles 2 and 8 of the Convention. The Judge's approach was consistent with the case law of the European Court.
62. Mr Hart Q.C., with Mr Beamont, for the interested party adopted the submissions of Mr Mould.

Discussion

The Role of the Court

63. The role of the court under the 1998 Act is to determine whether a public authority is acting unlawfully by acting in a way which is incompatible with a person's Convention rights: see section 6 of the 1998 Act. An act includes a failure to act. A person is entitled to bring proceedings before the appropriate court, here by way of judicial review, where it is claimed that a public authority has acted, or is proposing to act, in a way that is unlawful because it is incompatible with that person's Convention rights: see section 7 of the 1998 Act. The focus is on the actions, or proposed actions, of the public authority. If it is to be found that a public authority is acting, or is proposing to act, unlawfully, there must be a proper evidential basis for that finding. Furthermore, the court's role is to adjudicate on whether a claim as brought is made out, and, if so what remedy is appropriate. Here, the claim alleged that the appellant was acting unlawfully as the date of the hearing in August 2021 (or, possibly, as at the date of Dr Sinha's report on 4 July 2021) because it was acting incompatibly with Mathew's right to life under Article 2 of the Convention and his right to respect for his family and private life and his home which is guaranteed by Article 8 of the Convention. The court's role was to determine whether that claim was established.

64. In the present case, however, the Judge sought instead to define the legal content of the obligation owed under Articles 2 and 8 of the Convention. He sought to prescribe the precise outcomes that the appellant had to achieve, and the timescale within which it had to achieve those outcomes. In doing so, the Judge exceeded his role under the 1998 Act. Furthermore, he was not acting in accordance with the principles established by the European Court. Indeed, he was acting contrary to the principles recognised in cases such as *Budayeva* and *Fadeyeva*. The Judge went beyond the proper limits of adjudicating on the dispute between the parties. I reach that conclusion for the following reasons.
65. First, the Judge determined that the appellant would have to take steps to achieve a reduction in the levels of hydrogen sulphide below the levels recommended by PHE within the timescales he prescribed. That is clear from paragraph 60 of his judgment and the terms of the declaration. The Judge considered that taking such steps would not merely be a “sufficient” way by which the appellant could demonstrate that it was discharging its obligations under Articles 2 or 8 of the Convention. Rather, he considered that achieving compliance with the levels recommended by PHE was “necessary” in order for the appellant to discharge its obligation. In other words, the Judge decided that the appellant was legally required to implement the advice of PHE and achieve the specified outcomes within the timescale prescribed. That involved 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.
66. Secondly, the approach adopted by the Judge also ran counter to the principles established by the European Court in cases concerned with dangerous activities carried on by the operator of a facility. A regulator may have legal powers to regulate those activities and to require the operator to take steps designed to address risks posed by those activities. As the European Court said at paragraph 128 of its judgment in *Fadeyeva* in the context of Article 8 of the Convention:
- “128..... 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.....”
67. A similar approach is recognised in the context of Article 2 of the Convention in *Budayeva* at paragraphs 133 and 134. The European Court recognised that the choice of means was for the contracting state and care should be taken not to impose impossible or disproportionate burdens on the authorities. Similar principles are referred to in other decisions of the European Court such as, for example, *Oneryildiz v Turkey* (2005) 41 EHRR 20 at paragraph 107.
68. The Judge was aware of the principles established in the case law of the European Court and referred to them in his judgment at, for example, paragraphs 38, 39 and 42. At paragraph 51, the Judge reminded himself of the latitude for judgment to be accorded to public authorities regulating dangerous activities and said that it was important that a court “never lose sight of it” and that the court “does not substitute its view of the best policy to adopt in a difficult technical and social sphere”. The Judge

was aware that the case concerned the question of whether the appellant was discharging its duty under section 6 of the 1998 Act (see paragraph 1 of the judgment).

