Neutral Citation Number: [2025] EWHC 1269 (Admin)

Case No: AC-2025-LON-000626

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2025

Before :

MRS JUSTICE LANG DBE

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Between :

THE KING	**Claimant**
on the application of	
MATHEW RICHARDS **(a child by his mother and Litigation Friend,** **REBECCA CURRIE)**	
- and -	
ENVIRONMENT AGENCY	**Defendant**
WALLEYS QUARRY	**Interested Party**

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Ian Wise KC and Catherine Dobson (instructed by **Miles & Partners LLP**) for the **Claimant**
Gwion Lewis KC and Jacqueline Lean (instructed by **Environment Agency, Legal Services**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 18 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 23 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant, by his litigation friend, seeks permission to apply for judicial review of regulatory failings on the part of Defendant in respect of pollution, namely, hydrogen sulphide ("H_2S") emissions, from a landfill site ("the Site"), known as Walleys Quarry, Silverdale, Staffordshire. It is claimed that the Defendant is in breach of the operational and procedural obligations in Articles 2 and 8 ECHR, and has acted unlawfully at common law.

2. The test for permission was authoritatively stated by Lord Sales in *Maharaj v Petroleum Company of Trinidad and Tobago Ltd* [2019] UKPC 21, at [3]:

> "The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether Mr Maharaj has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780."

The test for permission is subject to discretionary bars such as delay.

3. The Interested Party ("IP") previously operated the Site under a permit granted by the Defendant. In November 2024, the Defendant issued a landfill closure notice upon it, and thereafter it ceased accepting waste in November 2024. On 28 February 2025, the IP entered liquidation and the liquidators disclaimed the permit. The Site has been abandoned.

4. The Claimant is a child aged 9 who lives with his family in Silverdale. The Claimant suffers from bronco-pulmonary dysplasia, which puts him on a pathway to developing Chronic Obstructive Pulmonary Disease ("COPD"). COPD will reduce his life expectancy. Dr Sinha, a consultant in paediatric respiratory medicine, advised in his report of 4 July 2023 that exposure to H_2S was significantly impairing the Claimant's health and quality of life, with detrimental effects on his respiratory health, reducing his life expectancy. In a further report dated 18 February 2025, Dr Sinha concluded that continued exposure to emissions will accelerate the decline in lung function, worsening his long-term prognosis and reducing his life expectancy. In reaching this conclusion, Dr Sinha took into account the Claimant's recent move to a house and school further away from the Site.

5. The Claimant's first judicial review claim ("JR1") was issued on 15 July 2021, alleging regulatory failures on the part of the Defendant which amounted to a breach of its positive obligations under Articles 2 and 8 ECHR and at common law. Fordham J. in his judgment dated 16 September 2012 found, on the evidence, that it was inevitable that the Claimant would develop COPD as a result of the ongoing exposure to H_2S emissions. Therefore there was a real and immediate risk to his life as at August 2021, as a result of which the Defendant's positive operational duties under Articles 2 and 8 were triggered. Fordham J. decided it was not appropriate or necessary to find that that the Defendant was currently in breach of its Convention or common law obligations. However, he made a declaration which required the Defendant to take steps to ensure that H_2S levels were reduced to safe levels specified by Public Health England.

6. The Defendant successfully appealed against Fordham J.'s decision. There was no appeal against the finding that there was a real and immediate risk to the Claimant's life and that Articles 2 and 8 were engaged. In its judgment dated 17 January 2022, the Court of Appeal found that there was no proper basis for finding that the Defendant had acted in breach of its Convention obligations up to August 2021, or was proposing to act in breach of its legal obligations. Fordham J. was correct in not making any such findings. However, he erred in granting a declaration, in the absence of a finding that the Defendant was in breach of its obligation. The terms of the declaration, which required the Defendant to achieve prescribed outcomes within a prescribed timetable, went beyond the scope of the court's functions, having regard to the case law governing the appropriateness of judicial intervention in the regulation of industrial activities in a difficult area of technical and social policy. The Supreme Court refused permission to appeal.

Legal framework

7. Landfill facilities in England are obliged to comply with the requirements of Council Directive 1999/31/EC on the landfill of waste, implemented in England and Wales through the Environmental Permitting (England and Wales) Regulations 2016 ("EPR"). The operation of a landfill site is prohibited unless authorised by an environmental permit (regulation 12).

