Neutral Citation Number: [2026] UKUT 119 (AAC)
Appeal No. UA-2024-001230-GIA

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Between:

SHEELAGH CASEY-HULME

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) THE DEPARTMENT FOR THE ENVIRONMENT,

FOOD AND RURAL AFFAIRS

Respondents

Before: Upper Tribunal Judge West

Hearing Date: 11 December 2025

Decision Date: 12 March 2026

Representation: Mr Clíodhna Kelleher, counsel, for the Appellant (instructed by Miles and Partners, acting pro bono)

Mr Leo Davidson, counsel, for the First Respondent (instructed by the Information Commissioner)

Mr Robin Hopkins & Mr Christian Davies, counsel, for the Second Respondent (instructed by the Government Legal Department)

ON APPEAL FROM

Tribunal	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No:	EA/2022/0390

Panel: Judge Ord, Members Cosgrave, Murphy

Tribunal Hearing Date: 11/9/2024

Tribunal Decision Date: 25/9/2024

Summary of Decision Environmental Information Regulations 2004 – whether Articles 2 and 8 of the European Convention on Human Rights are irrelevant to the public interest balancing test or inhere in the public interest balancing test

Keyword Name **93 Information rights**

93.7 Environmental information – general

93.8 Environmental information - exceptions

Please note that the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and the Reasons of the Judge follow.

DECISION

The decision of the First-tier Tribunal (General Regulatory Chamber) dated 25 September 2024 under file reference EA2022/00390 does not contain an error on a point of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This appeal concerns information relating to a landfill known as “Walley’s Quarry”, Silverdale, Newcastle-under-Lyme, which is situated close to residential properties. For some time it had been emitting hydrogen sulphide, which smells of rotten eggs. Some residents experienced an impact on their health and two of them brought separate public law proceedings against the Environment Agency (“the EA”), which is the main regulator of pollution from

the site. The EA served a closure notice on Walley's Quarry Ltd, which operated the quarry, on 28 November 2024. On 28 February 2025 the EA was informed that the company had gone into liquidation and the liquidator disclaimed both the environmental permits held by the company and the freehold title to the site. In effect the site as abandoned by the liquidator and reverts to the Crown estate by way of escheat. The EA described the position thus:

> "This means that the environmental permits, for the landfill and the soil treatment activity no longer exist. Following disclaimer, the property is subject to 'escheat', a legal process under which it falls to be dealt with by the Crown Estate. The Environment Agency is using its limited, discretionary powers under Regulation 57 of the Environmental Permitting Regulations to arrange for steps to be taken to remove a risk of serious pollution. We have engaged contractors for this purpose and you may see activity on the site as a result."

2. The sole issue in this appeal is whether Articles 2 and 8 of the European Convention on Human Rights ("the ECHR") are irrelevant to the public interest balancing test under the Environmental Information Regulations 2004 ("the EIR") or inhere in the public interest balancing test.

Factual Background

3. On 16 June 2022 Mrs Sheelagh Casey-Hulme, the Appellant, requested information from the Department for Environment, Food and Rural Affairs ("DEFRA"), the Second Respondent, in the following terms:

> "The Secretary of State for the Environment, Food and Rural Affairs is requested to provide all information that he has with respect to Walley's Quarry Landfill site, Cemetery Road, Silverdale, Newcastle-under-Lyme, including but not limited to all communications he has had with the Environment Agency relating to this Landfill site."

4. DEFRA refused the request on 15 July 2022, relying on the "manifestly unreasonable" exception in regulation12(4)(b) of the EIR and it upheld its original decision on 10 August 2022 at an internal review.

5. It provided the Appellant with advice on formulating a fresh, narrower request, which she duly made. Whilst no information was forthcoming in response to the modified request, that is not the subject of this appeal.

6. The Appellant referred the refusal of the original request to the Information Commissioner ("the IC"), the First Respondent, on 16 August 2022. In his decision notice of 31 October 2022 he concluded that DEFRA was entitled to rely on the manifestly unreasonable exception. The Tribunal summarised the effect of the IC's decision in the following terms

> "13. The Commissioner's decision notice (reference IC-186765-D0M1) referred to Defra's reliance on the burden of providing the information in terms of costs and the diversion of resources. He noted that, if this had been a Freedom of Information Act (FOIA) request, it would have been subject to an upper cost limit of £600 with respect to the amount of work required to produce the information. Whilst there was no upper cost limit under EIR, the FOIA limit of £600 provided a useful reference point when considering the manifestly unreasonable test, albeit it was not the determining factor.
>
> 14. He noted that public authorities may be required to accept a greater burden in providing environmental information than other information. Furthermore, the "manifestly unreasonable" test was a robust one, such that the term "manifestly" meant an obvious or clear quality to the identified unreasonableness. This imposed a high burden on the public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose an unreasonable burden on it.
>
> 15. The Commissioner referred to Defra's workings, which demonstrated that conservatively it would take at least 122 hours of work involving: "Determining whether the information is held, Locating the information, or a document which may contain the information, Retrieving the information, or a document which may contain the information and Extracting the information from a document containing it." There was also the prospect of there being more. He noted that the appellant had essentially asked Defra to disclose everything it held on Walley's Quarry, and was not limited in any way by time, specific departments or members of staff.

> 16. Due to the broad nature of the request and the number of documents identified, the Commissioner was satisfied that it would place a significant burden on Defra in terms of time and resources. In his view, this amounted to a "manifestly unreasonable" burden, despite the size of Defra and the resources it had.
>
> 17. The Commissioner then carried out the public interest balance. He noted Defra's acknowledgment that it was in the public interest to disclose information on Walley's Quarry, and that there was a lot of information on the EA's website. The EA prepared weekly updates for the community to keep them informed, and the EA were currently investigating matters. This all contributed to transparency and public understanding and went some way to meeting the public interest in disclosure.
>
> 18. Defra considered the public interest rested in maintaining the exception due to the manifestly unreasonable burden involved in disclosure. Compliance would disproportionately divert Defra's resources away from the provision of other services and key functions.
>
> 19. The Commissioner considered there were very compelling arguments in favour of disclosure, which would enable the local community to understand more closely what was being done to mitigate the impacts of the site. However, there were weighty public interest arguments in favour of protecting Defra's resources. It was not in the public interest to divert resources away from Defra's other functions and services when compliance would take such a significant amount of time. Disclosure would place an overwhelming burden on Defra in terms of time and expense and despite its size and resources, this could not be justified.
>
> 20. For the above reasons, the Commissioner decided that the public interest in favour of disclosure was outweighed by the public interest in favour of maintaining the exception."