69. Nonetheless, despite these reminders, the Judge did in fact do precisely what he recognised that a court should not do. He decided what level of emissions would be acceptable both for long-term exposure when dealing with Article 2 of the Convention and for exposure capable of amounting to an infringement of Article 8 of the Convention. He elevated the advice given by PHE to a legally binding standard. He fixed the precise outcomes to be achieved and the timetable within which they were to be achieved. In doing so, the Judge exceeded the function allocated to him under the 1998 Act. 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. For these reasons alone, ground 1 of the appeal succeeds and the appeal must be allowed and the declaration set aside.

The application of *Fadeyeva*

70. There is a separate, and second, reason why the Judge erred in granting the declaration that he did. At paragraph 60 of his judgment, he says that the breach of the positive operation obligation in *Fadeyeva* arose because the polluting enterprise operated in breach of domestic environmental standards and because “there is no information that the State designed or applied effective measures”. The Judge concluded that the phrases he cited provided a “clear encapsulation” of what it was “necessary” for the appellant to do in the present case. In doing so, he misunderstood and misapplied the decision in *Fadeyeva*.
71. The *Fadeyeva* case concerned a steel plant in the town of Cherepovets in Russia. The plant produced levels of toxic emissions above those permitted under domestic legislation. In 1965, the authorities had established a 5,000 metre buffer zone around the plant which was intended to separate the plant from the town’s residential area. The size of the buffer zone was subsequently doubled. In practice, however, people established homes within the buffer zone. The applicant, Ms Fadeyeva, and her family moved into one such home in 1982. The applicant brought actions in the domestic courts in 1995 and 1999 seeking resettlement outside the buffer zone. The courts accepted that she should be re-housed but ordered only that she be placed on a waiting list. She then filed a complaint with the European Court alleging that the concentration of toxic substances near her home constituted a violation of Article 8 of the Convention.
72. The European Court accepted that, since 1998, the levels of pollution had exceeded the standards derived from domestic legislation. It found that the level of pollution gave rise to a detriment to the health and well-being of the applicant and reached a level sufficient to bring it within Article 8 of the Convention. The authorities knew of the pollution created by the plant and were in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The European Court then considered whether the infringement was justified under Article 8(2) of the Convention. It accepted that the continuing operation of the plant pursued a legitimate aim. In dealing with what was necessary for achieving that aim, the European Court identified the relevant general principles. It recognised that it was not for the European Court to substitute its view as to what might be the best policy in a difficult technical and social sphere. The role of the Court was to ensure that no manifest error had been made by the

national authorities in striking a fair balance between the interests of the applicant and the community as a whole.

73. In applying those principles to the facts of the case, it noted at paragraph 128 that it was not for the European Court to determine exactly what should have been done to reduce pollution in a more efficient way. It was for the Court to assess whether the national authorities had approached the problem with due diligence and given consideration to all the competing interests. The European Court noted that the government had referred to a number of studies carried out to assess the environmental situation. The government had, however, failed to produce those documents or explain how they influenced policy in respect of the plant. The government had not provided a copy of the operating permit for the plant. Further, while the government had said that the operator of the plant was subjected to various checks and penalties, no details of the breaches or the penalties had been provided. It was not possible for the Court to assess whether the sanctions could induce the operator to take the necessary measures for environmental protection. In that regard, the European Court held that it was not possible for it to make a sensible analysis of the government's policy towards the plant because the government failed to show clearly what the policy consisted of. In those circumstances "the Court has to draw an adverse inference" and it could not conclude that the authorities had given due weight to the interests of the community living in close proximity to the plant (see paragraphs 130 to 131). It was in those circumstances, that the European Court summed up its reasons for finding a breach at paragraphs 132 to 134 in the following terms:

"132. In sum, the Court finds the following. The State authorised the operation of a polluting enterprise in the middle of a densely populated town. Since the toxic emissions from this enterprise exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established that a certain territory around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice."

