R (Mathew Richards): Fordham J gives judgment on state authorities' combined Article 2 and Article 8 operational obligations in a pollution context

R (Mathew Richards) v the Environment Agency
(Walleys Quarry Limited, Interested Party)
[2021] EWHC 2501 (Admin)

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Ian Wise QC, Michael Armitage and Will Perry acted for Mathew Richards, instructed by Hopkin Murray Beskine. Antonia Fitzpatrick assisted on the case as a pupil.

References in square brackets are to paragraphs of the judgment.

The judgment is available here.

Overview

Fordham J handed down judgment in *R (Mathew Richards) v the Environment Agency* [2021] EWHC 2501 (Admin) on 16 September 2021, following an expedited, rolled up hearing on 18-20 August 2021. *Richards* is a landmark human rights case, concerning a vulnerable five-year-old boy's Article 2 (right to life) and Article 8 (right to respect for private and family life) rights under the European Convention on Human Rights ("ECHR"), and his successful challenge to the Environment Agency ("EA")'s failure to protect his respiratory health from being harmed by dangerous hydrogen sulphide emissions from a landfill, Walleys Quarry Landfill Site ("WQLS"), next to where he lives in Silverdale, Staffordshire.

Richards is a remarkable case in several respects. Fordham J's is the first domestic judgment to clarify important principles of law applicable in environmental/industrial pollution cases involving both Article 2 and Article 8 rights, including that a reduction in life expectancy qualifies as a "real and immediate risk to life" for the purposes of the Article 2 operational duty. *Richards* is also a rare example of the use of live evidence in judicial review. It may be

the first example in judicial review of the "hot-tubbing" of expert witnesses.

Then, there is the outcome. Fordham J found that the EA had not complied with the operational duties it owed to Mathew under s.6 of the Human Rights Act 1998 ("HRA 98") in respect of Articles 2 and 8, and yet, deliberately and in his discretion, held back from declaring a breach.

Fordham J's judgment is lengthy and detailed. It provides a comprehensive survey of the relevant law and should be read carefully by anyone who is interested in the intersection between environmental issues and Article 2 and Article 8 rights, and in the scope of the Article 2 right more broadly. The section on Fordham's legal findings below summarises five "headline" points only.

Background and critical findings of fact

The parties

The Claimant, Mathew Richards, is a five-year-old boy with respiratory problems (bronchopulmonary dysplasia, or "BPD"), who is particularly badly affected by hydrogen sulphide emissions from WQLS. The Defendant, the EA, is the regulator responsible for protecting Mathew and his community from pollution from WQLS. Walleys Quarry Limited, the operator of WQLS, joined the EA as an Interested Party.

Emissions levels and Fordham J's reliance on the Fourth PHE Risk Assessment

The key to understanding the terms of Fordham J's eventual declaration in *Richards* is a report on the health risks of hydrogen sulphide emissions from WQLS published by Public Health England ("PHE") on 5 August 2021, a mere two weeks before the hearing. That report "*ultimately provide[d] the answer for the human rights analysis*" [34] and is referred to in the judgment as the "Fourth PHE Risk Assessment". It was adduced and relied upon by the EA as part of the written witness evidence of Dr Coetzee of PHE. In Fordham J's judgment, the Fourth PHE Risk Assessment was "*a beacon in this case*" because "*It is clear and transparent. It is a coherent, reasoned analysis. It makes clear, assessed choices as to relevant "health-based guidance values*" [33].

The Fourth PHE Risk Assessment made two recommendations which shaped the terms of Fordham J's declaration (what follows is Fordham J's summary): (i) first, "*that all measures should be taken to reduce offsite odours as early as possible so that the WHO half hour guideline (5PPB), currently exceeded for "a considerable percentage of the time"… is met"; and (ii) second, that "all measures be taken to reduce concentrations in the local area for 2022… below the US EPA reference concentration (1PPB), being the acceptable level and health-based guidance value used to assess long-term exposure*" [33]. "PPB"

is a measure of concentration, meaning “parts per billion”.

