Neutral Citation No: [2025] NICA 44 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12819** *ICOS No:* **21/41114/A01** *Delivered:* **16/09/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

AND IN THE MATTER OF ONGOING FAILURES OF LISBURN AND CASTLEREAGH CITY COUNCIL AND/OR THE NORTHERN IRELAND ENVIRONMENT AGENCY AND/OR THE MINISTER, DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS TO ABATE A NUISANCE ODOUR AND POLLUTION ARISING FROM MULLAGHGLASS LANDFILL SITE

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Hugh Southey KC with Sarah Minford (instructed by Phoenix Law, Solicitors) for the Appellant
Peter Coll KC with Gordon Anthony (instructed by Arthur Cox, Solicitors) for Lisburn and Castlereagh City Council
Tony McGleenan KC with Maria Mulholland (instructed by the Departmental Solicitor's Office) for the Northern Ireland Environment Agency and the Minister, DAERA
Stewart Beattie KC with Simon Turbitt (instructed by Carson McDowell LLP, Solicitors) for the Notice Party

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Before: Keegan LCJ, Treacy LJ and Horner LJ

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The appellant issued judicial review proceedings on 21 May 2021 as a result of an alleged failure to investigate an alleged nuisance odour which was emanating from Mullaghglass landfill site. At that time the appellant was residing at 17a Barleywood Mill, Lisburn which falls within the catchment area of Lisburn and Castlereagh City Council. That is not now the case as she has lived outside the area for some time. Alpha Resource Management Ltd ("Alpha") occupies and operates the site, and it is therefore a notice party to these proceedings.

[2] The decision, which is the subject of this appeal, was delivered by Humphreys J ("the judge") on 25 May 2022. On this date, the judge dismissed the application for judicial review against the Lisburn and Castlereagh City Council, ("LCCC/first respondent"), the Northern Ireland Environment Agency ("NIEA/second respondent"), and the Minister for the Department of Agriculture, Environment and Rural Affairs ("DAERA/third respondent").

[3] Shortly thereafter, the appellant appealed against the High Court decision and the second and third respondents cross-appealed the judge's conclusions on whether there was an alternative remedy available. A hearing took place before the Court of Appeal on 22 November 2022. This court determined that the appellant had an alternative remedy available to her in the form of a private prosecution in the magistrates' court under section 70 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 ("the 2011 Act") and also in the form of a claim for the tort of nuisance in the County Court or the High Court. The Court of Appeal dismissed the appeal on this basis without adjudication on the substantive merits raised by the appellant (see *Re Noeleen McAleenon's Application for Judicial Review* [2023] NICA 15).

[4] The appellant challenged that decision before the United Kingdom Supreme Court. A hearing took place on 25 June 2024 as a result of which the Supreme Court remitted the case to this court to be determined on the merits (see *Re Noeleen McAleenon's Application for Judicial Review* [2024] UKSC 31). Essentially, the Supreme Court held that the appellant was entitled to choose which claim she wished to bring and to assess judicial review proceedings as being the appropriate forum to request the relevant regulators to comply with their public law duties properly (paras [54] - [56]). In agreement with this court, the Supreme Court found that, notwithstanding closure of the site, the claim was not academic.

[5] Further at para [64] the Supreme Court opined as follows:

> "Having explained that Ms McAleenon was entitled to bring a claim against the defendants by way of judicial review to challenge their compliance with their public law duties, we should also make it clear that the validity or otherwise of that challenge falls to be judged according to conventional public law standards. The Court of Appeal considered (para 74) that it would not be 'either fair or just' for Ms McAleenon's claim to be disposed of without a trial involving cross-examination of the expert witnesses and a resolution by the court of the disputes between them. We do not agree. She has chosen to bring a claim in public law, and it is appropriate for that claim to be determined by reference to public law standards and in the conventional manner, without the need for oral evidence. That may well mean that Ms McAleenon faces

difficulties if she is to succeed in her claim, having regard to *Fadeyeva* and *Richards* CA, as Humphreys J held."

Summary of judgment at first instance

[6] As to the merits of the judicial review, we summarise the findings of the judge at first instance as follows:

(i) The LCCC as the local district council was under a duty to investigate a complaint of statutory nuisance made by a person living in the district: see section 64(b) of the 2011 Act. Where such a nuisance exists, a council must serve an abatement notice under section 65.

(ii) The LCCC was entitled to determine the means by which the duty is satisfied. A discretion to investigate can be exercised in different ways although always in a manner consistent with the objects of the statutory duty. In such circumstances the only challenge can be on the basis of irrationality.

(iii) It was entirely reasonable for LCCC to refer a complaint to the NIEA which had a parallel regulatory jurisdiction.

(iv) The evidence of Ms Courtney, the Environmental Health Manager for LCCC, completely undermined the claim that LCCC in some way abrogated its responsibility for the investigation of the problem which had been reported.

(v) LCCC had investigated and reached a rational conclusion. Any claim that there was a breach of section 64 and that the discretion was exercised irrationally was bound to fail.

(vi) The claim that NIEA and DAERA breached the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 ("the 2013 Regulations") by failing to set some guidance or standard in relation to life-time exposure to H_2S can only be made good if it satisfies the standard of *Wednesbury* unreasonableness. There is no basis for concluding that they exercised their discretion irrationality.

(vii) In respect of the claim made that there was a breach of Article 8 of the European Convention on Human Rights ("ECHR") the appellant had to establish "victim" status for the purpose of section 7 of the Human Rights Act 1998 ("the HRA 1998"). This required the appellant to show both that there had been actual interference with her family life and that a certain level of severity had been reached.

(viii) The judge was satisfied that the appellant had met the minimum level of severity required to engage her article 8 rights. However, in applying the relevant tests from *R (Mathew Richards) v Environment Agency* [2021] EWHC

2501 (Admin) and *Fadeyeva v Russia* [2007] 45 EHRR 10, it was not the court's role to substitute its view for that of the public authorities. Once the court was satisfied that the appropriate level of due diligence had been exercised, then any interference with article 8 rights was justified and a claim for a breach must fail.

Issues arising on appeal

[7] We note that the second and third respondents have criticised the appellant for the mutability of her case. However, as a result of the Supreme Court's consideration of this case the issues have narrowed considerably. We are no longer asked to consider competing expert evidence. The core issues on appeal are encapsulated in the following three questions:

(i) Did the LCCC breach its statutory duty to investigate complaints about statutory nuisances pursuant to section 64(b) of the 2011 Act?

(ii) Did the NIEA and DAERA breach their statutory duties and/or act unlawfully by failing to identify a level of lifetime exposure to hydrogen sulphide (H_2S) that posed a risk?

(iii) Did all three respondents breach the appellant's rights under article 8 of the ECHR?

Factual background

[8] The relevant background has been set out in full on several occasions, first, by the High Court, second the Court of Appeal, and third the Supreme Court and so we will not repeat it all here. For present purposes, we recall the following key facts and information on the updated circumstances since the case was last before the Court of Appeal.