8. In addition to the controls imposed by the conditions of permits, the Defendant has other powers under the EPR to ensure compliance and/or to prevent or remedy pollution. These include:

    i) a power to serve an enforcement notice (regulation 36);

    ii) a power to serve a suspension notice (regulation 37);

    iii) a power to revoke a permit, in whole or in part (regulation 22); and

    iv) a power to take steps to prevent or remedy pollution (regulation 57).

9. Regulations 22, 36 and 37 are only available to the Defendant where a permit remains extant and in force, which is no longer the case at the Site. That limitation does not apply to regulation 57, which enables the Defendant to arrange for steps to be taken to remove "a risk of serious pollution" that exists "as a result of the operation of a regulated facility" under the EPR regulation 57(1). The costs of doing so may be recoverable from an operator.

10. "Serious pollution" is not defined in the EPR. "Pollution" is defined in regulation 2 as including "any emission as a result of human activity which may" *inter alia* "(a) be harmful to human health or the quality of the environment" or "(b) cause offence to a human sense".

11. As a public authority, the Defendant is required to act compatibly with the Human Rights Act 1998. That includes, where triggered, complying with its positive obligations to take such operational measures, within the scope of its powers, as constitute reasonable steps to avoid the risk to life (Article 2 ECHR) and 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 (Article 8 ECHR).

12. The Court of Appeal in JR1 considered what is required of a regulator where its positive operational duties under Article 2 and/or 8 ECHR are engaged, per Lewis LJ at [12]-[15]. In particular:

    i) Where the regulator knows of a real and immediate risk to life, it must "take measures within the scope of its powers which, judged reasonably, it might be expected to take to avoid the risk" to comply with Article 2 [12].

    ii) In the context of the regulation of industrial processes, there are a number of general principles which apply, including that the choice of measures is, in principle, a matter that falls within the Contracting State's margin of appreciation, and an "impossible or disproportionate burden must not be imposed on the authorities" [13].

    iii) As regards Article 8, when regulating industrial activities which may cause pollution, "[i]n broad terms, [the State] 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) […]". Again, it is not for the court to substitute its own view as to what is the appropriate policy in "a difficult technical and social sphere" or to determine "exactly what should be done" [15].

    iv) This reflects the well-established domestic principle that in cases involving scientific, technical and predictive assessments by an expert regulator, an enhanced margin of appreciation is to be applied when considering a challenge to such assessments: *Mott v Environment Agency* [2016] 1 WLR 4338 at [69], [74].

Grounds of challenge

13. This claim was issued on 28 February 2025. Chamberlain J. granted the Claimant permission to amend the Statement of Facts and Grounds, (without having seen a draft) at a case management hearing on 11 March 2025, in the light of the change in circumstances.

14. I considered that the pleading of the grounds of challenge was inadequate in that it did not set out the dates upon which the unlawful acts were said to occur, and the Claim Form at section 3 and the Amended Statement of Facts and Grounds were inconsistent with one another. At the hearing I directed the Claimant to amend the claim form and to re-amend the Amended Statement of Facts and Grounds to remedy these defects.

Grounds 1 and 3

15. Grounds 1 and 3 cover essentially the same issues, and therefore it is convenient to consider them together. Under Ground 1, the Claimant submits that the Defendant has been in continuous breach of its operational duties owed to the Claimant under Articles

2 and 8 ECHR in respect of the H_2S emissions emanating from the Site since January 2022, and relies on three main issues. Under Ground 3, the Claimant submits that the Defendant thereby acted irrationally.

16. Three main issues are identified in the Claimant's skeleton argument, at paragraph 37:

    i) What the Defendant knew or should have known about the cause of the pollution;

    ii) The Defendant's knowledge of the IP's persistent failure to comply with regulatory requirements adequately; and

    iii) The protracted and serious nature of the H_2S pollution.

17. Issue 1 is that, by January 2022 the Defendant knew or ought reasonably to have known that waste being delivered to the Site was high-sulphate bearing waste and that this freshly deposited waste was resulting in H_2S emissions. The Defendant continued to allow high-sulphate bearing waste to be delivered until November 2024. In my view, it is arguable that the Defendant's failure to identify at an earlier stage that high-sulphate waste was currently being delivered to the Site, and/or to prevent this from happening, was a breach of its legal obligations. The Defendant had proceeded on the mistaken basis that H_2S emissions were only emanating from historically deposited waste. That was the evidence presented by the Defendant in JR1. In my judgment, the Closure Notice Decision Document ("CNDD"), dated 28 November 2024, provides sufficient evidence of the Defendant's state of knowledge, and the information available to the Defendant, to support this sub-ground as arguable. The main area of dispute between the parties is the date at which the Defendant ought reasonably to have identified the source of the emissions, and taken appropriate action. That is a matter which ought to be resolved at a full hearing.