The Decision of the First-Tier Tribunal

7. The Appellant appealed to the First-tier Tribunal, which sat on 11 September 2023 and which produced its decision on 25 September 2023. The neutral citation number is [2023] UKFTT 00779 (GRC). There were two grounds of appeal. Ground 1 was that the IC erred in determining that the request was manifestly unreasonable. Ground 2 was that he erred in determining that the

public interest in disclosure was outweighed by the public interest in withholding information. The appeal was dismissed.

8. So far as material, the Tribunal found that

> *"Ground 1 - Whether, in all the circumstances of the case, the request for information is manifestly unreasonable due to the cost and burden on Defra's resources*
>
> 66. Having regard to *Craven*, we note that, even with the presumption in favour of disclosure, it should not be easier to get a request accepted under EIR than under FOIA. Furthermore, a public authority is entitled to refuse a single extremely burdensome request.
>
> 67. The request seems to have come about because the Appellant believed nothing was being done to prevent the pollution from the site (her WS para 2, p52 CB), and the EA and Defra were not being honest and transparent. However, it is unclear why asking for so much information would answer that question.
>
> 68. The request is extremely broad and we find it difficult to see what would be a larger request. It simply asks for all information held with respect to the quarry without any qualification whatsoever. This would include matters wider than the pollution issue and the impact on the community.
>
> 69. It is accepted by the Commissioner and Defra, and indeed by this tribunal, that the health and environmental impacts from the quarry are serious. In response, the EA, as the main regulatory body for the quarry, has been taking enforcement action and had commenced criminal investigations. Therefore, contrary to the Appellant's belief, things were being done.
>
> 70. The EA has been continuously ensuring that the public was informed about the regulatory action being undertaken, and about other environmental concerns including emission levels. This has been achieved through the EA's website, which was regularly updated with information. Furthermore, the *Richards* and *Lally* litigation has put more information into the public domain.
>
> 71. Consequently, there has been transparency, and disclosure of a considerable amount of information, and it

is unclear what incremental value the requested disclosure would give.

72. It is not disputed that at least 122 hours of work would be needed to comply with the disclosure request, although this is a conservative estimate and it is likely to be more in the region of over 300 hours. Defra has shown its workings on how it reached this figure, explaining how it estimated the timings for each activity. The Appellant has not challenged whether this looked reasonable.

73. There is no need to consider how much this might cost. It is clear from the time it would take to comply with the request that this would be a substantial burden on Defra. However, the Commissioner was entitled to refer to the FOIA costs limit of £600 as an indicator of an appropriate threshold and did not err in law by doing so.

74. Whilst Defra is a large government department, it operates under significant resource constraints and dealing with the request would involve a significant diversion of public resources, including diverting staff away from substantive work relating to the quarry.

75. Taking account of all the above factors, and weighing in the balance what was already in the public domain, we find that the request was disproportionate. Accordingly, bearing in mind the presumption in favour of disclosure, we conclude that the request for information was manifestly unreasonable and regulation 12(4)(b) is engaged.

Ground 2 - Whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

76. We again took account of the factors set out under Ground 1, given the overlap of considerations.

77. Whilst we accept that the health and wellbeing issues are serious, taking account of what was already in the public domain at the time, we are unclear as to what benefit there would be to the public interest in disclosing the requested information.

78. On the other hand, diverting such significant public resources away from Defra to deal with the request would clearly not be in the public interest.

> 79. Balancing the two, we conclude that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> 80. With respect to the Appellant's submissions concerning Articles 2 and 8 of the Human Rights Convention, we take the view that these Articles are irrelevant to the public interest test under EIR, which is intended to protect public interests and not private rights. Consequently, we have not factored them into our considerations.
>
> *Summary of decision*
>
> 81. For the above reasons, we conclude that Defra was entitled to withhold the requested information under regulation 12(4)(b) EIR."

The Appeal

9. The Appellant was refused permission to appeal by the Tribunal on 20 July 2024. She applied to the Upper Tribunal for permission to appeal on 21 August 2024.

10. On 6 September 2024 I directed that there was to be an oral hearing of the application for permission to appeal, although given the respective commitments of counsel it was not possible to find a date for the hearing before 2 May 2025 when I granted permission to appeal.

11. I heard the substantive appeal on the morning of 11 December 2025 all three parties appeared before me, ably represented by Ms Kelleher, Mr Davidson and Mr Hopkins and Mr Davies respectively, to whom I am indebted for their written and oral submissions. Ms Kelleher and Mr Hopkins had appeared in the Tribunal below. For the sake of simplicity, and meaning no disrespect to Mr Davies, when I refer to the submissions of DEFRA I shall refer to them as the submissions of Mr Hopkins.

The Legal Framework

The EIR

12. The relevant provisions of the EIR are regulations 2, 5(1), 12 (1), (2) and (4)(b).

13. Regulation 2 includes

> "any information in written, visual, aural, electronic or any other material form on—
>
> …
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
> …
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c); …"

14. Regulation 5(1) provides a general duty to make environmental information available on request.

15. Regulation 12 sets out exceptions to the duty as follows:

> "12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
>
> (a) An exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> (3) […]
>
> (4) For the purposes of paragraph 1(a), a public authority my refuse to disclose information to the extent that –
>
> …
>
> (b) the request for information is manifestly unreasonable."

16. The relevant date for the assessment of the public interest test is the date on which the request for information was first refused, see ***Montague v IC & Department for International Trade*** [2022] UKUT 104 (ACC) at [25].

The ECHR

17. Article 2(1) of the ECHR provides that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which that penalty is provided by law.

18. Article 8 of the ECHR provides a qualified right to respect for private and family life.

19. Article 10 of the ECHR provides a qualified right to (among other things) freedom "to receive and impart information and ideas without interference by public authority".

20. The European Court of Human Rights ("the ECtHR") has held that, in certain circumstances, an individual may have a right to receive certain information from the state pursuant to the ECHR. In particular:

(1) in ***Guerra v Italy*** (1998) 26 EHRR 357 the ECtHR held that a failure by the state to provide local residents with essential information to enable them to assess the environmental and health risks associated with living near a fertiliser factory breached their Article 8 rights (see [60]).