[9] At the time of bringing the judicial review, the appellant was one of several neighbouring individuals who had made complaints about an odour which they alleged started emerging from the Mullaghglass landfill site in early 2018. She has described the odour as a "distinct gassy rotten-egg smell which is very disturbing." The appellant averred that she experienced physical symptoms related to the smell, including painful headaches, a runny nose, watering eyes and nausea. She submitted that the consequences of this were that she was unable to use her garden and is often forced to remain indoors with the windows shut, making her feel like a prisoner in her own house. At the first hearing before us the appellant referred to adverse effects upon children and the neighbourhood to such an extent that we suggested she take alternative action against the operator. That did not happen and happily the same complaints have not arisen over the last number of years. It is common case that the site is now closed and has not given rise to complaints of late.

[10] Returning to the history for a moment we can see that the appellant first made a complaint to the LCCC on 31 December 2019 and in response, the LCCC referred her to make a complaint to the NIEA. According to the affidavit of Ms Sally Courtney, the Acting Head of Environmental Health, Risk and Emergency Planning in LCCC, the LCCC's belief was that the "primary responsibility for monitoring the site rests with the NIEA." The appellant's solicitors then wrote to the LCCC, NIEA and the Minister of DAERA in and around 27 and 28 January 2021, asking them to exercise their powers to manage the site more effectively and to eliminate odours and fumes affecting the appellant's property. In later correspondence, the appellant's solicitors raised concerns about the H_2S being emitted from the site and the consequent health impacts that would have on the appellant and other individuals nearby.

[11] In the months which followed, the LCCC, NIEA and DAERA began to take steps to investigate the complaints. The evidence provided by the respondents in support of this was summarised in our previous judgment as follows:

> "[26] Over the next few months following January 2021:
>
> (a) Weekly meetings were held between representatives of LCCC and NIEA.
>
> (b) Briefings from NIEA took place as part of its inspection and compliance programme.
>
> (c) Information sharing took place with councillors at an LCCC meeting.
>
> (d) 46 daily odour monitoring visits were carried out by LCCC officers between 26 April and 30 June 2021.
>
> (e) LCCC concluded from the evidence that they had gathered that there was no statutory nuisance. The complaints were reduced during 2021 and so did the frequency of monitoring.
>
> [27] Mr Mullan, a Director of Alpha, a wholly owned subsidiary of Whitemountain Quarries, and a graduate civil engineer, points out, inter alia:
>
> (i) Mr Thompson was appointed as an expert witness.
>
> (ii) He had concluded that there was no "cold drainage flow" as asserted by Dr Dickerson.

(iii) There was no evidence that there was anything untoward either on the Site or being emitted from the Site which could amount to a statutory nuisance.

(iv) He then attacked the evidence and each of the dates/links of the appellant and her experts and averred that this "is plainly at odds with the data and expert observations presented by the respondents and their witnesses and those of Alpha."

[28] NIEA claims that:

(i) It has found no evidential basis for taking enforcement action against Alpha in respect of odour production and the escape of gases from the Site or on the Site.

(ii) The Site has been monitored regularly to ensure that there is compliance with the conditions of the permit.

(iii) H_2S is produced but that alone is not enough. There has been monitoring and a number of measures taken to prevent, or if that is not possible, to minimise any odour.

(iv) The FIDOR method of assessing the seriousness of pollution has been adopted and followed.

(v) Following the NIEA inspection in September 2020 various works have been undertaken by Alpha, these include reduction of the size of the working face, installation of provisional gas well infrastructure, a change of daily cover, an extension of odour monitoring masking.

[29] The evidence from Alpha is that:

(a) The Site is nearing the end of its natural life.

(b) It will cease operating as a landfill Site shortly, if it has not stopped already.

(c) The extraction of landfill gas will continue and be used to generate electricity.

(d) Alpha have used best available techniques ("BAT") and engaged in full with NIEA and LCCC.

(e) There has been compliance with the terms of the permit which was issued.

(f) Alpha refutes the claim (unsupported by any evidence) that it accepted any gypsum at the Site.

(g) On the 40 occasions odour assessments have been carried out, only on two occasions was there a very faint, transient, and intermittent odour. This did not constitute a statutory nuisance."

[12] In terms of case trajectory, pre-action protocol letters were sent by the appellant's solicitors to the three respondents on 12 and 15 April 2021. These complained that there was a failure by the LCCC to conduct proper investigations into the complaints and failures by the NIEA and DAERA to manage the site properly in compliance with various regulations and under article 8 of the ECHR.

[13] The appellant then lodged proceedings against the respondents in the High Court on 21 May 2021. On 14 September 2021, Scoffield J granted leave on the papers and the case then proceeded to hearing before Humphreys J.

[14] The case before the High Court was initially wide ranging. The pleadings largely reflected those made in similar judicial review proceedings in England which were brought by an asthmatic child named Mathew Richards (*R (Richards) v Environment Agency* [2021] EWHC 2501 (Admin)). The child complained that he suffered harm due to emissions emanating from a nearby landfill site called Walley's Quarry in Staffordshire, which amounted to an infringement of his rights under articles 2 and 8 ECHR. While this case had succeeded in the High Court, it was overturned in the Court of Appeal for reasons which are outlined later in this judgment. This took place shortly before the appellant's High Court hearing in April and May 2022 and so the appellant adjusted her appeal arguments accordingly. In particular, as noted by the trial judge at para [77] of his decision:

> "In light of this judgment, the applicant does not seek the type of relief which was contended for in *Richards*. The more nuanced case advanced is that the failure to prescribe some guidance or standards is itself an unlawful interference with the applicant's article 8 rights since the respondents have failed to approach the matter with due

> diligence and to give proper consideration to competing interests."

Relevant updates

[15] In the time which has ensued following the High Court and Court of Appeal decisions, there have also been factual updates which merit mention as follows.

[16] Firstly, as the appellant's recent affidavit of 24 June 2025 avers, she no longer permanently resides at the Barleywood property, as she now resides at a rented property in County Down. However, she states that she continues to attend the Barleywood Mill property every day and resides there for at least three nights due to caring commitments for a family member.

[17] In addition, the up-to-date evidence of Mr Colin Millar, the Principal Scientific Officer within the Regulation Unit of the NIEA, in his recent affidavit dated 2 June 2025 is that the landfill site ceased accepting non-hazardous black bin waste in or around November 2022. NIEA continues to monitor the site as a closed landfill, which uses landfill gas for the generation of electricity. Both the Belfast Hills Partnership and Ulster Wildlife Trust are engaged at the site to promote nature. The latest inspection took place on 21 May 2025. Landfill gas odour was detected at four points on the site, although this did not require remedial action as it was not a breach of permit. Mr Millar states that the last substantiated odour complaint the NIEA is aware of was made in May 2023.

[18] Finally, the evidence from Ms Courtney on behalf of the LCCC in her affidavit of 20 June 2024 is that the LCCC received three complaints since 1 January 2023, dated 2 March 2023, 30 May 2023 and 10 January 2024. None of these complaints could be substantiated.

Relevant law

(i) The LCCC's statutory obligations

[19] Part 7 of the 2011 Act sets out the law concerning statutory nuisances. Section 63(1)(d) states that "any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance" constitutes a statutory nuisance for the purposes of that Part. Section 63(10) defines "prejudicial to health" as "injurious, or likely to cause injury, to health."