18. Issue 2 is that the Claimant submits that the Defendant's response was unreasonable and inadequate because it continued to rely upon the IP to implement its "Contain, Capture and Destroy" strategy, despite being aware that the IP was persistently failing to cover and cap the landfill and to manage leachate and surface water. Direct enforcement measures were required. The Claimant relies upon the evidence of the IP's failures in the CNDD. In my view, this evidence does disclose an arguable case. The areas of dispute in relation to this issue ought to be determined at a full hearing.

19. Under issue 3, the Claimant relies upon the prolonged and serious nature of the pollution, as demonstrated by the monitoring data. The Defendant submits that evidence of heightened emissions is not of itself sufficient to establish a breach, and in any event, regulatory action taken by the Defendant did deliver a material improvement in the level of emissions. There is a dispute between the parties as to the significance of the data, particularly bearing in mind that the level of emissions is affected by weather conditions. In my view, the Claimant has not established a sufficient basis for this to be a standalone challenge. However, the Claimant's submission and evidence of persistent serious pollution may be used by the Claimant in support of its case on issues 1 and 2 above.

20. As to limitation periods, I accept that Grounds 1 and 3 concern a continuous course of conduct rather than a single act or omission. For the purposes of section 7(5) of the

Human Rights Act 1998, time runs from the date of the last act in the course of conduct: see *O'Connor v Bar Standards Board* [2017] 1 WLR 4833. The same principle applies to the common law claim. The Defendant has not resisted permission on grounds of delay.

Ground 2

21. Under Ground 2, the Claimant challenges the Defendant's failure to comply with its procedural obligations under Articles 2 and 8 ECHR to provide information to the public, to enable them to assess environmental risks. I was referred to case law from the ECtHR on this issue.

22. **Limb 1** Under the first limb of Ground 2, the Claimant submits that, from 21 March 2021 until 8 August 2024, the Defendant failed to publish accurate information on the level of H_2S emissions from the Site in respect of the period March 2021 to September 2023. This led the UK Health Security Agency ("UKHSA") to underestimate the health risks presented by emissions.

23. On 5 October 2023, the Defendant announced that there were errors in its monitoring of H_2S levels at or near the Site and as a result, it was likely that the H_2S levels had been under-reported since March 2021. The monitors had been wrongly calibrated. Further work was being undertaken to rectify the historic data. The revised data was published on 20 August 2024 and it revealed that the actual emissions were significantly higher than previously recorded. This information was made known to the public. The Claimant contrasts the UKHSA risk assessment for July 2023, based on the incorrect data, which found average emissions below the long-term (lifetime) health-based guidance value, with the UKHSA risk assessment of 20 August 2024, based on the revised data, which found that emissions regularly exceeded the long-term (lifetime) health-based guidance value and the World Health Organisation ("WHO") odour annoyance guideline value.

24. In my view, the Claimant has very low prospects of success in establishing a breach of the Defendant's procedural obligation because the Defendant publicised the best information it had about emissions, and actively sought advice from the UKHSA on the risks associated with those emissions. When the Defendant became aware of the flaws in the data, it took reasonable steps to ascertain the cause of the problem and to remedy it.

25. I accept the Defendant's submission that permission should be refused on grounds of delay. This claim was issued on 28 February 2025. The default limitation period for a claim under the Human Rights Act 1998 is one year (see section 7(5)). The Claimant's representatives have been aware of the flaws in the data since October 2023, so time ran from that date, and any claim should have been filed by October 2024. I do not consider that an extension of time would be equitable in all the circumstances. The Claimant's legal representatives have had a long-standing involvement in litigation concerning this Site and have been kept well-informed of developments at the Site. They were advised by the Defendant that this challenge could only be pursued in a new claim and that was confirmed by the Court of Appeal, on 2 October 2024, when it refused the Claimant's application to re-open JR1 on this basis, indicating that any claim relating to the historical monitoring data needed to be brought by way of a fresh

claim. The delay in not filing a claim until late February 2025 is unexplained. Unlike Grounds 1 and 3, the alleged breach is not a continuing act. Therefore permission is refused on limb 1 of Ground 2.

26. **Limb 2** Under the second limb of Ground 2, the Claimant submits that from January 2022 until at least 11 February 2025, the Defendant failed to publish information to inform the Claimant and the public that the cause of H_2S emissions from the Site was freshly deposited high sulphate-bearing waste. The Claimant states that it first became aware of this on 11 February 2025, through disclosure of the CNDD by the Defendant.