The target hydrogen sulphide emissions level of 1PPB for January 2022 and thereafter should be understood in the context of emissions during 2021. 7 and 8 March 2021 saw a peak in emissions. On 7 March, the 24h average concentration of hydrogen sulphide was 116PPB, and on 8 March, it was 144PPB [32(3)]. In 2021, the World Health Organisation (“WHO”)’s half-hour odour annoyance guideline of 5PPB (a measure of the potential for odour complaints) was exceeded for a “*considerable percentage of the time*” (i.e. between 9% and 31%, depending on where measurements were taken and period of time over which they were taken: [32(4)], [33]). At the time of publication of the Fourth PHE Risk Assessment there was a “*current ongoing exceedance*” of the US EPA reference concentration of 1PPB [32(9)].

In relying on the Fourth PHE Risk Assessment for his finding as to safe emissions levels, Fordham J rejected the live expert evidence on the same issue of both Dr Ian Sinha (“Dr Sinha”), Mathew’s consultant paediatrician, and Professor Sir Colin Berry (“Prof. Berry”), a histopathologist and toxicologist and witness for the operator Walleys Quarry Limited. Dr Sinha’s evidence was that extant research had identified no level of hydrogen sulphide that was a safe level for children to inhale: a “*zero tolerance*” approach was necessary and no level above 0.2PPB (the average ambient level, a fifth of the level ultimately recommended by PHE for long-term exposure) should be considered safe [23]. Prof. Berry’s evidence was that there could be no risk of harm to human health below 30,000PPB (below which there would be no effect at all on health) or below 100,000PPB (below which there would be no adverse effect on health): [22]. In other words, the experts were in “*polar opposite camps*” [22].

Fordham J explained why he relied on the Fourth PHE Risk Assessment: “*It means everyone knows where they stand*” [61]. Its “*clear virtues*” were: (i) that it told Mathew and his community the exceedances against which they were going to be protected; (ii) that it identified existing guideline values (most importantly the long-term 1PPB value); (iii) that it was based on impressive documented sources; and (iv) that whether the target emissions levels were being met was objectively verifiable [34].

As for the human rights analysis in *Richards*, reliance on the Fourth PHE Risk Assessment promoted “*practical and effective rights*”, by enabling Fordham J to identify “*what the concrete content of the operational obligation is, and to say so*” [61].

Action by the EA prior to the publication of the Fourth PHE Risk Assessment

Prior to the publication of the Fourth PHE Risk Assessment, the EA had (see: [15]): (i) installed four mobile monitoring facilities (“MMFs”) around WQLS, to

measure emissions levels; (ii) served an enforcement notice on Walleys Quarry Limited, for a breach of the odour condition in the operator's Permit; and (iii) relied upon the previous advice of PHE in not taking any more drastic action. The reasonableness of the EA's reliance on advice from PHE was a central plank of the EA's case, which, as discussed below, Fordham J emphatically accepted.

The most critical finding: current levels of emissions are shortening Mathew's life expectancy

Critically for Mathew, Fordham J accepted Dr Sinha's evidence that hydrogen sulphide emissions at current levels were inevitably shortening his life because those emissions would cause him to develop Chronic Obstructive Pulmonary Disease ("COPD") in adulthood [56]. By way of explanation, Fordham J's judgment uses the metaphor of a "pathway" from BPD to COPD [21]. Mathew's BPD was caused by premature birth. As Dr Sinha explained, Mathew is already on the pathway from BPD to COPD and will remain on it unless his lungs are able to recover in the next 3 to 5 years. The judge accepted that inhaling hydrogen sulphide at present levels is making that recovery impossible [56].