[20] The LCCC's duty to investigate a statutory nuisance complaint is set out in section 64, as follows:

> "64 It shall be the duty of every district council—
> …

(b) where a complaint of a statutory nuisance is made to it by a person living within its district, to take such steps as are reasonably practicable to investigate the complaint."

[21] Section 65 states that if a district council is satisfied that a statutory nuisance exists, or is likely to occur or recur, it will serve an abatement notice on the person responsible for the nuisance. A person served with an abatement notice who fails to comply without reasonable excuse shall be guilty of an offence (section 65(9)), but it is a defence to "prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance" (section 65(12)).

[22] The judge held at para [59] that this duty, correctly interpreted, meant that the LCCC has discretion and is entitled to determine the means by which the duty is satisfied. However, the LCCC, in support of its analysis to the contrary, submitted three authorities: *Marshall v Gotham* [1954] AC 360; *Jenkins v Allied Ironfounders Ltd* [1970] 1 WLR 304; and *R(Friends of the Earth) v SOS Business, Enterprise and Regulatory Reform* [2010] HLR 18. A closer analysis of these authorities illustrates the approach previously taken by courts when assessing whether a public authority has taken reasonably practicable steps.

[23] Specifically, in *Marshall v Gotham*, the court held that:

> "As to the meaning of 'reasonably practicable,' see *In re Naylor Benzon Mining Co. Ld. 2; Black v. Fife Coal Co. Ld. 3; Summers v Salford Corporation 4*, and *Adsett v. K. and L. Steelfounders and Engineers Ld. 5.* 'Practicable' means 'possible to be accomplished with known means or resources,' or capable of being carried out in practice. What is practicable for one man may not be so for another who has different means and resources. 'Reasonably practicable' means just 'practicable' and does not qualify the duty, so that it is enough to show that it was physically practicable to take certain precautions, and it is irrelevant to consider whether in the circumstances it would have been reasonable."

[24] Also, in the *Jenkins* case, the court stated:

> "The test of what is reasonable has been succinctly set out by Asquith L.J. in Edwards v National Coal Board [1949] 1 K.B. 704, 712:
>
> > ''Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the

> owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them — the risk being insignificant in relation to the sacrifice — the defendants discharge the onus on them.'"

[25] These cases illustrate that the test for what is reasonably practicable is case and circumstance specific. It does not mean that the relevant authority must take all steps that are physically possible. It creates a discretion where the authority might weigh up consideration of competing interests and other practical matters such as costs and level of severity of the complaint, for example. It is also important to delineate the roles of the LCCC and the NIEA/DAERA.

[26] It was also accepted by Carnwath J in *R v Carrick DC ex p Shelley* [1996] Env LR 273 that a local authority was under a duty to investigate its area for the existence of statutory nuisances under section 80 of the Environmental Protection Act 1990, which is the English statutory equivalent to section 65 of the 2011 Act. He held that section 80 creates a duty on the relevant district council and he also considered the role of the National Rivers Authority ("NRA") to also investigate the nuisance. He stated:

> "So far as the decision to serve an abatement notice is concerned, if the authority are satisfied on the balance of probabilities that there is a statutory nuisance, they have a duty to serve a notice.
>
> Secondly, that duty is not affected by any action of the NRA under the Acts relating to them. <u>They are separate duties. If there is a statutory nuisance on the beach that is a matter for the District Council, even if it is caused by discharges from outfalls within the jurisdiction of the NRA</u>." [emphasis added].

(ii) NIEA and DAERA's statutory obligations

[27] NIEA and DAERA's obligations are derived from the Environment (Northern Ireland) Order 2002 ("the 2002 Order") and the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 ("the 2013 Regulations").

[28] Article 4 of the 2002 Order provides that the Department of Environment may make regulations for the purposes of regulating polluting activities. In accordance

with powers under Article 4 of the 2002 Order, the Department of the Environment adopted the 2013 Regulations.

[29] According to Article 3 of the 2002 Order, one of the purposes of Article 4, and consequently the 2013 Regulations, is to enable provisions to be made for or in connection with "(a) implementing Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)."

[30] The appellant notes that the preamble to Directive 2010/75/EU ("the Emissions Directive") is relevant to determine the overall objective of the 2002 Order and the 2013 Regulations. The preamble states that it was established:

> "In order to prevent, reduce and as far as possible eliminate pollution arising from industrial activities in compliance with the 'polluter pays' principle and the principle of pollution prevention …
>
> In order to take account of developments in best available techniques or other changes to an installation, permit conditions should be reconsidered regularly and, where necessary, updated, in particular where new or updated BAT conclusions are adopted.
>
> … effective public participation in decision-making is necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken."

[31] Part 2 of the 2013 Regulations regulates the provision of permits, which, according to regulation 9(1), must be granted by the enforcing authority to enable a person to operate an installation or mobile plant. A landfill site falls within the definition of installation as set out in the 2013 Regulations, namely by virtue of regulation 2(1) and Part 1 of Schedule 1. The enforcing authority in this case is the NIEA and the operator of the landfill site to whom the permit applies is Alpha, the notice party to these proceedings.

[32] Regulation 11(2) sets out the principles that the NIEA must take into account when determining the conditions of a permit. These include that the landfill site is operated in such a way that:

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

(b) no significant pollution is caused."

[33] BAT, or best available techniques, is defined in regulation 3 as meaning:

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

(a) "available techniques" means those techniques which have been developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the cost and advantages, whether or not the techniques are used or produced inside the United Kingdom, as long as they are reasonably accessible to the operator;

(b) "best" means, in relation to techniques, the most effective in achieving a high general level of protection of the environment as a whole;

(c) "techniques" includes both the technology used and the way in which the installation or mobile plant is designed, built, maintained, operated and decommissioned."

[34] Schedule 2 to the 2013 Regulations also develops the meaning of BAT, and states that:

"… in determining BAT, special consideration shall be given to the following matters, bearing in mind the likely costs and benefits of a measure and the principles of precaution and prevention—

(a) the use of low-waste technology;

(b) the use of less hazardous substances;

(c) the furthering of recovery and recycling of substances generated and used in the process and of waste where appropriate;

(d) comparable processes, facilities or methods of operation which have been tried with success on an industrial scale;

(e) technological advances and changes in scientific knowledge and understanding;

(f) the nature, effects and volume of the emissions concerned;

(g) the commissioning dates for new or existing installations or mobile plant;

(h) the length of time needed to introduce the best available technique;

(i) the consumption and nature of raw materials (including water) used in the process and the energy efficiency of the process;

(j) the need to prevent or reduce to a minimum the overall impact of the emissions on the environment and the risks to it;

(k) the need to prevent accidents and to minimise the consequences for the environment;

(l) the information published by public international organisations."

[35] As well as consideration of the above best available techniques, the NIEA is also required pursuant to regulation 12(2) to consider specific conditions, as follows:

> "a permit shall include emission limit values for pollutants, in particular those listed in Schedule 5, likely to be emitted from the installation or mobile plant in significant quantities …"

[36] Schedule 5 identifies "sulphur dioxide and other sulphur compounds" as being one of the pollutants that should have emission limit values included in the permit.