133. It would be going too far to state that the State or the polluting enterprise were under an obligation to provide the applicant with free housing, and, in any event, it is not the Court's role to dictate precise measures which should be adopted by the states in order to comply with their positive duties under Art.8 of the Convention. In the present case, however, although the situation around the plant called for a special treatment of those living within the zone, the state did not offer the applicant any effective solution to help her move from the dangerous area. Furthermore, although the polluting enterprise at issue operated in breach of domestic environmental standards, there is no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a

fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Art.8 .”

74. Read fairly and as a whole, the judgment in *Fadeyeva* does not provide a justification for the approach taken by the Judge in the present case in making the declaration that he did. The paragraphs cited by the Judge explain why, on the facts of that case, the authorities had not demonstrated that the interference was justified under Article 8(2) of the Convention. It is not possible to elevate the facts which gave rise to a breach of Article 8 of the Convention in one case, to a general definition, applicable to all other cases, of the legal content of the obligations in Articles 2 or 8 of the Convention on regulatory bodies regulating the conduct of those involved in activities which can give rise to pollution.
75. Further, the facts in *Fadeyeva* are diametrically the opposite of the facts in this case. The appellant has provided the operating permit, the monitoring data that it has obtained, and the advice that it has been given by PHE. It has provided detailed witness statements explaining its assessment of the problem, the steps already taken to address the problem, the further steps it was proposing to take and its willingness to review matters in the light of the emerging advice. There would be no basis for the court here to draw an adverse inference as the European Court had done in *Fadeyeva*. The task for the Judge was to assess the material to determine whether the appellant had demonstrated that it had struck a fair balance between the legitimate interest in maintaining a landfill site and the interests of Mathew and others in the community. He did not carry out that task. Instead, he erroneously took the factual findings in *Fadeyeva*, treated those as a comprehensive definition of the scope of the obligations imposed by Articles 2 and 8 of the Convention and granted a declaration that the appellant must comply with the obligations as defined. For that second, and separate, reason ground 1 of the appeal succeeds and the appeal must be allowed and the declaration set aside.

THE SECOND ISSUE – THE QUESTION OF PAST OR PRESENT BREACH OF ARTICLES 2 AND 8 OF THE CONVENTION

76. Ground 2 of the appeal is that the Judge erred in making a declaration where there was no finding of past or current breach of any positive obligation of the appellant. This overlaps with the first part of the respondent's cross-appeal where he submits that the Judge did the opposite. He submits that the Judge did find that the appellant was in breach of its obligations as at the date of the hearing and so should have granted a declaration to that effect. It is appropriate to deal with ground 2 of the appeal and the first part of ground 1 of the cross-appeal together.

Submissions

77. Mr Mould submitted that the Judge had not found any past or current breach by the appellant of its obligations. In those circumstances, there was neither a justification nor a requirement for a remedy. Furthermore, the respondent had never sought an advisory declaration as part of his case. In the circumstances, the Judge should have refused relief for similar reasons to those given by the Court of Appeal when refusing to grant a declaration in *R (Bell and A) v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363 at paragraph 69. Further, the declaration is prescriptive of the

outcomes to be achieved and the timescale within which that was to be done, namely as early as possible for reducing the emissions below the WHO 30-minute average for odour thresholds and by 1 January 2022 for the reduction in daily concentrations below the USEPA levels. There was no evidence before the court that those outcomes could be achieved within that timetable. Nor did the declaration allow for any change in recommendations or any practical difficulties in achieving, or maintaining the prescribed outcomes. Those submissions were adopted by Mr Hart for the interested party.

78. Mr Wise submitted that the Judge had found that, at least by the date of the hearing, if not earlier, the appellant was in breach of its obligations under Articles 2 and 8 of the Convention. That is why the Judge said at paragraph 64 of the judgment that the appellant “has not yet addressed its legal duties in the way it must”. In those circumstances, the Judge should have granted a declaration recording the finding of breach, in accordance with the guidance given by Lord Toulson in the Supreme Court in *Hunt v North Somerset Council* [2015] UKSC 51, [2015] 1 WLR 3575 at paragraph 12. In any event, even if there had been no finding of breach, the Judge was entitled to grant a declaration where he considered that it was just and convenient to do so, as section 8 of the 1998 Act recognised.