(2) in ***Oneryildiz v Turkey*** (2005) 41 EHRR 20 the ECtHR held by analogy with ***Guerra*** that a state's positive obligation under Article 2 to put in place a legislative and administrative framework to safeguard life can similarly entail an obligation on the state to provide information to local residents to enable them to assess significant environmental and health risks (see [89-90], [108]).

(3) in ***Magyar Helsinki Bizottsag v Hungary*** (2020) 71 EHRR 2 the ECtHR held at [156] that, whilst Article 10 does not generally confer a right of access to information held by a public authority, such a right may arise where access to information is instrumental to the individual's exercise of his or her right to freedom of expression.

The HRA

21. As an international treaty, the ECHR has no direct effect in domestic law. However, it is given effect by and in accordance with the provisions of the Human Rights Act 1998 ("the HRA").

22. S.3(1) of the HRA provides that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the ECHR rights.

23. S.6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right.

24. S.7 of the HRA relevantly provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by

s.6(1) may bring proceedings against the authority under the HRA. Such proceedings can be brought as a civil claim in the County Court or High Court, or by way of judicial review proceedings in the Administrative Court.

Directive 2003/4/EC

25. The EIR implement the UK's obligations under Directive 2003/4/EC ("the Directive"). The Directive, in turn, implements the EU's obligations as a signatory to the Aarhus Convention. The Aarhus Convention grants rights to the public in respect of access to environmental information, access to justice in relation to environmental issues and promotes public participation in environmental decision-making.

26. The EIR and the Directive fall to be interpreted in the light of the Aarhus Convention, see ***Department for BEIS v IC and Henney ("BEIS")*** [2017] EWCA Civ 844, [2017] PTSR 1644 at [14]:

> "The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention. In *Case C-297/12 Fish Legal v Information Commissioner* [2014] QB 521, [2014] 2 CMLR 36 the CJEU stated:
>
>> "35. First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities: see *Ville de Lyon v Caisse des dépôts et consignations (Case C-524/09)* [2010] ECR I-14115, para 36 and *Flachglas Torgau GmbH v Federal Republic of Germany (Case C-204/09)* [2013] QB 212, para 30.
>>
>> 36. As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state has a right of access to environmental information held by or on behalf of public authorities, without that person having to

> state an interest: see the *Flachglas Torgau* case, para 31.
>
> 37. It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in EU law: see the *Flachglas Torgau* case, para 40."

The Ground of Appeal

27. There is a sole ground of appeal, namely that the Tribunal erred on its determination that Articles 2 and 8 of the ECR are irrelevant to the public interest balancing test or inhere in the public interest balancing test.

The Appellant's Submissions

28. For the Appellant, Ms Kelleher contended that DEFRA did not carry out the public interest balancing test correctly because it did not recognise that the interests militating in favour of the disclosure of the information included Article 2 and 8 ECHR rights and these rights were consequently not weighed in the balancing exercise.

29. The Tribunal determined that the public interest in maintaining the exception outweighed the public interest in disclosing the information (at [77 – 79]).

30. The key issue on this appeal is the Tribunal's treatment of Article 2 and Article 8 ECHR. In its decision it determined:

> "80. With respect to the Appellant's submissions concerning Articles 2 and 8 of the Human Rights Convention, we take the view that these Articles are irrelevant to the public interest test under EIR, which is intended to protect public interests and not private rights. Consequently, we have not factored them into our considerations."

31. In consequence, argued Ms Kelleher, although the Tribunal has made a determination as to where the public interest lies in this case, it has done so without considering the Article 2 and 8 rights of the local population, on the basis that these rights are irrelevant.

32. Articles 2 and 8 ECHR are engaged on the facts of this case. In ***R (Richards) v Environment Agency*** [2021] EWHC 2501 (Admin), [2022] Env LR 14 ("***Richards I***") the Administrative Court found an interference with these rights. This finding was not appealed to the Court of Appeal, as is recorded in the judgment of the Court of Appeal in ***Richards I*** [2022] EWCA Civ 26, [2022] 1 WLR 2593 at [49]:

> "49. Thirdly, the Judge found that there was a real and immediate risk to life in Mathew's case as there was a substantial and significant risk of Mathew's life expectancy being reduced by Mathew developing chronic obstructive pulmonary disease as a result of exposure to current levels of hydrogen sulphide (see paras 53—56 of the judgment). That is one of the necessary requirements that must be met as part of the process of establishing a breach of article 2 of the Convention. There is no appeal against this finding.
>
> 50 Fourthly, the Judge found that the levels of hydrogen sulphide gave rise to adverse environmental pollution that had a direct effect on Mathew's home, and his family and private life and which attained the relevant minimum level of severity by reason of its intensity and duration and the physical and mental effects it caused (see para 57 of the judgment). These are necessary requirements which must be met as part of the process of establishing an interference within the meaning of article 8(1) of the Convention. There is no appeal against this finding."

33. The Grand Chamber of the ECtHR has determined that access to information is an aspect of Articles 2 and 8. Where Articles 2 and 8 are engaged "… particular emphasis should be placed on the public's right to information…".

34. In ***Oneryildiz*** the applicant lived in a dwelling in Turkey which was destroyed following a methane explosion at an adjacent landfill, which caused a landslip of waste that destroyed ten dwellings and killed 9 people. He contended that the local authority had not taken appropriate steps to safeguard against the risk of a methane explosion and so had breached Article 2. The Grand Chamber in that case summarised the "general principles" applicable in the case as follows (in relevant part):

> "89. The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 71 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life …
>
> 90. This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The Grand Chamber agrees with the Chamber (see paragraph 84 of the Chamber judgment) that this right, which has already been recognised under Article 8 (see *Guerra and Others*, cited above, p. 228, § 60), may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards (see paragraph 62 above)."

35. The Grand Chamber situates the "public's rights to information" within the obligation on the state to put in place an appropriate legislative and administrative framework designed to provide effective deterrence against threats to the right to life. This is also known as the "framework duty" (or the "systems duty"). The framework duty derives from the fact that Article 2 imports a positive obligation on the state to take appropriate steps to safeguard the lives of those within its jurisdiction (and not merely a negative duty to refrain from the intentional and unlawful taking of life on the part of the state). The positive duty has a dual aspect. It requires the state to put in place a legal framework which will protect the right to life of individuals in its jurisdiction (i.e. the framework duty) and it further requires the state to take preventative operational measures to protect individuals from risks to their lives (also known as the "operational duty").