[37] Regulation 17 sets out that the NIEA is required to periodically review the conditions of permits and may do so at any time. Regulation 17(2) further provides that permits should include emission limit values when necessary:

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

(iii) Human Rights obligations

[38] The appellant also raises a complaint under section 6 of the HRA 1998, which makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. Section 7 entitles a person to bring proceedings against a public authority or rely on the Convention right in legal proceedings if he/she is or would be a victim of the unlawful act.

[39] It is submitted that the respondents have breached the appellant's article 8 rights. Article 8 of the ECHR 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 wellbeing 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."

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

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

[41] This test was considered domestically by the Court of Appeal in England & Wales in *Richards* as follows:

> "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 approach of the appellate court

[42] In its judgment, the Supreme Court also analysed the approach the court should take in a judicial review challenge when assessing the lawfulness of a public authority's decision-making. At para [40], the Supreme Court noted:

> "This means that the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. This may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B (Lord Diplock). Accordingly, it is for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only."

[43] The Supreme Court stressed that the key question for the court is whether the respondents had done enough to justify their decision in light of all the circumstances, applying the usual rationality standard, and the test appropriate for proportionality analysis in relation to article 8 (see para [44](i)).

Our analysis

(i) Interpretation of the section 64(b) duty

[44] The appellant contends that the judge incorrectly interpreted the LCCC's duty set out in the 2011 Act. The position of the LCCC, in accordance with the findings of the judge in the court below, is that the wording of the statute implies that the manner in which the duty may be discharged is discretionary applying *Engineers and Managers Association v Advisory Conciliation & Arbitration Service* [1980] 1 WLR 302. The LCCC further submits that the relevant test for review to be applied by the court concerning the LCCC's statutory duty is one of *Wednesbury* unreasonableness, citing *R (Anne) v Test Valley Borough Council* [2002] Env LR 22.

[45] Some particular focus has been applied to the above case which we have considered. The *R (Anne) v Test Valley Borough Council* case was a judicial review of a Council's alleged failure to take "such steps as are reasonably practicable to investigate" a complaint regarding a lime tree that the applicants believed was amounting to a statutory nuisance under sections 79 and 80 of the Environmental Health Act 1990. Following thorough investigations into the complaint and several reports, the Council concluded that the tree was not a statutory nuisance. The judge noted at para [45] that:

> "the focus of these proceedings is really on the outcome of those investigations that is to say whether the conclusions reached by Ms Newman, to the effect that there was no statutory nuisance, were irrational or Wednesbury unreasonable."

[46] He held that the steps carried out by the local authority were reasonably practicable in the circumstances in this case.

[47] The appellant highlighted that the *R (Anne) v Test Valley Borough Council* case should be differentiated on the basis that the judge was concerned with the outcome of an investigation rather than the duty to investigate. Similarly, it was submitted that the *Engineers and Managers Association* case cited above does not assist the LCCC, as this concerned an authority that had complete discretion as to the steps it could take to comply with its duties. Therefore, the appellant submits that the key point in these cases is that the approach taken by the court reflects the nature of the statutory test in issue.

[48] The appellant's challenge against the LCCC can be characterised in short form as follows:

(i) the judge erred in finding that the LCCC's misdirection stating that the NIEA had primary responsibility for regulating the site was not material; and

(ii) the judge erred in interpreting the LCCC's statutory duty as discretionary.

[49] Concerning the first point, the first affidavit sworn by Ms Courtney dated 21 December 2021, contains a response to the appellant's complaints which has been critiqued by the judge at first instance. Under a sub-heading titled, "LCCC's enforcement powers under the 2011 Act", Ms Courtney avers that, it was "LCCC's understanding that the primary responsibility for monitoring the site rests with NIEA." She indicates that this was the reason that LCCC had directed the appellant and other complainants to NIEA in the first instance.

[50] While finding that Ms Courtney had been incorrect in law to state that the NIEA had primary responsibility, the judge found that this was irrelevant in any event, as the LCCC had taken appropriate steps to investigate:

> "[60] In this case, the applicant asserts that LCCC failed to comply with the duty because it "left responsibility for investigating complaints to the NIEA." It must be recognised that NIEA was the agency within DAERA tasked with the regulatory responsibilities under the 2013 Regulations. As a matter of law, it is not correct to say that this was the "primary responsibility", as asserted by Ms Courtney, but it is certainly a relevant factor when one considers the exercise of discretion by LCCC in respect of its section 64 duty. When faced with a complaint, it was entirely reasonable to refer a complainant to the NIEA which had a parallel regulatory jurisdiction.
>
> [61] The evidence does not sustain the assertion that LCCC abrogated responsibility for investigation. In fact, the unchallenged evidence of Ms Courtney reveals that LCCC:
>
> (i) Engaged in meetings with residents, BCC, Alpha and the NIEA;
>
> (ii) Carried out its own monitoring;
>
> (iii) Sent odour diaries to residents;
>
> (iv) Considered the available evidence from independent experts;
>
> (v) Reached a conclusion on the basis of the evidence that there was no statutory nuisance."

[51] The appellant submits that the judge's analysis of this issue is flawed for two reasons. Firstly, a decision based on an erroneous view of the law is unreasonable (see *Bromley LBC v GLC* [1983] 1 AC 768). The argument is made that Ms Courtney's misdirection should therefore have led to a conclusion that the LCCC's response was irrational. Secondly, it is contended that to determine whether an error of law is material, the court should apply the approach as set out by the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 (although this case was overturned in *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52).

[52] The appellant contends that this misdirection was material because the LCCC's understanding that the NIEA was primarily responsible for investigating complaints was erroneous and clearly influenced its decisions in response to other complaints. Further, it is argued that the outcome would not have been the same if the LCCC had not made this public law error as the LCCC had taken steps to investigate the odour, the appellant contends that the judge should have focused on whether other steps were reasonably practicable - not just whether any steps were taken. The appellant also contends that there was a potential second misdirection concerning the relevance of a defence to any proceedings that the site is using best available techniques. It is submitted that even if best available techniques are being used, that does not mean that there is no statutory nuisance. An investigation is still required.

[53] In response to this submission, the LCCC contends that the judge's analysis should not be misconstrued - the correct interpretation is that the judge was illustrating an understanding of the overlap between regulatory functions of the NIEA and LCCC and noting that the NIEA's work was relevant to the LCCC's exercise of discretion under section 64(b) of the 2011 Act. Furthermore, it is submitted that any error in law made by the LCCC could not be said to have affected the exercise of its duty under section 64(b).

[54] In assessing these competing arguments the evidence filed in this case is key. This evidence, which was recognised by the judge as "unchallenged", illustrated the logical and reasonable investigative steps taken by the LCCC in response to complaints about the Mullaghglass site. It took steps both alone and in concert with other regulatory bodies such as the NIEA. Moreover, the appellant has not effectively argued what further steps the LCCC should reasonably have taken in the absence of misdirection related to the role of the NIEA. It therefore cannot be said that the alleged misdirection had any material impact. In response to the alleged second misdirection, the LCCC notes that this argument was not raised in the appellant's notice of appeal and the court should therefore not entertain this as a limb of challenge.