27. The Defendant previously defended its regulatory approach on the basis that it was confident that no-gypsum bearing material had been deposited since May 2021 and that the fresh waste deposited would have the capability of diluting the H_2S in historic waste: see the witness statement of Ms Sarah Dennis, EA's Installations Technical Leader filed in JR1, quoted in the Amended Statement of Facts and Grounds at paragraph 18.

28. At public meetings held in May 2022, June 2022, August 2022 and October 2022, the Defendant made no mention of the IP accepting waste in breach of its permit. At the meeting in August 2022, Mr Jenkins, an officer of the Defendant responded to concerns about the composition of fresh waste being delivered to the Site stating "We're not aware of any changes to the composition of the waste on site. There's been no variation to the permit to allow Walleys Quarry Limited to bring in different materials. We have previously highlighted the recent changes to the waste acceptance procedure, but these would not have an adverse impact on odour emissions." (recorded in Transcript of Facebook Q&A Event 25.08.2022).

29. However, the Defendant states that it only became aware of potential contaminated waste streams following two audits of waste producers, in 2022 and 2023, which led to enforcement notices being issued in 2022 and 2023. Further, it was only after it was interpreting the gas emissions surveys carried out in 2024 that it was able to confirm the link between the heightened H_2S emissions and the deposition of contaminated waste.

30. The Defendant submits that it has regularly updated the public on the H_2S emissions and the regulatory actions taken against the IP via its dedicated website for the Site. The "May 2023 Enforcement Update" included the following text:

> "The audit identified two non-compliances with waste acceptance and management system permit conditions, which have been assessed as having a potentially significant impact on quality of life if not addressed promptly and adequately (Common Incidence Classification Scheme (CCS) 2). These are:
>
> 1. We are satisfied that WQL has accepted fines *[small particles of waste]* where the producer of the waste has not demonstrated that these fulfil relevant waste acceptance criteria, as appropriate basic characterisation was not completed. Supporting evidence of the basic characterisation, which is completed and provided by waste producers, did not demonstrate that the waste was non-

> hazardous and that it not contain gypsum-based/high sulphate-bearing materials.
>
> 2. The root cause of this non-compliance is WQL's failure to follow its agreed waste acceptance procedures, which form part of its written management system.
>
> These non-compliances are recorded in a Compliance Assessment Report (CAR), which will be sent to WQL on Friday 5 May 2023. In the CAR we explain why we have assessed the reasonable foreseeable impact as significant. A high level of hydrogen sulphide (H2S) in landfill gas is indicative of gypsum-based and/or other high sulphate-bearing materials in the deposited waste mass….."

31. The CARs referred to above were also available on the website.

32. In the light of these submissions by the Defendant, I do not consider that the Claimant has a realistic prospect of success in establishing that there was a duty to provide this information from January 2022 because it was not then known to the Defendant. By May 2023, the Defendant was providing sufficient information to the public via the website, and it continued to do so, as more information became available. Thus, even if there was a breach of duty, it was not a continuing breach. The Claimant is out of time to bring a challenge to the alleged failure to provide information from January 2022.

33. Therefore permission is also refused on limb 2 of Ground 2.

Ground 4

34. Ground 4 concerns the lawfulness of the Defendant's acts and omissions since the IP entered into liquidation on 28 February 2025.

35. A Closure Notice does not relieve the operator of liability under the conditions of a permit. As required by Schedule 10, paragraph 10 of the EPR, the Closure Notice set out the steps that the IP was required to take and the period within which they must be taken, including addressing the problem of the H_2S emissions. However, when the permit was disclaimed by the IP's liquidators, the Closure Notice fell away. In law, the Defendant does not take over the responsibilities of the operator.

36. The Defendant has decided that it should exercise its powers under regulation 57(1) of the EPR. The witness statement of Mr David Preston, who is employed by the Defendant as a Regulated Industry Manager, sets out the actions that the Defendant has taken, and is intending to take, in relation to the Site since the disclaimer of the permit, which I summarise below.

37. On 28 February 2025, Mr Preston assessed the Site, and identified that the IP had not complied with the Closure Notice. The Site appeared poorly maintained with visible pools of contaminated water and incomplete and damaged temporary capping. Bubbling gas was visible and there was a distinct landfill gas odour.

38. On 5 and 13 March 2025, the Defendant informed the local community via the website that works were to be carried out to remove the risk of serious pollution at the Site, including securing the Site, installing temporary capping to an area of previously deposited waste; remedial work to improve the stability of waste near the western flank; a review of arrangements for surface water management to include possible alterations; and action to manage the groundwater under the Site and leachate levels within the capped area. A public meeting was held on 20 March 2025. An update on the works being undertaken was posted on the website on 1 April 2025.