36. The UK has put in place a regulatory framework which enables the public to access information held by public authorities, including FOIA and EIR. The obvious mechanism in EIR and FOIA by which any rights under Articles 2 and 8 can be considered and weighed by the public authority is in the operation of the public interest balancing test, when considering the interests which militate in favour of disclosure of information.

37. This is not to say that ECHR rights will always be relevant to the carrying out of the public interest balancing test. Context will dictate whether any of the relevant rights are engaged. This is clear from the language of regulation 12 EIR "… in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

38. Nor is this to say that Articles 2/8 trump other considerations in the public interest balancing test. The fact that they are engaged does not *ipso facto* give rise to any automatic entitlement to the information sought. Rather, it is the public interest balancing test – conducted correctly – which determines whether the information must be disclosed or not.

39. The Tribunal ought to have considered that Article 2/8 rights were engaged in the context of the information sought and to have factored this into the public interest balancing test. Having failed to do so, it cannot safely conclude that the public interest in withholding the information outweighs the public interest in disclosure. It has not placed the proper weights on the scale.

The Respondents' position

40. DEFRA and the IC have each filed responses to the appeal in which they set out their respective submissions on the appeal.

41. In summary, the arguments made in response to the appeal are:

(1) there can be no question of any breach of ECHR rights in respect of the landfill ("the No Breach" argument);

(2) in any event, ECHR rights do not give rise to a freestanding right of access to information and information access regimes such as FOIA do not need to be read to give effect to Convention rights (“the No Freestanding Right” argument);

(3) the position in domestic law is that a qualified right under the ECHR is given effect by the carefully calibrated statutory regime enacted by Parliament” (“the Calibrated Scheme” argument);

(4) human/ECHR rights are not relevant to the conduct of the public interest balancing exercise *per se* and, to the extent that the underlying matters are relevant to the conduct of the public interest balancing test, they were considered by the Tribunal.

42. The Appellant takes each of these arguments in turn, below.

The No Breach argument

43. DEFRA appears to suggest that rights arising under the ECHR could only be relevant to the operation of the EIR if the Appellant’s rights (or potentially the rights of “anyone else”) would otherwise be breached and that the domestic courts have repeatedly rejected claims that DEFRA and/or the EA have breached their obligations under Articles 2/8.

44. This submission suggests that there must be an independent breach of Articles 2/8 before those Articles could be relevant to an authority determining whether information should be disclosed. But consideration of, and compliance with ECHR rights is a matter for each public authority. An authority is not required to wait until a different authority (e.g., here, the EA) has been determined to be in breach of an ECHR right before considering whether the same right is engaged on the facts of the case before that authority. Nor should an authority do so. Rather, the advantage of the availability of judicial analysis in ***Richards I*** is that it offers a shortcut to the authority considering whether

Articles 2 and 8 could be engaged on the facts and it is clear from the analysis in ***Richards I*** that each of those rights were engaged on the facts.

The No Freestanding Right argument

45. This argument misfires. It has never, at any stage in this appeal, been the Appellant's case that Articles 2/8 of the ECHR create a freestanding right to information such that EIR can be bypassed or the statutory scheme rewritten in order to give her access to the documents that she has requested. This can be contrasted with the position of the appellants in ***BBC v Sugar (No. 2)*** [2012] UKSC 4, [2012] 1 WLR 439 and ***Kennedy v Charity Commission*** [2014] UKSC 20, [2015] AC 455. who did each seek to have express limitations in the scope of FOIA and/or the existence of absolute exemptions "read down" in order to give effect to Article 10 ECHR rights. The suggestion that the Appellant was "compelled to concede" this point is inaccurate and tendentious. It has never been in issue.

The Calibrated Scheme argument

46. The premise of the Calibrated Scheme argument is that the operation of EIR does not give the Appellant access to the information which she seeks and it does so by design. But that premise is inaccurate. This is not a case of absolute exemption, or a restriction in the scope of EIR (as was the case in ***Kennedy*** and **R *(Hardy v Milford Haven Port Authority*** [2007] EWCA Civ 1403, respectively). The "calibrated scheme" in this case is the qualified exemption in regulation 12 of the EIR. The crux of the Appellant's argument is that regulation 12 of the EIR is calibrated properly to enable rights under Article 2 and 8 to be considered by an authority carrying out the public interest balancing exercise. What went wrong in this case is that the Tribunal failed to do so, not that the regulation prevents it.

Human rights are not a relevant factor *per se*

47. The argument that human rights are not relevant per se follows logically from the Calibrated Scheme argument. The IC puts the position thus:

> "It follows from the "careful calibration" by the relevant legislators that the question of whether a public authority is required to disclose information in relation to a request is to be determined solely by reference to the applicable statutory scheme. The public interest balancing test requires a holistic analysis, which has regard to all relevant circumstances which tend to show that it would be in the public interest either to disclose, or to withhold, particular information.
>
> …
>
> This holistic assessment may involve matters which happen also to engage other legal frameworks. In this case, it is said to be Articles 2 and 8 of the ECHR, but the underlying factual matrix could just as easily invoke the criminal law, a regulatory regime, civil law, statutory rights, and so on. The Convention rights are said to be, as the Appellant puts it, "engaged on the facts of this case" (GOA §17) because of risk to life and health arising from pollution.
>
> The weighty public interest in that underlying subject matter was recognised in both the DN and the Judgment. To that extent, the public interest balancing test already includes regard to the factors which also invoke other legal regimes. In other words, the fact that Convention rights are engaged would simply be a reflection of the serious nature of the underlying matter, which is not only factored into the FTT's analysis but central to it, albeit that it is outweighed by countervailing factors relevant to the exception in issue. …".

48. In short, the IC accepts that the matters which underlie the Appellant's complaint are weighty matters of public interest, but they are already considered in the public interest balancing exercise, such that the fact that ECHR rights are engaged is simply a reflection of the serious subject matter, which happens to be outweighed on this occasion. Similarly, DEFRA argues (on its alternative case) that the relevant matters were expressly considered by the Tribunal and the Tribunal "gave weight" to them.