[55] We agree with the judge's analysis of the LCCC's duty found at para [59] of his judgment:

> "The section 64(b) duty is couched in terms "to take such steps as are reasonably practicable to investigate the complaint." Thus, whilst there is a statutory duty, the council is entitled to determine the means by which this duty is satisfied. The legislative provision recognises that there may be different ways in which to comply with the obligation and there is therefore a discretion to be exercised. Any such discretion must be exercised in a manner consistent with the objects of the statutory duty

but, provided it has been, can only be impugned on the grounds of irrationality."

[56] Put simply, the LCCC had a discretion as to how to discharge its duty. The wording of "reasonably practicable" means that a step shall be taken if it is practicable unless in all the circumstances that would not be reasonable. It does not mean that all possible steps must be taken, only those that are reasonable. In support of this argument the LCCC relies on the following authorities: *Marshall v Gotham* [1954] AC 360; *Jenkins v Allied Ironfounders Ltd* [1970] 1 WLR 304; and *R (Friends of the Earth) v SOS Business, Enterprise and Regulatory Reform* [2010] HLR 18. Therefore, the section 64(b) duty does give the LCCC discretion to assess what steps are reasonably practicable. This discretion may be subject to review by the High Court through the lens of rationality or *Wednesbury* unreasonableness (see *R (Anne) v Test Valley Borough Council* [2002] Env LR 22). This is the approach followed by the judge when he considered the steps the LCCC had taken. Furthermore, we agree that the LCCC's discretionary duty must be viewed in light of the overlap between its regulatory functions under the 2011 Act and those performed by the NIEA under the 2013 Regulations.

[57] The evidence contained in the affidavits of Ms Courtney for the LCCC, also establishes the fact that the Council did not simply step back from this issue entirely. The first affidavit of Ms Courtney of 21 December 2021 illustrates the fulfilment of the LCCC's investigative duty by way of collaborative approach between the different regulatory and enforcement bodies. We agree that it is important to look at the overall picture, which involves actions of the Council and the enforcement and regulatory opportunities of other bodies. Summarising, the first affidavit:

- Addresses three issues: the nature of Mullaghglass and its site in LCCC's district area, LCCC's understanding of the nature of its enforcement powers under the 2011 Act, and the manner in which LCCC enquired into the appellant's complaints about the alleged emission of noxious odours at Mullaghglass.

- States that it is "LCCC's understanding that the primary responsibility for monitoring the site rests with the NIEA."

- Notes the steps taken by LCCC in respect of each complaint from 4 January 2021 to 6 December 2021. This included, in summary:

    - Attending Mullaghglass with NIEA and Belfast City Council ("BCC") officials to meet with Alpha.

    - Attending meetings with MLAs, LCCC and BCC councillors and residents, NIEA officials, and Public Health Agency ("PHA") officials.

- Establishing weekly meetings between NIEA and LCCC to share information on complaints, actions taken, and other concerns about the Mullaghglass site.

- Sending letters and odour diaries to a number of complainants living near the Mullaghglass site.

- Daily odour monitoring activities by LCCC officers from 26 April 2021 to 29 July 2021.

[58] Furthermore, Ms Courtney's second affidavit of 20 June 2024:

- Confirms LCCC has received no further complaints from the appellant since her initial complaints.

- Confirms that LCCC has received three complaints about the site since 1 January 2023. These were on 2 March 2023, 30 May 2023, and 10 January 2024. None of these complaints could be substantiated by LCCC.

[59] If the LCCC had done nothing in response to complaints, the appellant's argument would have much more weight, but that is not the case as the evidence demonstrates. In addition, some investigative steps might be more likely to fall within the remit of NIEA and DAERA, who are better suited to handle scientific assessments such as monitoring air quality and assessing levels of H_2S. It is ultimately unclear what further steps the LCCC could have taken, and the appellant has not addressed this issue in full either.

[60] Having considered the statutory obligation imposed on LCCC and the evidence, we are satisfied that the judge has not erred in his assessment of this first issue and so we dismiss the first ground of appeal.

(ii) NIEA and DAERA's obligations

[61] The crux of the appellant's contention against the NIEA and DAERA is that these respondents had a duty under the 2013 Regulations to engage with standards and guidance adopted in England about lifetime exposure to H_2S. The second and third respondents maintain that this contention boils down to a claim that there is a legal obligation on the relevant public authorities to produce more specific guidance on the relevant values of H_2S emissions. We agree that this is now the primary question at issue in this appeal.

[62] In this regard, the case of *A v Secretary of State for the Home Department* [2021] UKSC 37 and *BF (Eritrea)* [2021] UKSC 38, in which the Supreme Court gave guidance about challenges of this nature is useful. Para [39] of *A v Secretary of State for the Home Department* is particularly relevant, as the court stated:

> "39. The approach to be derived from *Gillick* is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower…"

[63] Thus, reading this authority across, it appears that there is no obligation on public authorities to produce more specific guidance about H_2S levels. Moreover, the respondents submit that the Supreme Court robustly rejected the argument that there was a legal obligation under article 8 ECHR to draft guidance in a manner which sought to eliminate or reduce any uncertainty as to the application of a policy:

> "52. … The 'in accordance with the law' rubric in article 8(2) does not require the elimination of uncertainty but is concerned with ensuring that law attains a reasonable degree of predictability and provides safeguards against arbitrary or capricious decision-making by public officials. Judged even on its own terms, the Guidance meets those standards.
>
> 53. We would add that it is established that a policy may make a contribution to meeting the 'in accordance with the law' requirement in some cases, by helping to provide a degree of predictability in the application of general discretionary provisions in statute (see eg *Silver v United Kingdom* (1983) 5 EHRR 547, para 88). However, it by no means follows that there is an obligation to have a policy in every case where a statute creates a discretionary power."

[64] The appellant argues that this case does not assist the respondents, as it was about whether domestic law requires a policy to be published. The issue in this case,

however, is whether duties to regulate mean that there is a need for a clear understanding as to whether there is an unsafe level of lifetime exposure to H_2S.

[65] Dealing with this issue the judge at para [64], stated:

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

[66] The appellant did not suggest that the English guidelines must be adopted, as this would ask too much of the court by requiring a particular response. Rather, the appellant's submission is that the NIEA and DAERA have not engaged in a sufficiently diligent manner with the English guidelines, which had reached conclusions about the levels of H_2S that pose a risk. In particular, it is suggested that the respondents have a duty to keep up to date with best practice and technical standards as they develop over time in accordance with Schedule 2 to the 2013 Regulations and the Emissions Directive preamble. Those regulations require the respondents to give proper consideration of the approach adopted in England, which was to work towards reducing H_2S levels to below 1 part per billion (1ppb). NIEA and DAERA have not adequately assessed whether the UK Health Security Agency (UKHSA) had correctly identified the H_2S level at which risk to health arises.

[67] Moreover, the appellant latches onto the following indication by the trial judge:

> "[79] It is apparent that the applicant would wish there to be in place some limit, standard or guideline by which the emission from the site would be measured. However, the evidence before me is to the effect that no landfill site in the United Kingdom operates with a particular H_2S emission requirement or guidance figure in its permit."

[68] The appellant contends that the above analysis misses the key point in her argument, which is that the English authorities have adopted a clear guidance level for lifetime exposure to H_2S and were working towards it. There is nothing equivalent in Northern Ireland. Moreover, it is submitted that the judge failed to recognise that other tools were being used in England to ensure H_2S emissions levels were below safe limits. The failure to review UKHSA standards is also a failure to

take reasonable steps to acquaint decision makers with relevant information (see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1047).