Procedure: "hot-tubbing" of experts

Fordham J heard live expert evidence from Dr Sinha and Prof. Berry on the first day of the hearing. The experts gave evidence in a "hot-tub" (i.e. concurrently, pursuant to CPR PD 35, paras. 11.1-11.4), which may have been unprecedented in judicial review before the hearing in *Richards*.

In his judgment, Fordham J is notably emphatic about the benefits of hot-tubbing the experts. The following comments from the judgment may prompt those involved in other complex judicial review cases to consider whether a "hot tub" may be "*appropriate and necessary for the just disposal of the issues*" [5]. The "hot tub" gave Fordham J "*real assistance in understanding what the two experts were saying to [him], and where the areas of difference in their expertise and in their opinions lay*" and help in "*crystallising the topics that really matter and the key evidence in relation to those topics*". The "hot tub" enabled Fordham J "*to try to address ideas and opinions, explained to [him] by distinguished experts with whom [he] had a direct interactive discourse, in a particular way: using non-technical and down to earth language*". All of that had the added virtues of "*accessibility*" and "*transparency*" [5] (insertions added).

Substantive law: five headline points

The judgment in *Richards* is the first domestic judgment dealing with both Article 2 and Article 8 rights in an environmental context. Summarised below are the five most important points of law that emerge from Fordham J's judgment.

Point 1: The courts must "step up" in "in the moment" pollution cases

Surveying five key cases over thirty years of relevant Strasbourg case law, Fordham J divided up environmental cases involving Article 2 and/or Article 8 rights into "*looking back*" cases and "*in the moment*" cases [50]. Most environmental cases involving state authorities' positive operational duties under Article 2 and Article 8 ECHR, he noted, involved "*looking back*" on what had, and had not, been done [50]. Among the Strasbourg cases, only *Fadeyeva v Russia* (2007) 45 EHRR 10 (concerning ongoing pollution from a Russian steel plant) was a "*present breach*" or "*in the moment case*" [50].

Courts, Fordham J emphasised, plainly are not confined to considering positive operational duties with "*hindsight*". That "*would be inconsistent with the principle that Convention rights are interpreted and applied to make safeguards "practical and effective*"" [50]. He went on: "*The inexorable logic of these human rights cases is that public authorities – and courts – must 'step up' at the time*" [50] (emphasis added).

Fordham J explained what it meant for domestic courts to "step up", as follows.

Where the positive operational duty under Article 2 is engaged (the judgment, throughout, uses the word "*triggered*" rather than "engaged" in respect of both the Article 2 duty and the Article 8 duty, see, e.g.: [1]), it is the duty of the state authority to take measures within the scope of its powers, which, "*judged reasonably*" and in the circumstances of the case, might be expected to avoid the risk to life (cf. *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; 2 AC 72 [12] and [43]). In the judgment in *Richards*, that duty is described as "*the reasonable steps duty*" [43(2)]. Where the positive operational duty under Article 8 is engaged, it is the duty of the state authority to: "*take reasonable and appropriate measures to secure rights to private and family life, striking a fair balance between the interests of the individual and of the community as a whole*" [42] (emphasis added).

Fordham J explained that in "*in the moment*" cases, "[*r]easonable steps and the striking of a fair balance need to be seen, and approached, with caution*" [50] (insertion added). But, crucially, "*[c]aution is one thing. Abdication is another*" [50] (insertion added). Caution does not mean that the court gives the public authority the benefit of any doubt. Caution means that the court must "*[ask] itself "in the moment" whether there is an identifiable content to an applicable positive operational duty and, if so, give such remedies as ensures that the duty is being complied with*" [50] (insertion added).

The comments above as regards what it means for the courts, with due caution, to "step up", provide the context for the terms of Fordham J's declaration in *Richards*, but they are evidently intended to have application in future, urgent "*in the moment*" cases.

Point 2: Reduced life expectancy is "a real and immediate risk to life" under Article 2.