Discussion and Conclusion

79. On a fair reading of the judgment, the Judge did not find that, as at the date of the hearing, there was any past or current breach by the appellant of its obligations under Articles 2 and 8 of the Convention. Put more accurately, the Judge did not find that the appellant had acted unlawfully by failing to comply with its obligations under Articles 2 and 8 of the Convention in the period prior to the hearing, or that it was failing to comply with those obligations as at the time of the hearing in August 2021. I reach that conclusion for the following reasons.
80. First, the Judge did not expressly state anywhere in his judgment that the appellant was in breach of its obligations under Articles 2 or 8 of the Convention. Nor did the order made by the Judge record any such breach. Secondly, parts of the judgment make it clear that the Judge was not finding any past or current breach. At paragraph 70, for example, the Judge expressly stated that he had declined to make any finding that the appellant was in present breach of its obligations. Further, at paragraph 64, the Judge stated that having granted the declaration, he did not consider it necessary or appropriate to say that the appellant was in current breach of its obligations. Thirdly, the terms of the declaration make it clear that the Judge was defining what the appellant would have to do in future to ensure that it did not act unlawfully. It would have to ensure that it took the necessary measures to ensure that the levels of hydrogen sulphide fell below the WHO guideline level for 30-minute exposure “as early as possible” and below the USEPA guideline levels on long term exposure from 1 January 2022. The declaration, which is said by the Judge to reflect the conclusions in his judgment, is therefore looking to the future. It is not seeking to declare any past or current breach as at the date of the hearing. It is in that context that the Judge said at paragraph 64 that the appellant has “yet to address” its legal duties. That is not a finding that the appellant was acting unlawfully as at the date of the hearing.
81. The next question is whether it was appropriate to grant a declaration of the sort granted in this case. Declarations are one of the remedies available in claims for judicial review:

see section 31(2) of the Senior Courts Act 1981. Declaratory relief is flexible. It enables the courts to identify whether or not particular action or inaction would be unlawful and can also perform an ancillary role in, for example, clarifying the consequences of a finding of unlawfulness or dealing with any issues of public law that need to be resolved. In judicial review claims alleging a breach of a duty owed by a public body, a declaration is a commonly used remedy following a finding that a public authority is acting, or is proposing to act, in a way made unlawful by public law (see *Bell* at paragraph 69). The courts have recognised that, in exceptional circumstances, an advisory declaration may be granted clarifying the law on a particular issue. Underlying the grant of a declaration, however, is the concept that the courts need to resolve an issue of public law and, usually, to grant an appropriate remedy to address actual or proposed unlawful action or inaction on the part of a public body.