[69] The appellant contends that, following from the above, NIEA and DAERA have not acted consistently and in accordance with the 2002 Order and the Emissions Directive. The appellant contends that the provisions of both the 2002 Order and the Emissions Directive make it clear that the objective of the legislation is the elimination of pollution. The 2013 Regulations recognise that achieving this objective will require authorities to keep up to date with technical standards that develop with time (see Schedule 2 to the 2013 Regulations). Similarly, it is contended that the authorities must consider emission limit values in accordance with regulation 12(2), which NIEA and DAERA have failed to do in respect of H_2S emissions. The argument goes that regardless of the English and American authorities, however, it is submitted that there is a need to assess whether there was a harmful lifetime level of exposure to H_2S emissions at the Mullaghglass landfill site. Currently, there is no clear lifetime guideline that NIEA or the PHA are working towards or applying, and neither NIEA nor DAERA have offered adequate evidence to illustrate why they have not adopted appropriate guidelines.

[70] Against this argument, the second and third respondents underline the fact that there is no evidence that any landfill site in England has an emission limit for H_2S in its permit, including Walley's Quarry. The UKHSA guidance referred to by the appellant was in relation to a public health risk assessment carried out at Walley's Quarry, based on air quality monitoring data undertaken by the Environment Agency. The UKHSA compared the data provided with health-based air quality guidelines and standards or assessment levels for H_2S and other pollutants to produce health-based guidance values for exposure to the gas. However, it is not correct to suggest that this is a guideline or standard being applied for H_2S in England and Wales. The appellant suggests that the NIEA should be regulating the Mullaghglass landfill site against an emission limit that is not in its permit and is not contained in any enforceable guidance. The guidance issued by the UKHSA and Environmental Agency in England was specific to the Walley's Quarry site and was not intended to apply across the board. The trial judge was therefore correct to reject the appellant's argument in the court below.

[71] Of course the NIEA takes its public advice from the PHA and has acted upon that advice accordingly in regulating the Mullaghglass landfill site. Logically it follows that the appellant's appeal must also be directed against the PHA for not adopting a long-term exposure level - although they are not party to this appeal. In any event, we are cognisant of the fact that the court should be slow to interfere with advice given by an expert public health agency on scientific and medical issues (see *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at para [89]). Furthermore, should the appellant's appeal succeed, the court would have to go further than substituting its view for the view of the NIEA as it would also be usurping the advice of the PHA in Northern Ireland and

setting a standard itself. We are also in an area where no legal obligation to publish highly specific guidance on the relevant values of H_2S emissions (see *A v Secretary of State for the Home Department* [2021] UKSC 37; *BF (Eritrea)* [2021] UKSC 38 at para [52]) has been identified.

[72] The following aspects of the evidence are of critical relevance in this analysis. Specifically, the first affidavit of Mr Millar of 1 November 2021 is clear in material respects in that:

- It states that NIEA's regulation of the site has involved the following:
    - Monitoring Alpha's compliance with its permit conditions by carrying out regular site inspections and identifying permit breaches.
    - Adopting an approved Odour Management Plan which includes measures to prevent or minimise odours.
- It documents the number of complaints received by NIEA (para 43) and the procedure followed by NIEA when it receives an odour complaint (para 47).
- It sets out NIEA's response to the odour complaints, which mainly required action to be taken by Alpha due to non-compliance with permits:
    - Reducing the size of the working face (where lorries deposit the incoming waste) to minimise potential fresh waste odour impacts.
    - Implementing gas well infrastructure.
    - Carrying out on-site ambient methane gas monitoring and inspections.
    - Carrying out daily odour assessments from April 2021, which involves assessing meteorological data, conducting sniff tests, using the Jerome monitor to read hydrogen sulphide levels.
    - Setting up a Mullaghglass Regulatory Team and a Mullaghglass Task and Finish Group to oversee regulation of the site.
    - Using the Jerome monitor to measure H_2S samples in the Antrim and Newtownards areas to provide context and comparison with the Mullaghglass landfill site. Also assessed potential transportation of H_2S as a result of cold flow drainage in the vicinity of the landfill site with the assistance of Tetra Tech. It concluded that there was no significant increase in levels of odour or H_2S during cold flow drainage conditions.
    - Engaged with PHA, LCCC and BCC through meetings and inspections.

[73] The second affidavit of Mr Millar of 28 March 2022 also engages with the position in England & Wales following the Walley's Quarry case as follows:

- This affidavit confirms that Mr Millar has spoken to UKHSA who confirmed that there is no condition in the environmental permit issued to Walley's Quarry Ltd which requires ambient air levels to meet a proposed standard.

- At para 6(d), Mr Millar sets out clearly that the UKHSA has confirmed that it uses the US EPA reference concentration of $2\mu g/m^3$ for hydrogen sulphide for public health risk assessments.

- The averment is made at paras 7 and 8 that the levels at Walley's Quarry were significantly higher than those at Mullaghglass, and in any event, there are background measurements of H_2S in the Antrim and Newtownards areas, which supports the position that it is unfair and potentially unenforceable to impose a H_2S ambient air level requirement in the permits of landfill sites to meet a UKHSA standard.

[74] The appellant did not dispute the fact that the Walley's Quarry permit did not have a H_2S limit, however the argument was advanced that this does not mean that the 1ppb limit is not used more generally in the guidance. Moreover, it was contended that whilst the standard expressed at para 6(d) of the second affidavit of Mr Millar is not specific to Walley's Quarry, it indicates that there is a more general standard followed. The appellant also submitted that Mr Millar does not address what the safe level of exposure to H_2S is and if there are background levels in Antrim and Newtownards this might raise public safety concerns.

[75] To deal with these claims we cannot lose sight of the reality of the situation on the ground as Mr McGleenan reminded us. The 2013 Regulations clearly demonstrate an obligation to identify and limit harm. However, that requires technical and specialist input, and it is not as simple as setting an absolute benchmark given the variables in play. By way of illustration, the background levels of H_2S found in Newtownards and Antrim are a consequence of urban life and traffic. Thus, he validly makes the point that an absolute standard would be unworkable and impractical in the modern urban environment. Moreover, Mr McGleenan reminded us that the NIEA does conduct its assessment against certain standards, as assessments emerging from use of the Jerome monitor are carried out in consideration of World Health Organisation ("WHO") guidelines. The findings were also significantly lower than the 1ppb threshold the appellant relies on.

[76] In this regard Mr Millar's third affidavit of 20 March 2022 is also material. In this affidavit he responds to the report written by Dr Sinha for the appellant and also the appellant's contention that the UKHSA guidance values had been rejected on the basis that Mullaghglass pollution levels are lower than Walley's Quarry. In this affidavit Mr Millar also confirms that NIEA takes its advice from the PHA NI, which

has advised that the UKHSA guidance value in respect of long-term exposure to H_2S is not a guidance value that NIEA should be adopting as the context is completely different to the Walley's Quarry site.