Before *Richards*, the only case in the relevant jurisprudence which had considered that a shortening of life expectancy could engage the Article 2 operational duty was *Watts v UK* (App. No. 53586/09), although, as Fordham J noted in his judgment in *Richards* at [52], several other Strasbourg cases had decided that Article 2 was engaged where the risk to life was a life-threatening illness such as cancer.

In *Richards* at [52], Fordham J makes it explicit for the first time in domestic jurisprudence that a shortening of life expectancy can qualify as a "*real and immediate risk to life*" for the purpose of satisfying the test for engagement of the Article 2 operational duty set out by the Supreme Court at [12] of *Rabone*. That is because the relevant risk to life is to be identified with a risk of life ending earlier that it would have but for the relevant failing on the part of the state authority, irrespective of whether death happens immediately or after a time lag (of perhaps several decades if the victim is a child). In Fordham J's words: "*I find it difficult to conceive that Article 2 would apply to a real and immediate risk of a methane explosion which would mean employees all in their 40s and 50s would be killed, but would not apply to the real and immediate risk of a nuclear leak which would mean local children would get cancer reducing their life expectancy so that they would in due course die in their 40s or 50s*" [52].

Point 3: The Article 2 duty is no more exacting than a "reasonable steps" duty, even in a public health emergency.

There was an issue between the parties as to whether, as in Ian Wise QC's submission Mathew's behalf, the Article 2 "*reasonable steps*" was a duty upon state authority to do "*everything that it can*" in the circumstances of cases, such as Mathew's, involving state supervision of private operators of inherently dangerous industrial activities, and (as per Dr Sinha's evidence) a "*public health emergency*" [51]. The authority for that proposition was *Budayeva v Russia* (2014) 59 EHRR 2, a case involving a mudslide in Russia, which referred (at [175]) to a duty "*to do everything within the authority's power*".

The standard of "*everything that it can*" taken abstractly, is a "*more exacting*" standard than "*reasonable steps*" [51]. But what is reasonable, as *Rabone* makes clear (at [43]), always falls to be considered within the specific circumstances of the case. In oral submissions, Ian Wise QC argued that there is a "sliding scale" of reasonableness, at one end of which, in an emergency, what it is reasonable is for the authority to do is, precisely, "everything that it can". The "everything that it can" standard, so the argument went, was not a distinct standard but a version of the "reasonable steps" standard: a version which, importantly, the Strasbourg Court had said would apply in the context of an emergency.

Ian Wise QC's image of a sliding scale did not make its way into Fordham J's judgment. What concerned Fordham J was what he saw as the overly prescriptive implications of an "*everything that it can*" standard. The Judge drew attention to the basic Strasbourg principle of the "margin of appreciation", which, he pointed out, has an equivalent in domestic law "*when the domestic judicial authority is supervising the actions of the domestic administrative authorities*" [51]. In sum, the Court: "*does not substitute its view of the best policy to adopt in a difficult technical and social sphere*"; and "*recognises that there may be a choice of means and that the positive duty may be capable of fulfilment by alternative means*" [51].

That concern explains why Fordham J both: (i) accepted that "*in principle*" a contextual consideration of what was reasonable in the circumstances "*could give rise to a situation where there is no room for any discretion or latitude*" [51], an example being something like – as in the case of *Oneryildiz v Turkey* (2005) 41 EHRR 20 – the installation of a gas extraction system being a necessary step to avoid a methane explosion at a refuse tip; and (ii) noted, in the same paragraph of his judgment in *Richards*, and again with reference to *Oneryildiz*, that "*even specific action like installing a gas extraction system… will involve judgment, appreciation and choice*" [51]. That is to say, although in principle there might be a case in which it is possible to state with the highest degree of specificity, not only what ought reasonably to have been done, but also how it ought reasonably to have been done, that will be true only where there really is no room for judgment, appreciation or choice. The obvious question that follows is whether, in practice, there could ever be such a case.