49. The Appellant does not accept that the seriousness of the underlying subject matter was appropriately considered by the decision-makers in this case. That is the essence of her case.

50. The public interest "benefits" of disclosure identified by the IC in the decision are, exhaustively, that disclosure would:

(1) contribute to the transparency of government (at [31])

(2) aid public debate (at [31])

(3) aid public understanding of the "discussions that are taking place" (at [31])

(4) assist with the concerns raised in respect of the impact of the site on public health (at [34])

(5) enable the local community to understand more closely what is being done to mitigate the impacts of this site (at [34])

(6) further the public's understanding "in this area and the debate around it" (at [34]).

51. The closest reference to these rights is the elliptical reference to "concerns" about "public health". Similarly, the height of the Tribunal's consideration of the issue was limited to a recognition that "the health and environmental impacts from the quarry are serious" (at [69] and [77]).

52. This analysis fails to grasp the true acuteness of the impacts in question. The health effects have been assessed as sufficiently severe to constitute an interference with Articles 2 and 8, rights which attract a level of protection well above the public's ordinary interest in government transparency or participation in local discussion, or mere concerns about health.

53. This is not, as the Respondents suggest, a matter of semantics. The entire conceit of the public interest balancing exercise is that different considerations have different weights which fall to be placed on the scale and considered by the authority in determining whether or not to disclose information. Only impacts

of a particularly serious nature will engage Articles 2/8 of the ECHR. Any mischaracterisation or understatement of those impacts will distort the entire balancing exercise by understating the true weight that should be afforded to them.

The IC's Submissions

54. For the IC, Mr Davidson submitted that the correct position in law is:

(a) the EIR is a self-contained statutory code. It is to be applied and interpreted in accordance with its objectives.

(b) to whatever extent the Appellant has a right to information from any other source, that right cannot be enforced through the EIR. The EIR is not a "mechanism" for enforcing extraneous rights.

(c) to whatever extent such a right to information arises from the underlying environmental factors, those factors will already form part of the EIR's decision-making matrix, so the Appellant's position involves double-counting.

EIR is a self-contained code

55. The IC agrees with the Appellant, citing ***BEIS*** at [14] (cf. the judgment at [25]), that "the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention". At [17], the Court of Appeal goes on to quote the CJEU in ***Fish Legal v IC*** [2014] QB 521, [2014] 2 CMLR 36, which held at [39]:

> "… [It] should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that directive, which means inter alia that the information must be 'environmental information' within the meaning of Article 2(1) of the directive, a matter which is for the referring tribunal to determine in the main proceedings (*Flachglas Torgau*, paragraph 32)."

56. Neither the Directive, nor the Aarhus Convention, makes any mention of human rights per se. Recital 1 of the Directive explains:

> "(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment".

57. Recital 8 makes clear that the right of access is applicant- and motive-blind:

> "(8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest".

58. Before the Tribunal the Appellant relied on Recital 9. However, the excerpt quoted at [26] of the Judgment is incomplete:

> "(9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies. The future development of these technologies should be taken into account in the reporting on, and reviewing of, this Directive".

59. As to factors militating against disclosure, Recital 16 explains:

> "(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive".

60. Recital 24 clarifies that this scheme may exist in parallel with other regimes:

> "(24) The provisions of this Directive shall not affect the right of a Member State to maintain or introduce

> measures providing for broader access to information than required by this Directive”.

61. To give effect to the scheme, environment information is defined as:

> “… any information in written, visual, aural, electronic or any other material form on—
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) reports on the implementation of environmental legislation;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)”.

62. Regulation 12 provides an exhaustive list of exceptions to the duty to disclose and provides that even where one applies a public authority may refuse only where, “in all the circumstances of the case, the public interest in

maintaining the exception outweighs the public interest in disclosing the information".

63. The EIR therefore provides a comprehensive, self-contained scheme whereby certain information is to be made available (or not, as the case may be) for certain statutory purposes, all calibrated in order to achieve the overarching objective(s) of the legislation. That does not exclude such information being available by another route or mechanism. But there is no basis in the EIR for importing extraneous considerations, nor can it be co-opted or repurposed to give effect to parallel rights.

EIR not a "mechanism" to enforce other rights

64. The position in domestic case-law is clear. To whatever extent there may be alternative or additional avenues to obtain information, those should be "located and enforced elsewhere": ***Kennedy v Charity Commission*** at [39]; cf. [6]-[7], [106]-[107], [136]-[137] and [156]-[158], and ***Moss v IC*** [2020] UKUT 242 (AAC) at [107]-[110]. Strikingly, at [136]-[137], Lord Toulson uses the word "mechanism" to counter Lord Carnwath's dissent, maintaining that judicial review was the appropriate remedy rather than crowbarring the right of access into the statutory scheme where the legislator had expressly not included it.

65. The Appellant's arguments regarding what she identifies as the "freestanding right" issue reveal the fundamental incoherence of her appeal. She expressly disavows any notion of Articles 2/8 being a freestanding right which "bypasses" or "rewrites" the statutory scheme, purportedly in contrast to ***Sugar (No 2)*** and ***Kennedy*** (***Moss*** and ***FCDO v IC*** [2021] UKUT 248 (AAC), [2022] 1 WLR 1132 are not mentioned). At the same time she asserts a "positive obligation" derived from those human rights and describes the EIR and FOIA as the "obvious mechanism" to give effect to that obligation.

66. This analysis is woolly and fails to provide any basis in law for the relevance of human rights to the EIR. In the cases mentioned above, the requesters argued that a refusal under the statutory scheme would amount to an interference with a human right. It seems that is not being argued here. But it is

not clear how the human rights therefore enter the scene. If the operation of the EIR without human rights does not infringe the ECHR, then there is no reason why the ECHR should affect the operation of the EIR.

67. Indeed, what is notably absent from the Appellant's analysis is any basis for saying that Article 2/8 afford an entitlement to information which is more extensive than what is provided for under the EIR. On the face of the authorities relied on by the Appellant, it is not clear why any such entitlement is not answered by the existence of the EIR itself, as "a legislative and administrative framework". It follows that, much like the requester in ***FCDO***, the Appellant cannot show that her human right puts her in any better position
than the one which she already enjoys under the statutory scheme.