[77] In his evidence Mr Millar also confirms that the appellant has not made any complaint to NIEA in respect of the odour. He records the number of recorded complaints received by NIEA since December 2022, noting that there have been 0 substantiated complaints since May 2023. He confirms that Mullaghglass landfill site stopped accepting non-hazardous waste in or around November 2022, and NIEA have inspected the site seven times since then. Significantly, he notes that on 9 May 2023 a faint odour was detected approximately 500 metres away from the site and it was reported to the operator. There have been no other issues up to and including the last inspection on 9 May 2024. Finally, he states that Alpha carries out monthly Flame Ionisation Detection ("FID") surveys to monitor levels of methane gas as part of the ongoing waste permit requirements.

[78] In addition, of significance are the affidavits of Dr David Cromie of January and March 2022 who is a consultant employed by PHA. Summarising this evidence, we note that it provides as follows:

- Gives details of the number and types of enquiries/complaints received by the PHA and the approach taken by PHA in respect of Mullaghglass landfill site.

- States that the level of health concerns reported to PHA was considered to be very low or negligible at the time, general practitioners in the area surrounding Mullaghglass were not reporting any significant concerns, and the complaints did not justify further health specific investigations (pages 1315-1316).

- Responds to Dr Sinha's fourth report for the appellant. In this regard Dr Cromie states that "to summarise, there is no evidence of harm caused to the population surrounding Mullaghglass landfill site resulting from H_2S emissions at the site, therefore further investigation is not merited."

[79] The evidence highlights considerable interactions between PHA, NIEA and DAERA which is obviously relevant. We note that the PHA participated in a webinar with the public to explain its position to local residents. We have also been provided with extensive risk assessments and reports regarding both Walley's Quarry and the Mullaghglass site all of which demonstrate the attention paid to this issue.

[80] We were referred to a meeting between the PHA, NIEA and DAERA on 22 October 2021. This was to "update on air quality monitoring and comparison to Walley's Quarry ruling." The minutes record that the PHA repeatedly states that emissions at Mullaghglass are within regulated limits.

[81] Finally, we note the affidavits of Aidan Mullan of Alpha Resource Management Ltd. In particular, the first affidavit of 27 January 2022 sets out Alpha's position in relation to the Mullaghglass Site and the steps taken to regulate the landfill, including odour management plans and use of the best available techniques.

[82] Drawing all of the above together, the evidence in this case clearly demonstrates thorough engagement with the approach adopted by the UKHSA in England in respect of Walley's Quarry and a fulfilment by NIEA of its statutory duties under the 2013 Regulations. This court cannot go further into a specialist area and substitute its own view when specialist agencies including the PHA have addressed the issue. The case law clearly states it is not within the court's powers to direct a public authority to publish specific guidance or prescribe specific details for guidance. However, the appellant's case seems to be focused on whether NIEA/DAERA have breached obligations by failing to keep up to date with best available techniques and standards followed in England and Wales.

[83] In this regard, the report issued by the UKHSA following odour complaints and health concerns were made in connection with the Walley's Quarry Ltd site is understandably referred to. However, the Walley's Quarry case is factually different from this case in numerous respects given the proximity of the quarry to residents, the number of complaints and the higher readings. We discuss this case further in the next section of our judgment. Suffice to say at this point, as the Court of Appeal stated in *Richards*, it is not for this court to prescribe standards that the authority must accept. In any event, the evidence in this case is comprehensive, assessing the effects of short-term, medium-term, and long-term exposure to hydrogen sulphide in the subject area.

[84] Whether or not the PHA can in future be challenged about specific guidelines in relation to lifetime exposure to H_2S remains to be seen and is not something this court has been asked to adjudicate upon. In any event we expect that the PHA will continue to monitor the situation across the United Kingdom cognisant of any emerging international standards as regards lifetime exposure to H_2S. Accordingly, on the evidence before us, we must reject the second ground of appeal.

(iii) Article 8 compliance

[85] At the outset when dealing with this aspect of the challenge, we record noting that the second and third respondents contend that the appellant must establish ongoing victim status to make a successful complaint under article 8 of the ECHR. The respondents cite the case of *Re Ryan Taylor* [2022] NICA 21 in support of this.

[86] In *Ryan Taylor*, the Court of Appeal considered whether the appellant could fall within the class of a "potential victim" of an ECHR breach. It noted the following principles:

> "28. … Plainly, a vague or fanciful possibility of a Convention violation will not suffice. In short 'risk' in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation."

[87] The judge in the court below held that the appellant did acquire victim status within the meaning of section 7 of the HRA 1998, noting at para [73]:

> "I am however quite satisfied on the evidence available that the applicant has met the minimum level of severity required to engage her Article 8 rights."

[88] In making this finding, the judge referred to the European Court of Human Rights ("ECtHR") case of *Fadeyeva v Russia* [2007] 45 EHRR 10. In this case, the complainant submitted that the state had breached her rights under article 8 of the ECHR by failing to protect her private life and home from severe environmental nuisance arising from the activities of a nearby steel plant.

[89] The approach adopted by the ECtHR in *Fadeyeva* was later endorsed by the Court of Appeal in England in the case of *R (on the application of Richards v Environment Agency* [2022] EWCA Civ 26. As has been noted above, the circumstances of the *Richards* case influenced the initial pleadings before the High Court in this appellant's case. We, therefore, return to the facts of that case in further detail as follows.

[90] The *Richards* case concerned a complaint brought by a resident in Staffordshire due to hydrogen sulphide gas emanating from the nearby landfill site, Walley's Quarry. The case was brought against the Environment Agency by a child, Mathew Richards, who had been born with severe respiratory problems. It was alleged that the Environment Agency had failed to take all reasonable steps within its powers to address the level of hydrogen sulphide emissions emanating from the landfill site, which amounted to a breach of the complainant's rights under articles 2 and 8 of ECHR.

[91] Initially, the High Court Judge Fordham J granted a declaration where he gave clear instructions as to what the Environment Agency must do to comply with its legal obligations under the ECHR. This included specific requirements such as reducing off-site odours so as to meet the WHO half-hour average recommendations. However, the Court of Appeal overturned this decision, finding that the judge erred in principle by granting such a declaration. In so doing, the court noted the role of the court when reviewing a public authority's decisions under the Human Rights Act 1998:

> "63. … 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."

[92] The Court of Appeal considered that the judge had gone beyond the proper limits of adjudicating the dispute between the parties. The analysis which follows bears repeating in full given its relevance to the issues at hand in this case:

> "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 … 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.
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> 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 …'
> >
> > …

> 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."