82. That idea is reflected in the remedial provisions of the 1998 Act. Section 7 of the 1998 Act deals with the situation where a person is alleging that a public authority has acted, or proposes to act, in way that is made unlawful by section 6, that is because the authority is acting or proposing to act in way which is incompatible with a person's Convention rights. The person may bring proceedings against the public authority under the 1998 Act in an appropriate court or tribunal. In the context of public law claims, such a claim will often be brought by way of a claim for judicial review. Section 8 of the 1998 Act provides that in "relation to any act (or proposed act)" which the court finds is or would be unlawful, it may grant such relief or remedy within its powers which it considers to be just and appropriate.
83. The starting point under section 8 of the 1998 Act is, therefore, a finding by the court that the public body is acting (or is failing to act), or is proposing to act in a way which is unlawful because it involves, or would involve, acting incompatibly with a Convention right. Then, where the claim is brought by way of judicial review, the court has a range of remedies available, including quashing and prohibiting orders, mandatory orders, declarations and injunctions. It may grant such of those remedies as it considers just and appropriate to address, and remedy, the unlawful act or proposed unlawful act. A declaration may be used in a flexible way to address actual or proposed unlawful action and, in principle, an advisory declaration could be granted in appropriate circumstances.
84. In the present case, however, the Judge had not found that the appellant was acting unlawfully as at the date of the hearing. The Judge did not directly address the question of whether the appellant proposed to act unlawfully. If he had done so, evidence would have been necessary from which the Judge could properly have concluded that the appellant proposed to act unlawfully by breaching its obligations under Articles 2 or 8 of the Convention. The Judge would have needed to assess the evidence of the appellant, such as the witness statements of Ms Dennis and Mr Browell, and to assess the steps the appellant had taken, and was proposing to take, and the expressed willingness of the appellant to review matters and have regard to the advice given by PHE in order to determine if there was evidence from which he could properly find that the appellant proposed to act unlawfully. The Judge did not carry out that exercise. Instead, at most, he proceeded on the basis that as at the hearing on 18 to 20 August 2021, the appellant had not yet demonstrated how it proposed to address and implement the advice given by PHE on 5 August 2021.

85. Furthermore, this was not a case where an advisory declaration was sought as to the content of the appellant's obligations under Articles 2 and 8 of the Convention. Nor would such a declaration be likely to be appropriate given that the situation involves assessing what action to take, at what time, in a complex regulatory and technical sphere where data and advice was emerging over time. Indeed, although said to be a declaration, the order made by the Judge is in substance a mandatory order indicating that the appellant must achieve certain outcomes within a prescribed timetable.
86. The Judge, therefore, erred in granting the declaration that he did in circumstances where no finding of actual or proposed unlawfulness was made, and where an advisory declaration was neither sought and would not be appropriate. Such a declaration was neither justified nor required to remedy any unlawful act or failure to act. For that reason, the second ground of appeal succeeds and the declaration granted must be set aside. It is not necessary, therefore, to consider the other complaints about whether the Judge had sufficient evidence to justify the making of the declaration that he did.

THE THIRD ISSUE – WHETHER THE COURT SHOULD HAVE FOUND A BREACH OF ARTICLES 2 OR 8 OF THE CONVENTION

Submissions

87. Mr Wise for the respondent submitted that the court should have found that the appellant was in breach of its obligations under Article 2 or, at least, Article 8 of the Convention. He submitted that it necessarily followed from the conclusion that Article 2 and, in particular, Article 8, required achievement of the WHO 30-minute guideline and that the levels of hydrogen sulphide had remained persistently above those levels in the period from April to the end of June 2021, that the appellant was in breach of its obligation. Further, the appellant had not provided evidence that it had done everything within its powers to avoid the situation where Mathew's life expectancy would be shortened by exposure to the levels of hydrogen sulphide.
88. Mr Mould submitted that the Judge was correct not to find any breach of Articles 2 or 8 of the Convention. In essence, the central problem was the degradation of waste already deposited on the site. The landfill gas, including hydrogen sulphide, needed to be managed and controlled by effective action within the landfill site. The appellant's objective was, and continued to be, to ensure the control and suppression the potential for landfill gases to be released to the atmosphere. To that end, the appellant had used its powers to ensure that the operator had in place means to secure the capture, collection and destruction of landfill gas. It had established monitoring stations around the landfill site to provide data as to the level of landfill gas at and in the vicinity of the site to determine the scale of the problem, whether the steps taken would be effective and to enable the measures to be reviewed and if necessary refined. The respondent had not produced evidence to demonstrate that those measures would be ineffective. Mr Hart for the interested party adopted Mr Mould's submissions.

Discussion and conclusion

89. Dealing first with Article 2 of the Convention, there is no appeal against the finding that the levels of hydrogen sulphide presented a real and immediate risk to life in that, unless addressed, the levels would lead to a shortening of the life expectancy of Mathew.