68. In reality, the Appellant's attempted distinction is one without a difference. The essential point, common to those cases and this, is that there is an obligation arising from outside the statutory scheme which, it is said, should be given effect within or through it. That has been roundly rejected in relation to Article 10 and should similarly be rejected in relation to Articles 2/8.

Environmental factors inherent in EIR

69. The source of the asserted Article 2/8 right to information is said to be the threat to life and health arising from the environmental factors at Walley's Quarry. It follows not only that information about the environment and the impact on "human health and safety" will be covered by the EIR, but that transparency in such information will be central to any decision taken in accordance with the legislative objectives.

70. It follows that any properly conducted public interest balancing exercise will give considerable weight to the environmental impact on human health and safety – and, indeed, both the IC and the Tribunal expressly did so. To that extent, the public interest balancing test already includes regard to the factors which also invoke other legal regimes.

71. The Appellant's narrow framing of her argument is, simply, that the fact that Articles 2/8 give rise to a human right to access information should be taken

into account. But without being able to show that those rights go beyond the EIR, doing so would be wrong in principle and a form of double-counting. The existence of any such Article 2/8 right would simply reflect the underlying environmental impacts on human health and safety. Those impacts should be, and in the case have been, central to the EIR analysis. It would be duplicative to have regard to those factors twice by reference to a separate regime which is no more favourable than the EIR itself.

DEFRA's Submissions

72. For DEFRA Mr Hopkins submitted that notably the Appellant does not challenge the Tribunal's conclusion that her request was manifestly unreasonable. There is thus no dispute that, for example "at least 122 hours of work would be needed to comply with the disclosure request, although this is a conservative estimate and it is likely to be more in the region of over 300 hours" (see the judgment at [72]). Instead, her case appears to be that she is entitled by law to impose such a burden on DEFRA and to do so solely on the basis that ECHR rights are "relevant" to the public interest balancing test.

73. Mr Hopkins invited the Upper Tribunal to dismiss the appeal. In summary, and as explained further below:

(1) the Tribunal was right to conclude that the ECHR was irrelevant to the application of the public interest test, given that:

(a) the Appellant does not have (nor does she claim to have) a right of access to the requested information under the ECHR.

(b) even if she did have a right of access to the requested information under the ECHR, that would not be relevant to the application of the EIR (including the public interest test). The case law is clear that the existence of a freestanding right to information under the ECHR does not enable an individual to obtain a result more beneficial than otherwise applies under domestic freedom of information legislation.

(c) where the factual matters which are said to engage the relevant rights under the ECHR are taken into account as part of the public interest balancing test (as was done by the FTT in this case), the ECHR analysis adds nothing to that public interest balancing test.

(2) in the alternative, to the extent that the Tribunal erred in concluding that the ECHR was irrelevant, that error was immaterial and academic. It made no difference (and is not capable of making any difference) to the outcome of the case. That is because, as indicated above, the Tribunal took into account the factual matters which are said to engage the relevant rights under Article 2 and 8 of the ECHR (i.e. serious health, wellbeing and environmental issues) when assessing the public interest. Express reference to a different legal framework which is said to be engaged or infringed by reason of those very same facts would have made no difference to the outcome of the public interest balancing exercise.

(3) further and in any event, if the Upper Tribunal were in any doubt about the submission made in the paragraph above, it could determine the point for itself: on the (undisputed) basis that this request was manifestly unreasonable and indeed so broad as to impose a burden in the region of 300 hours of work on DEFRA and thus the public purse, the Upper Tribunal should in any event (i.e. regardless of its view on this sole ground appeal) go on to uphold DEFRA's refusal of this request under regulation 12(4)(b) EIR. The case does not require or justify remission to the another first-tier tribunal.

The ECHR is not relevant to the EIR public interest test

74. At [80] of the judgment the Tribunal concluded that:

> "With respect to the Appellant's submissions concerning Articles 2 and 8 of the Human Rights Convention, we take the view that these Articles are irrelevant to the public interest test under EIR, which is intended to protect public interests and not private rights. Consequently, we have not factored them into our considerations."

75. That conclusion was based on the arguments and analysis set out at [31-33] and [51-59] of the judgment.

76. The Appellant's ground of appeal is that

> "… although the FTT has made a determination as to where the public interest lies in this case, it has done so without considering the Article 2 and 8 rights of the local population, on the basis that these rights are irrelevant."

77. DEFRA opposes that ground of appeal. It submits that the Tribunal was right to conclude that the ECHR was not relevant to the public interest test under the EIR, for the following reasons.

78. First, the starting point is that the Appellant does not contend that she has a legal right under Article 2 or 8 of the ECHR to be provided with the requested information. That is recorded in the judgment at [33] and is confirmed in the Appellant's skeleton argument.

79. In those circumstances, the Appellant's reliance on the ***Oneryildiz*** case is misplaced. That case established that Article 8 may in certain specific circumstances impose a legal obligation on the state and bestow a corresponding legal right on individuals, to provide individuals with access to certain information about environmental matters, but the Appellant's own case is that no such obligation or right exists here.

80. Second, the fact that the Appellant does not even claim to have a relevant right to information under the ECHR is telling. There would be no arguable basis for such a claim:

(1) in stark contrast to the ECtHR cases relied on by the Appellant (see ***Oneryildiz*** at [108] and ***Guerra*** at [60]), in this case, detailed information about the quarry had already been placed in the public domain at the time of the request (see [39] and [70] of the judgment). The information in the public domain was sufficient to enable local residents to assess the risks associated

with living near the quarry. There is nothing in the case law to support the proposition that the Appellant (or anyone else) is entitled to more than that, far less that she has an entitlement to "all information" about the quarry.

(2) as the ECtHR authorities cited above make clear, any right to information under Article 2 or 8 of the ECHR arises as part of the state's positive obligations to protect the right to life and the right to a private and a family life. Here, the problem for the Appellant is that the domestic courts have repeatedly rejected claims that DEFRA and/or the EA have breached their obligations under Article 2 or 8 in respect of their handling of the situation at the quarry.

(3) in one set of proceedings, ***Richards I***, Fordham J accepted that positive obligations of the state under Articles 2 and 8 were engaged by the situation at the quarry, but concluded that there had been no past, current or proposed breach of those duties. The finding that there had been no breach of duty was upheld by the Court of Appeal: see e.g. [3] of the headnote. The Court of Appeal also held that Fordham J should not have granted declaratory relief to the claimant given that there had been no breach of duty.