[93] This case is a persuasive authority from a sister appellate court in England & Wales with which there is no reason for us not to follow. Notwithstanding this clear articulation of the law, the appellant argues that the test established in *Richards* requires the respondents to approach the problem with due diligence and consideration of competing interests. The respondents submit that the judge correctly applied the tests in *Richards* and *Fadeyeva* and came to the conclusion that the correct level of due diligence was applied. The appellant has also placed reliance on the more recent Grand Chamber ECtHR case of *Verein KlimaSeniorinnen Schweiz v Switzerland* [2024] 4 WLUK 614; (2024) 79 EHRR 1. The Grand Chamber held in this case that Switzerland had breached the article 8 rights of a group of older women by failing to implement adequate climate change mitigation policy. It is, therefore, clearly a different context to the case at hand. However, the appellant relies on the following passage from the judgment, in which the court outlined the principles to be applied in the context of environmental regulation:

> "539. In environmental cases examined under Article 8 of the Convention, the Court has frequently reviewed the domestic decision-making process, taking into account that the procedural safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation (see, for instance, *Flamenbaum and others v France*, nos. 3675/04 and 23264/04, § 137, 13 December 2012). In this context, the court has had particular regard to the following principles and considerations:
> …
>
> (c) In particular, a governmental decision-making process concerning complex issues such as those in respect of environmental and economic policy must necessarily involve appropriate investigations and studies in order to allow the authorities to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided (ibid., § 128). What is important is that the effects of activities that might harm the environment and thus infringe the rights of individuals under the Convention may be predicted and evaluated in advance (see Hardy and Maile, cited above, § 220, with further references).
>
> (d) The public must have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed."

[94] The appellant submits that this case highlights the obligation on authorities to identify and evaluate circumstances in which there may be harm to the environment in the future. In the present case, this translates to a duty to assess the circumstances in which gases such as H_2S cause harm. Moreover, this illustrates the importance of providing publicly available environmental information, a principle previously established by the ECtHR in *Taťar v Romania* (application no 67021-01).

[95] The core contention concerning article 8 is that the respondents failed to investigate the nuisance complaint with due diligence and with proper consideration of competing interests, in accordance with the *Fadeyeva* and *Richards* cases. In respect of this, the appellant relies mainly on the arguments illustrated above. It is contended that the NIEA and DAERA failed to take account of the UKHSA's guidance values for H_2S, failed to assess lifetime exposure risks, and failed to demonstrate how they are aiming to achieve exposure less than that level. The need

to identify and evaluate potential harm to the environment in the future was recently highlighted by the ECtHR in the *Verein KlimaSeniorinnen Schweiz v Switzerland* case, which strongly supports the case which the appellant advances.

[96] As noted by the Supreme Court in *JR123* [2025] 2 WLR 435:

> "…where matters of general principle are in issue or the question concerns the Convention compatibility and proportionality of general rules set out in legislation – it is the proper function of the appellate court to determine the question of proportionality for itself without deferring to the assessment made by the lower court, even if that court has directed itself correctly and its decision cannot be said to be unreasonable."

[97] The appellant also contends that the extent to which there is a need for an assessment of the levels of lifetime exposure to H_2S that cause harm is a matter of 'general principle', and the court should therefore assess for itself whether article 8 has been violated.

[98] In addition, the appellant submits that article 8 requires there to be publicly available information about how H_2S levels are tested and assessed, as well as the effects of long-term exposure risks. The appellant cites the ECtHR cases of *Tatar v Romania* (application no 67021-01) and *Verein KlimaSeniorinnen Schweiz* in support of this. On this basis, it is submitted that the judge erred in his findings at para [83] that all the material relevant to the questions at issue were available publicly, as there was a clear failure to make available the assessments used by the authorities to determine H_2S levels, and no publication of the tests and results.

[99] Finally, the appellant contends that the judge failed to address the historic illegality of the respondents' conduct, as many of the steps taken by the respondents occurred after issue was raised by the appellant through correspondence and/or commencing litigation.

[100] In reply to this claim of "historic illegality" the LCCC contended that the court should follow the approach set out in *Richards*, where the Court of Appeal relied on principles pointing towards judicial self-restraint. Moreover, the LCCC contends the historic illegality point should fail, as it took steps before the proceedings were lodged. In any event, all three respondents have highlighted that focused submissions on this point were not advanced before the High Court judge, and the appellant therefore requires leave of the court to make this point at this stage.

[101] The second and third respondents submitted that the judge applied the correct tests which had emerged from the *Richards* and *Fadeyeva* cases. He concluded that the appropriate level of due diligence was applied. The respondents submit

that this decision is supported by extensive evidence on behalf of the NIEA, which illustrate the reasons why it did not implement an emission limit or guidance value for long-term or lifetime exposure to H_2S. We agree, as we find that decision was rational, proportionate and lawfully made. In addition, whilst it is unclear what the appellant prays in aid in terms of accessibility of evidence, we are not convinced that the respondents have failed in terms of transparency or access. Rather, we find that the NIEA in liaison with the PHA engaged extensively on this issue.

[102] Rightly, the second and third respondents submit that the appellant must establish ongoing victim status for her arguments to have any traction. This is problematic as she no longer permanently resides near the site, the site has stopped accepting black bin waste which can cause odours, the last complaint made about the odour was in May 2023, and the landfill site is still subject to regulation by the NIEA and other organisations are now overseeing it, including the Ulster Wildlife Trust.

[103] We have considered the competing arguments. We also recall that during the hearing Mr McGleenan consistently raised the issue of where the appellant currently resides to inform whether she has victim status and standing to bring proceedings. He stressed that it is important to determine the scientific points about lifetime exposure to H_2S, as the basis for this calculation depends on whether people are exposed for a lifetime. In this regard the second and third respondents argued that the Mullaghglass site closed in November 2022, and if the appellant is no longer a resident there, it cannot be the case that she meets the threshold for lifetime exposure.

[104] We find some strength in Mr McGleenan's argument regarding victim status. However, we are not minded to reject the appellant's claim on that basis given the important point raised that the regulator has not implemented a standard to monitor the risks and effects of long-term exposure. We, therefore, proceed on the same basis as the trial judge that Article 8 is engaged. Having conducted our own assessment of the Convention arguments we are not convinced by the appellant's arguments on this appeal point. That is because assuming that the appellant has met the minimum level of severity required to engage her article 8 rights, applying the relevant tests from *Richards* and *Fadeyeva*, we are satisfied that the appropriate level of due diligence has been exercised and so then any interference with article 8 rights is justified and a claim for breach must fail. In adopting this approach, we are satisfied that we have complied with our obligations under section 6 of the 1998 Act and applied the principles established by the European Court in *Fadeyeva.*

[105] On the basis of the evidence we find that the latitude accorded to public authorities to regulate dangerous activities has not been exceeded. It is not the court's role to substitute its view for that of the public authorities who are specialist in this area. For the sake of completeness, we record our view that the *Verein KlimaSeniorinnen Schweiz* case does not assist the appellant, as it concerned the duty of states to urgently protect against the global climate change emergency and

the importance of setting national goals in accordance with international treaties like the Paris Agreement. It has not been suggested that there is a global emergency or international treaty in respect of long-term exposure to hydrogen sulphide which places NIEA/DAERA under an analogous obligation.

Conclusion

[106] We understand the frustration of this appellant and others when unpleasant odours in the urban environment from landfill affect their lives and the lives of their children. However, within the context of judicial review, applying *Fadeyeva* and *Richards* the appellant cannot maintain a case against the respondents to this claim.

[107] Returning to the questions posed in para [7] herein, we answer them as follows:

(i) The LCCC did not breach its statutory duty to investigate.

(ii) NIEA and DAERA did not breach its statutory duty by failing to identify a level of lifetime exposure to H_2S which posed a risk.

(iii) There has been no breach of the appellant's human rights.

[108] Accordingly, we affirm the decision of Humphreys J and dismiss this appeal.