90. As at the hearing in August 2021, the position was this. The appellant had taken steps to ensure that sulphate-bearing waste would not be deposited with other biodegradable waste at the site. Landfill gas, including hydrogen sulphide, was being released from waste already deposited at the site. The appellant took the view that that problem was best addressed through the mechanism of capturing landfill gas (by, for example, capping areas of the landfill site) and extracting gas and destroying it by using it for electricity generation or burning it off. Steps had been taken to achieve those aims. Further, the operator had been required to submit a revised landfill gas risk assessment and landfill gas management plan by 31 July 2021 which the appellant would review. Following the increase in complaints in late 2020 and early 2021, the appellant had established monitoring stations to obtain data as to the levels of landfill gas including hydrogen sulphide at and in the vicinity of the landfill site. It also took advice from PHE.
91. As at mid-August 2021, the levels of hydrogen sulphide exceeded the WHO 30-minute average and that would give rise to odour complaints and affect well-being but was not considered of itself to be a threat to life. The level of hydrogen sulphide did not exceed acceptable levels for medium-term exposure (14 to 364 days). That was the advice from PHE. So far as long-term exposure was concerned, it was only with the advice given on 5 August 2021 that PHE recommended the reduction of concentrations of hydrogen sulphide to levels below those in the USEPA guidelines. The appellant would necessarily need to have time to consider the 5 August 2021 advice, consider whether or not the measures taken would be sufficient or decide whether further steps could and would need to be taken and if so, within what timescale. Ms Dennis, in her witness statement dated 6 August 2021, confirms that the appellant would continue to review the position and the response from the operator. The appellant cannot be criticised for not addressing the fourth PHE report in its evidence. It was required to provide its evidence by 12 noon on 6 August 2021 and the fourth PHE report was published on 5 August 2021. Furthermore, the appellant had also sought advice from PHE on Dr Sinha's 4 July 2021 report and his addendum report. PHE had advised that those reports did not affect its risk assessment.
92. In all those circumstances, the Judge was correct not to find that the appellant was in breach of its obligations under Article 2 of the Convention as at the date of the hearing in August 2021. There was no proper basis upon which a court could find such a breach on the evidence before the court at that date. I would go further. There was no proper evidential basis for concluding, at that date, that the appellant was proposing to act unlawfully in the sense that it was proposing to act in breach of its obligation under Article 2 of the Convention. At that stage, it had accepted that there was a serious problem at the landfill site with landfill gases, it had taken relevant action and had proposed further action, and it had required the operator to submit a revised risk assessment and landfill gas management plan. It established a monitoring system in March 2021 to obtain reliable data. It had sought advice from PHE. The latest advice was provided shortly before the hearing. The evidence was that the appellant was reviewing matters.
93. Dealing with Article 8 of the Convention, the Judge found that the effects of the hydrogen sulphide gas were having a direct impact on Mathew's home and private and family life and that that effect had attained the relevant level of severity. There is no appeal against that finding. That was capable of amounting to an interference within

the meaning of Article 8(1) of the Convention which would need to be justified under Article 8(2). The measures pursued a legitimate aim in managing a landfill site for the deposit of waste. They were in accordance with the requirements of domestic law. The real question is whether the actions taken were necessary in a democratic society and, in particular, whether the appellant had struck a fair balance between the interests of the respondent and other competing interests.