39. A landfill gas emissions survey was planned for 24 April 2025 to assess and identify defects in the temporary capping that require repair. Soil will be placed above the temporary caps to reduce the risk of damage.

40. The third party gas operator CLP Envirogas Limited is continuing to operate on Site to monitor the operation of the gas engines and flare and maintain them in a satisfactory condition.

41. The Defendant does not intend to take certain steps specified in the Closure Notice which were intended for an operator-managed closure. It considers that it does not have power to take steps under regulation 57(1) of the EPR where there is no longer a risk of serious pollution. In particular, the Defendant does not intend to:

    i) Install permanent capping and carry out site restoration, subject to review of the efficacy of steps carried out and any ongoing risk of pollution.

    ii) Install a surface water management scheme beyond what is necessary to facilitate civil engineering works at the Site, and to prevent damage to the temporary cap on the void from excessive water bearing down on it.

    iii) Manage groundwater levels through pumping unless the technical review indicates it is necessary to do, to remove a risk of serious pollution.

42. Mr Preston set out the latest monitoring data and UKHSA assessment in his witness statement.

43. Mr Preston exhibits to his witness statement the Defendant's Decision Document under regulation 57(1) of the EPR, dated 6 March 2025, which sets out the steps to be taken at the Site.

44. The Claimant has divided Ground 4 into three sub-grounds. Under sub-ground 1, he submits that the Defendant continues to owe to the Claimant the positive obligations under Articles 2 and 8 ECHR to take reasonable and appropriate measures to reduce H_2S emissions from the Site and that it must exercise its powers under regulation 57 of the EPR compatibly with those obligations.

45. The Defendant has pleaded in paragraph 86 of the Summary Grounds of Defence that the positive obligations under Articles 2 and 8 ECHR continue to be engaged with regard to the Claimant and, in considering what steps to take under regulation 57(1) of the EPR, it has those obligations "firmly in mind". Regrettably, the Defendant then goes on to "express some reservations" on Dr Sinha's most recent report, in respect of the monitoring data, the Claimant's move to a house further from the Site, the extent to

which he visits his grandmother's house, and the High Court's rejection of his position that there should be a zero tolerance approach to any H_2S emissions. In my view, the Court ought to consider the reservations raised by the Defendant and determine whether or not Articles 2 and 8 ECHR are still engaged.

46. On the evidence available to me, it is arguable that the Defendant has and is treating its functions and powers as wholly governed by regulation 57 of the EPR, without consideration of the wider obligations under Article 2 and 8 ECHR. In my view, the Court ought to consider and clarify the Defendant's legal duties in the difficult circumstances in which it finds itself.

47. Therefore I grant permission on sub-ground 1 of Ground 4, which is pleaded in paragraphs 96 to 99 of the Amended Statement of Facts and Grounds. Further evidence on the Claimant's proximity to the Site may be required.

48. Under sub-ground 2, the Claimant submits that the Defendant made an irrational decision not to take all the measures set out in the Closure Notice. Under sub-ground 3, the Claimant submits that the Defendant breached the *Tameside* duty of sufficient enquiry when deciding what steps to take, following the liquidation.

49. In my judgment, there is simply not enough evidence available to enable sub-grounds 2 and 3 to succeed, at least at this time. On the evidence before the Court, the Defendant clearly has addressed its mind to the problems at the Site. It is conducting specialist investigations. It is taking active steps to remedy what it considers to be "serious pollution" at the Site, but it is not proceeding with all the works specified in the Closure Notice, for the reasons it explains. There is no expert evidence from the Claimant to counter the Defendant's evidence. The Claimant's complaint is that the Defendant is taking a "short-term, do-minimum approach" (skeleton, paragraph 67). But the Claimant is effectively inviting the Court to substitute its view of the works required at the Site in place of the Defendant's view, which the Court of Appeal in JR1 held to be an impermissible approach.

50. Therefore I grant permission on the sub-ground 1, but refuse permission on sub-grounds 2 and 3.

Conclusions

51. Permission is granted on Grounds 1 and 3 but issue 3 (the prolonged and serious nature of the pollution) is not a standalone challenge; it may be relied upon in support of issues 1 and 2. Permission is also granted on sub-ground 1 of Ground 4. Permission is refused on Ground 2, and on sub-grounds 2 and 3 of Ground 4.