On the basis of the foregoing, Fordham J did not think that even the phrasing "*everything in the authority's power*" served to "*eliminate the importance of latitude, at least in a case like the present*" [51]. He was clear, however, that "*everything that it can*" was not the standard in any event: "*[j]udicial formulations must not be taken out of context and read like a statute*" [51] (insertion added).

Richards, therefore, clarifies that the Article 2 operational duty is always to be viewed as a "*reasonable steps*" duty: there is no "*more exacting standard of 'everything they can'*" [51], even in a public health emergency.

Point 4: The lived experience of the local community has a broad relevance

The EA and Walleys Quarry Limited both submitted that the evidence Mathew adduced regarding the impact of emissions from WQLS upon the local community in Silverdale was irrelevant to what Fordham J had to decide: Mathew alone was "victim" for the purposes of the HRA 98 [49].

Fordham J disagreed. He held that the lived experience of a victim's community in Article 2 and/or Article 8 pollution cases was relevant in three respects (see [49]): (i) first, to establishing, as regards Article 8, whether the adverse

effects of pollution have reached the "*minimum level*" necessary to engage the operational duty; (ii) second, to establishing, as regards article 8, whether a "*fair balance*" has been struck between the victims interest and the public interest (because just as elements of the public interest, e.g. in waste disposal arrangements, could weigh against the victim's interest, so could adverse impacts on the local community weigh in the balance on the same side as the victim's interest); and (iii) third, to establishing, as regards Article 2, whether "*reasonable steps*" have been taken, because "what steps are appropriate is informed by the *context and circumstances*", and because "*the importance of not imposing a disproportionate burden… necessarily brings in a balancing of competing considerations*".

Fordham J at [49] considered that what he held as regards the relevance of the community's experience to Article 8 "*fits with*" the fair balance test and had in effect been taken as read by the Strasbourg Court, including in *Fadeyeva v Russia* (2007) 45 EHRR 10, at [85] and [87]. As far as Article 2 was concerned, Fordham J evidently (at [49]) considered that his conclusion as to the relevance of the community's experience was implied by a broad statement as to the relevance of context and circumstances in *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [73].

It appears, however, that the Strasbourg Court has never actually decided that the experience of a victim's community has a broad relevance in Article 8 and/or Article 2 pollution cases such as Mathew's. Perhaps the point has been thought too obvious to be worth stating. Be that as it may, what *Richards* adds is a clear statement of principle in that regard.

Point 5: There is overlap between Article 2 and Article 8 in industrial pollution cases, but the "temptation" to consider Article 8 alone can be resisted

In the EA's submission, Article 8 alone was the only appropriate prism through which to test the legal adequacy of its response to hydrogen sulphide emissions from WQLS. Fordham J saw "*considerable force*" in the EA's submissions: (i) that the relevant Strasbourg case law recognised an "*overlap*" between the positive obligations owed under Article 2 and Article 8; (ii) that there were factual similarities between Mathew's case and Strasbourg cases analysed solely through Article 8, especially *Lopez Ostra v Spain* (1995) 20 EHRR 277, which also concerned hydrogen sulphide emissions; and (iii) that if the EA had acted compatibly with Article 8 then the whole claim would fail. "*It is possible*", Fordham J noted, "*that the Strasbourg Court would select Article 8 as the closest fit and find that no separate issue arose under Article 2*" [48].

The strongest point in the EA's favour appears to have been the "*overlapping positive operational duties*" under Article 2 and Article 8 [48]. A survey of the relevant Strasbourg case law had led Fordham J to draw out the general proposition that "*[i]n the context of dangerous industrial activities the scope of*

the positive obligation under Article 2 largely overlap with those under Article 8" [41(1a)] (emphasis and insertion added). Moreover, the Judge rejected a submission made on Mathew's behalf (see: [45]) that the Article 8 standard was heightened by the overlap [48]. In Fordham J's judgment, that large degree of overlap meant, on the facts of Mathew's case, that the answer to the question of whether the EA had complied with its operational duties would be the same whether those duties were "*analysed as originating from Article 2 or Article 8*" [48].