94. In that regard, the appellant knew of the complaints about the landfill site from late 2020. It had established monitoring stations from March 2021. The reports published by PHE showed that the levels of hydrogen gas consistently exceeded the WHO 30-minute average by a considerable margin and there was the potential for significant odour complaints over the period from March 2021 when monitoring began. We do not know when the first three reports were published. The first two reports recommended that all measures be taken to reduce the off-site odours from the landfill site. The third report strongly recommended this. The fourth report, published on 5 August 2021, strongly recommended that this be done as early as possible. On two days in March 2021, the levels also exceeded the WHO 24-hour average guideline at one of the monitoring stations. Against that background, the appellant had taken steps to ensure that certain areas of the landfill site were capped and that certain points where landfill gas was known to be emitted were also capped. It had sought an increase in the capacity for collection and destruction of landfill gas. It had required the operator to provide a revised risk assessment and a revised landfill management plan by 31 July 2021 which was under review. Again, the Judge was correct not to find that the appellant was in breach of its obligations under Article 8 of the Convention as at the date of the hearing in August 2021. There was no proper basis upon which a court could find such a breach on the evidence before the court at that date. Further, the appellant was obtaining relevant information and advice, was ensuring that the operator took appropriate steps to address the problem, and was keeping matters under review. The appellant was seeking to address the problem and, in so doing, was striking a fair balance between competing interests and was acting with due diligence. There is no basis for inferring from the evidence available at the hearing in August 2021 that the appellant was proposing to act in breach of its obligations under Article 8 of the Convention. For those reasons, I would dismiss the cross-appeal.

CONCLUSION

95. I would allow the appeal, dismiss the cross-appeal and set aside the declaration granted in this case. The declaration, which required the appellant to achieve prescribed outcomes within a prescribed timetable, went beyond the scope of the court's functions in dealing with a claim that the appellant was acting incompatibly with the respondent's Convention rights. It ran counter to the principles established in the case law of the European Court governing the appropriateness of judicial intervention in the regulation of industrial activities in a difficult area of technical and social policy. Further, there was no finding that the appellant was in breach of its obligations under Articles 2 or 8 of the Convention at the time of the hearing in August 2021 and, on the evidence available at that date, there was no proper basis upon which it could be said that the appellant proposed to act unlawfully. In those circumstances, the grant of the declaration was neither justified nor necessary as there was no actual or proposed unlawfulness which called for a remedy.

LADY JUSTICE ELISABETH LAING

96. I agree.

THE SENIOR PRESIDENT OF TRIBUNALS

97. I agree with the reasoning and conclusions of Lewis L.J. as the basis for our decision to allow this appeal and dismiss the cross-appeal. I add these brief observations only to emphasise what he has said about the role of the court in claims such as this.

98. The facts are obviously acute and attract much sympathy for Mathew and his family. They called for urgency, as well as sensitivity, in the court's handling of the claim. It is clear that the judge was aware of this. Understandably, he wanted to do what the court properly could to encourage the Environment Agency in the performance of its statutory functions. In a passage of his judgment headed "This is not a 'looking back', but an 'in the moment', case" (in paragraph 50), following his discussion of the relevant jurisprudence in the European Court of Human Rights, he said this:

“... Caution is one thing. Abdication is another. The inexorable logic of these cases is that public authorities – and courts must ‘step up’ at the time.”

99. That of course is right, in principle and in an appropriate case. But it is sometimes in circumstances such as these that the court must take the greatest care not to exceed the role it has. This may be so, for example, where a claim for judicial review has been made not merely promptly, but also, at best, prematurely. In this case, the relief sought in the claim was predicated squarely on asserted breaches of the Environment Agency's obligations under Articles 2 and 8 of the Convention, which were said to be extant and continuing. But as is clear from his judgment, the judge did not find that any such breach had occurred. Under section 8 of the 1998 Act, he identified no unlawful act and no proposal to act unlawfully. There was no unlawfulness requiring a remedy. Yet the judge nevertheless granted relief. And he did so not by way of an advisory declaration, but in the form of an order framed in terms which were both mandatory and prescriptive.

100. Like Lewis L.J., and for the reasons he gives, I think the judge was wrong to do that. His order was not “just and convenient and ... in the interests of justice” (paragraph 64 of the judgment), nor was it “the correct, just and proportionate order in all the circumstances of this case” (paragraph 68). To grant such relief in this case was, in my view, to step beyond the role of the court in determining the claim on the facts as they were at the time.