(4) in a second set of proceedings, Kerr J held the proposition that DEFRA and the EA had not complied with their framework duty under the ECHR to be unarguable and refused permission to apply for judicial review, see ***R (Lally) v Secretary of State for Environment, Food and Rural Affairs and Environment Agency*** (CO/2075/2022, unreported, 27 October 2022) ("***Lally***"). That decision was also upheld by the Court of Appeal, see the order of Stuart-Smith LJ (CA-2022-002133) dated 18 March 2023.

81. Third, given that the Appellant does not contend that she has a right to the relevant information under the ECHR, the argument that DEFRA or the IC or the Tribunal were obliged to take rights under Article 2 and 8 of the ECHR into account when conducting the public interest assessment is difficult to understand. In the Notice of Appeal, the Appellant relied on s.3 and s.6 of the HRA, but those provisions operate only to prevent legislation being interpreted, or actions being taken, in a manner which is incompatible with an ECHR right.

At risk of stating the obvious, if there is no relevant right, then there can be no incompatibility. Notably, there is no reference to the HRA – i.e. the exclusive mechanism by which the ECHR is given effect in domestic law – in the Appellant's skeleton argument. With respect, that reflects the confused nature of the legal analysis advanced.

82. Fourth, even if (contrary to the foregoing) the Appellant could establish that she had a right to access the requested information under the ECHR, it would not follow that the refusal of her EIR request by DEFRA (or the upholding of that decision by the IC and the Tribunal) was incompatible with that right.

83. In ***Moss v IC*** Upper Tribunal Judge Wright directly addressed the question of whether the existence of a right to information under the ECHR affects the ordinary application of FOIA.

84. Mr Moss contended that he had a right to receive the requested information under Article 10 of the ECHR and therefore the refusal of his FOIA request breached that right. The Upper Tribunal rejected the appeal. It held that binding domestic authority established that (contrary to the position adopted by the ECtHR in ***Magyar***) Article 10 did not entail a right to receive information from public authorities (at [59]).

85. Most relevantly for present for purposes, however, the Upper Tribunal went on to conclude that, even if Mr Moss did have a right to the requested information under Article 10, the application of an exemption from disclosure under FOIA was not incompatible with that right. That was because (see the reasoning in [104-110], in particular):

(1) FOIA is not intended to be the exclusive and exhaustive legal means of accessing information in domestic law (as established by the Supreme Court in ***Kennedy v Charity Commission***).

(2) accordingly, the fact that an exemption applies under FOIA does not mean that the relevant public body is prohibited from disclosing the relevant information outside of the FOIA regime.

(3) therefore, even if non-disclosure of the information in question could be said to amount to a violation of the relevant right under the ECHR, FOIA was not the cause of any such violation. As such, there was no basis for giving a different interpretation to FOIA in order to ensure compatibility with the ECHR.

86. The reasoning in ***Moss*** applies equally to the EIR, which is not an exhaustive scheme for the disclosure of environmental information. If the Appellant believed that the (extensive) information which had already been placed in the public domain was insufficient to discharge positive obligations that she was personally owed by the state pursuant to the ECHR, she could have brought a claim under s.7 of the HRA to that effect.

87. But as the EIR does not prohibit the disclosure of the requested information by other means, the reliance by DEFRA on an exception under the EIR cannot itself be said to be the cause of any incompatibility with any relevant rights the Appellant may have under the ECHR.

88. Accordingly, even if the Appellant had a relevant ECHR right to the requested information, there would be no basis under s.3 or s.6 of the HRA for interpreting the EIR exceptions or the public interest test more generously than would otherwise be the case. Or, to paraphrase Judge Wright in [3(ii)] of ***Moss***, even if the Appellant did have a right to information under the ECHR, it would not assist her to obtain a result more beneficial to her than otherwise applies under the EIR.

89. The Appellant appears to accept that there is no incompatibility between the EIR and Articles 2 and 8 of the ECHR. But it remains entirely unclear in those circumstances how the HRA could possibly be engaged so as to affect the outcome of the public interest balancing exercise.

90. Fifth, the foregoing legal analysis is consistent with the fact that, as the Tribunal held (at [80] of the judgment), the EIR is intended to protect public, not private, interests. Accordingly, the balance of the public interest test under the EIR should not change depending on the identity of the requester. The public interest test is sufficiently flexible to accommodate a wide range of issues, including risks to the health and wellbeing of individuals. Indeed, these factors were expressly taken into account by the Tribunal (as to which, see below). However, it would be wrong in law to introduce special considerations, or give certain issues additional weight, by reference to the rights the individual requester may have under a separate legal regime.

91. Sixth, the ECHR is not relevant because, provided that the factual matters which are said to engage the relevant rights under the ECHR are taken into account as part of the public interest balancing test, the ECHR analysis (i.e. the characterisation of those matters as engaging or interfering with ECHR rights) adds nothing to the public interest balancing test. To take a hypothetical example: if an EIR request engages concerns that members of the public were caused injury by a public authority's actions, those factors (the public authority's actions, the injury caused) would be relevant to the public interest. But it would make no difference to the public interest analysis that the public authority's actions could be characterised as torts.

92. The Tribunal in this case did take the relevant factual matters into account (see below).

93. Seventh, it is notable that the legislators make no mention of human rights considerations in Directive 2003/4/EC. This is in contrast to, for example, the GDPR which expressly states in recital 1 that data protection is a fundamental right and in recital 73 that restrictions on data rights must be in accordance with the EU Charter of Fundamental Rights and the ECHR. Thus where legislators think human rights consideration are directly relevant, they say so. They chose not to do so in the environmental information regime; instead they simply adopted a public interest test.

Alternatively, to the extent there was any error of law in the Tribunal's reasoning, it was immaterial to the outcome in this case

94. For all the reasons given above, the Appellant's human rights arguments are incoherent and seek to insert unnecessary legal complexity into what should be a straightforward question for the Tribunal: does the public interest in maintaining the exception outweigh the public interest in disclosing the information? When answering that question, the Tribunal is of course required to take into account all relevant facts and reach a conclusion which is not perverse.

95. The true nature of the Appellant's objection to the judgment is revealed by the statement (set out on paragraph 49 above) that

> "The Appellant does not accept that the seriousness of the underlying subject matter was appropriately considered by the decision-makers in this case. That is the essence of her case."