Fordham J's conclusion on the issue was that "*[n]otwithstanding all of this, I will resist the temptation to analyse the case solely by reference to Article 8*" [48] (insertion added). The nature of that "*temptation*" is unclear from the judgment. Fordham J made unequivocal findings that emissions from WQLS at current levels were inevitably shortening Mathew's life and that a reduction in his life expectancy amounted to a real and immediate risk to his life for the purposes of engaging the Article 2 operational duty.

The principle to be taken from *Richards*, then, may be that working out whether there is "*an identifiable content to an applicable positive operational duty*" under Article 2 is a necessary aspect of the court's "stepping up" in an "*in the moment*" case similar to Mathew's (cf. [50]). In any event, domestic courts hearing Article 2 and/or Article 8 environmental cases would still be in want of several important points of clarification (especially Points 2 and 3 above), were it not for Fordham's parallel analysis of Article 2 and Article 8 in *Richards*.

The Outcome: a declaration, not of breach but of "what the EA must, in law, do"

The reasoning behind the Outcome

The foregoing legal analysis provided Fordham J with the basis for addressing "*two critical questions*" he posed at the outset as being the key to the resolution of *Richards*: (i) "*whether positive operational duties are triggered";* and (ii) *"the content of those positive obligations in this case*" [1].

As for question (i), positive operational duties were triggered in respect of both Article 2 and Article 8. That finding in respect of Article 2 (summarised above) was the most critical in the case. In full, it was that: "*on the evidence, BPD is properly to be seen as constituting "an inevitable precursor" to a serious illness reducing life expectancy [i.e. COPD], where that very inevitability is attributable to the ongoing exposure to hydrogen sulphide emissions from WQLS at current levels, against which the EA has the powers to protect" [*56] (emphasis and insertion added). A finding that the operational duty under Article 8 was "triggered" followed: *"Based on all the evidence – about Mathew, and about the emissions, and about the implications of the emissions for Mathew – I am*

satisfied that there is a direct effect on Mathew's home, family life and private life from adverse effects of severe environmental pollution which attains the relevant minimum level by reference to intensity, duration, physical and mental effects" [57].

As for question (ii), the EA submitted that compliance with its operational duties required it to take "three key steps" [58]. Step 1 was the identification of appropriate steps (after appraising the situation and conducting suitable enquiries) as part of the exercise of its judgment as regulator [58]. Step 2 was the monitoring of emissions levels in conjunction with taking advice from PHE [59]. Step 3 was the design of measures which the EA had assessed to be effective in reducing pollution to the "*acceptable levels*" identified by PHE [62].

As for Step 1, Fordham J accepted that it was for the EA to identify appropriate steps as a matter of its own regulatory judgment [58].

As for Step 2, Fordham J considered that Step to be "*an essential part of the analysis in this case*" [60]. As indicated above, Fordham J emphatically agreed with the EA's pleaded case that it was reasonable for it consistently to have sought and acted upon the advice of PHE in relation to emissions from WQLS: "*PHE was plainly an appropriate state agency from whom to take advice"; and "[t]he actions of eliciting informed advice from PHE demonstrably discharged the duty to take reasonable steps to acquaint itself with the relevant information, when viewed alongside the EA's other actions including its consideration of residents*" [59] (emphasis and insertion added).

That finding as to Step 2 had important consequences in the case. A key plank in Mathew's case had been that the EA had known of the risk to his life since the service of a report from Dr Sinha on 5 July 2021 and ought to have taken reasonable steps from that moment to protect his Article 2 right [45]. But evidence from Dr Coetzee of PHE stated that Dr Sinha's report would not have led it to change its risk assessment approach to the emissions from WQLS. It followed from Fordham J's finding as to the reasonableness of the EA's reliance on PHE that in taking PHE's advice as regards Dr Sinha's report, the EA had "*manifestly discharged its duty to take into consideration the health effects of operations and emissions from WQLS*" [59] (emphasis added).

Still under Step 2, Fordham J considered, however, that the situation had changed when, on 5 August 2021, the PHE published the Fourth PHE Risk Assessment, whose contents and significance in the case were discussed above.

It was his analysis of Step 3 that was crucial to Fordham J's finding that the EA had not discharged its legal duties to protect Mathew's Article 2 and Article 8 rights. Fordham J noted that he had been invited by the EA, on the basis of a witness statement from one of their installations technical leaders, to "*adopt*

the "inference" that EA personnel have sat down, with PHE's recommendations as their objective, and have designed steps which they have assessed will be effective to meet that objective" [62]. That was not enough: Fordham J was "*not satisfied, on the evidence, that officials within the EA have done what compliance with the applicable legal duties requires*" [63]. That, in turn, was because: (i) setting a clear objective required "*discipline*", i.e. setting a timeline for the achievement of an objective and to working out what steps needed to be taken, by whom, to achieve the objective within that timeline; (ii) there was no document before the court "*which adopt[ed] that discipline, or beg[an] to do so*" (insertions added); and (iii) there was "*no reference, anywhere*" in any EA document before the Court to the objective of the 1PPB US EPA reference concentration being achieved by January 2022 [63].

In sum, the EA had not discharged its legal obligations towards Mathew because it had not designed measures that would be effective to implement the advice of PHE, specifically in the Fourth PHE Risk Assessment. In that regard, Fordham J noted that PHE's second recommendation in that report (i.e. the reduction of long-term exposure levels to 1PPB) "*really was very new*": the Fourth PHE Risk Assessment was published on 5 August 2021, and the Environment Agency's "*witness statements, the documents exhibited, and the pleaded defence, were all dated the following day*" [63] (emphasis added).

Discussion of the declaration

On the basis of the reasoning set out above, Fordham J's declaration took the following form (at [64]):

> *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.*

Fordham J stated "*The judgment did not find a present breach. It identified what was needed*" [70] (emphasis added). Why did Fordham J not, in his discretion, declare a breach of Mathew's Article 2 and 8 rights? The following five points are relevant to a consideration of that question:

First, there can be little doubt that what Fordham found what was, in substance,

a breach of Mathew's Article 2 and Article 8 rights. Having set out the content of the operational duty under those Articles (Steps 1-3 above), Fordham J said that that he was "*not satisfied*" that the EA had "*not done what compliance with the applicable legal duties requires*" in respect of Step 3 [63]. There is no distinction between not having complied and with a positive operational duty and breaching that duty. It is confusing that, at [50], Fordham J uses the term "present breach" to describe "*in the moment*" cases, such as Mathew's, where operational duties have not been complied with, and then, at [70], states that he has not found a present breach in Mathew's case.

Second, as for when any "breach" began, the corollary of Fordham J's finding that it was reasonable for the EA to rely at all times on the advice of PHE is that it can have begun no earlier than the publication of the Fourth PHE Risk Assessment on 5 August, the day before the EA's evidence was dated, and two weeks before the rolled-up hearing. Were the Judge to have declared a breach, it is to be inferred that it would have covered that short period only.

Third, and relatedly, there is the question of why it was that Fordham J did not find a breach of Mathew's Article 8 rights beginning at some point in the months before the emergence of the Fourth PHE Risk Assessment confirmed the health risk to Mathew (and the risk to his Article 2 right to life) arising from the hydrogen sulphide emissions. The Strasbourg case law makes it clear that Article 8 includes a right to protection from environmental pollution where the only interference is with an individual's enjoyment of their home: it is not necessary for there to be a danger to health (see: *Lopez Ostra v Spain*, another hydrogen sulphide emissions case, at [51]). The Court had evidence before it, in the form of witness statements from Mathew's mother Rebecca Currie, local resident and nuclear physicist Michael Salt, and local resident and pharmacy technician Sian Rooney, that Mathew and his community's enjoyment of their homes had been seriously adversely affected by the nuisance of the smell from WQLS since January 2021 at the latest, and that the EA had been aware of the nuisance [15]. The question of whether the EA had done what it needed, in law, to do to protect Mathew's Article 8 rights need not therefore have turned on the timing of the Fourth PHE Risk Assessment.

That no breach was found, beginning at an earlier time, in respect of Mathew's Article 8 rights was a counter-intuitive consequence that flowed from a combination of two decisions that Fordham J had already made, those being: (i) to treat the content of the operational duty under Article 2 as entirely overlapping with the content of that duty under Article 8 in Mathew's case [48]; and (ii) to treat the Fourth PHE Risk Assessment as determinative of the content of both operational duties (ultimately in the interest of securing practical and effective rights: [61]), in place of a possible alternative, fact-specific Convention analysis.

Fourth, and as noted above, the fact that Mathew's was an "*in the moment*" case, and indeed the first domestic pollution case ever that had considered a

combination of Article 2 and Article 8 infringements, was relevant to Fordham J's chosen approach to the declaration. It is possible in principle for an explicit declaration of breach to be made in "*in the moment*" environmental cases: an Article 8 violation was declared in *Fadeyeva v Russia* (2007) 45 EHRR 10, another "*in the moment*" case. That was in the Strasbourg court, however, and in his judgment in *Richards* Fordham J indicated there was a broad approach that he considered it appropriate for the "*national human rights court*" which was "enforcing a s.6-type obligation" to take, which followed from "*the logic of the Strasbourg Court's decisions", i.e. to "[ask] itself "in the moment" whether there is an identifiable content to an applicable positive operational duty, and, if so, give such remedies as ensures that the duty is being complied with*" [50] (insertion added). That was what Fordham J ultimately sought to do in *Richards*.

Fifth, and finally, Fordham J's decision not to declare a breach was plainly deliberate ("*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*" [64]), and he gave reasons for it. Those reasons were that "*what matters*" is "*clarity as to what the EA's legal obligations are and what it must, in law, do*" and that the declaration he gave "*puts the focus where it needs to be*" [64].

Conclusion

In *Richards*, Fordham J set out a general approach to granting relief in pollution cases involving the enforcement of obligations under s. 6 HRA and clarified several important points of law: as to the meaning of a "real and immediate risk to life" under Article 2 ECHR; as to the limits of the Court's jurisdiction objectively to determine what it is reasonable for a state authority to do to protect the Article 2 right to life, even in a public health emergency; as to the relevance of the lived experience of a victim's community to a decision as to the lawfulness of the action (or inaction) of a state authority in protecting their Article 2 and Article 8 rights in an environmental/pollution context; and as to the proper analysis of concurrent/overlapping claims under Article 2 and Article 8 ECHR in the context of environmental claims regarding regulated industrial activities.

For all that his judgment in *Richards* is dominated by a herculean effort of making sense of highly technical expert evidence and reports regarding emissions levels, and the consolidation of Strasbourg jurisprudence spanning a period of thirty years into a series of legal propositions for use by domestic courts (see: [42]), Fordham J repeatedly recognised that the reason for that effort was a vulnerable child ("*In the end, there is Mathew*" [26]), his health, and the health of his community. Fordham J's declaration requires the EA to take "*pressing and ongoing action*" to secure "*practical and effective human rights safeguards*" which will "*make a very real difference so far as the air which*

Mathew (and his community) breathes is concerned" [64].

Handing down his judgment on 16 September, Fordham J refused the EA permission to appeal [70]. With new waste still being accepted at WQLS, it remains to be seen whether or not it is possible for the EA to undertake "Step 3", and design measures capable of effectively reducing hydrogen sulphide emissions from WQLS to the levels now recommended by PHE.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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