96. Accordingly, the Appellant could simply have appealed on the basis that the Tribunal failed to take account of the seriousness of the underlying subject matter (i.e. the environmental and health impacts of emissions from the quarry). Unlike the ground of appeal actually advanced, such an argument would have at least been comprehensible. It would, however, have been equally doomed to fail. The Tribunal expressly did take account of the serious health, wellbeing and environmental issues caused by the situation at the quarry when undertaking the public interest assessment. It made relevant factual findings, recognised the seriousness of those matters and gave weight to them, albeit it ultimately concluded that they were outweighed by other factors that militated in favour of maintain the exception: see, in particular, [30], [69] and [77] of the judgment.

97. There is simply no basis for the contention that the Tribunal "fail[ed] to grasp the true acuteness of the impacts in question"; it heard evidence of and understood the situation at the quarry, but concluded that it did not justify wasting DEFRA's time on responding to a manifestly unreasonable request.

The Appellant may disagree with that conclusion, but it was plainly one that was open to the Tribunal.

98. Moreover, those factual matters which were considered by the Tribunal are precisely the same matters which were found in ***Richards I*** to engage Articles 2 and 8 of the ECHR. The Court's basis for finding that the relevant ECHR rights were engaged was that emissions from the quarry were causing serious health and environmental issues for the claimant.

99. Accordingly, to the extent that the Tribunal erred (which DEFRA does not accept) by concluding that ECHR rights were irrelevant to the public interest test, that error would not have made any material difference to the outcome. The relevant facts which are said to engage the ECHR had already been taken into account by the Tribunal and they would not gain additional weight simply by adding an ECHR label to them. Indeed, the Judge effectively confirmed as much in [4-5] of her decision refusing permission to appeal. Accordingly, the appeal should be dismissed even if (contrary to the above) the Upper Tribunal were to conclude that there was a technical legal error in the judgment.

100. Further and in any event, if the Upper Tribunal were to conclude that the appeal should be allowed on the basis of an error of law, it should nonetheless go on to remake the decision for itself and specifically to conclude that the Tribunal's ultimate decision was correct: the public interest balance favoured maintaining the regulation 12(4)(b) of the EIR exception. It would be appropriate for the Upper Tribunal to do so in this case, because of the unchallenged conclusions that (i) this request was manifestly unreasonable to the ***Dransfield/Craven*** standard, (ii) compliance with the request would impose a burden in the region of 300 hours of work on DEFRA and thus the public purse (at [72] of the judgment) and (iii) there was already very substantial relevant information in the public domain (at [77] of the judgment). Given those uncontested matters, the ultimate outcome is obvious: regulation 12(4)(b) of the EIR was correctly applied to refuse the request. This case does not require or justify remission to the Tribunal; the same conclusion would inevitably be reached on the same unchallenged facts.

Richards I

101. To put the request in the present case in context, there have been 3 sets of proceedings arising out of the impact on the local community of the pollution emanating from the quarry.

102. In ***Richards I***, the claimant, who was a 5 year old boy who lived near the site, sought declarations as to the failure of the EA to take measures necessary to protect him from emissions of hydrogen sulphide from the site. He was a vulnerable child with a serious health condition which meant that he was particularly badly affected by such emissions. The EA's failures were alleged to relate to its statutory duty to protect his Article 2 right to life and his Article 8 right to respect for private and family life and its public law duties at common law to act reasonably and take reasonable steps to acquaint itself with relevant information. The declaration sought was that the EA was failing to take measures necessary to protect the claimant in violation of his Article 2 and 8 rights, but not to mandate any particular operational steps.

103. Fordham J accepted that positive obligations of the state under Articles 2 and 8 were engaged by the situation at the quarry, but concluded that there had been no past, current or proposed breach of those duties.

104. The conditions for triggering the positive obligation to take operational steps to protect life under Article 2, that (a) there was a real and immediate risk to the right to life, which was significant and substantial, present and continuing and (b) the state authority knew or ought to know of that risk, were satisfied. State licensing and supervisory responsibility for private industry activities sufficed for assumption of responsibility. Conditions which either (i) constituted an inevitable precursor to the diagnosis of disease or (ii) were of a life-threatening nature could trigger the duty. On that basis, it was common ground that the requirements for the Article 2 obligation were satisfied. The Article 8 positive operational duty was also triggered. Based on all the evidence regarding the implications of the emissions for the claimant, there was a direct effect on his home, family life and private life from adverse effects of severe

environmental pollution which attained the relevant minimum level by reference to intensity, duration, physical and mental effects.

105. Although Fordham J accepted that positive obligations of the state under Articles 2 and 8 were engaged by the situation at the quarry, he concluded that there had been no past, current or proposed breach of those duties. He did not therefore grant any remedy in relation to the claim that the EA was acting in breach of its obligations under Articles 2 and 8 as at the time of the hearing, but granted a declaration that, in order to comply with its legal obligations, the EA had to implement the advice of Public Health England ("PHE") by taking such measures as would reduce emissions of hydrogen sulphide to a specified level.

106. The EA appealed on the grounds that the judge had erred in making the declaration when (i) it was for the EA, as the statutorily appointed and expert regulator, to determine what further action needed to be taken in relation to the problem of emissions from the landfill site and (ii) he had made no finding of any past or current breach of the EA's obligations. The claimant cross-appealed, contending that on analysis Fordham J had in fact found that the EA was in breach of its obligations under Articles 2 and 8 and so should have granted a declaration to that effect.

107. The Court of Appeal allowed the EA's appeal and dismissed the claimant's cross-appeal. The finding that there had been no breach of duty was upheld by the Court of Appeal, which also held that Fordham J should not have granted declaratory relief to the claimant given that there had been no breach of duty.

108. Lewis LJ held that

> "89 Dealing first with article 2 of the Convention, there is no appeal against the finding that the levels of hydrogen sulphide presented a real and immediate risk to life in that, unless addressed, the levels would lead to a shortening of the life expectancy of Mathew.
>
> 90 As at the hearing in August 2021, the position was this. The appellant had taken steps to ensure that sulphate-

bearing waste would not be deposited with other biodegradable waste at the site. Landfill gas, including hydrogen sulphide, was being released from waste already deposited at the site. The appellant took the view that that problem was best addressed through the mechanism of capturing landfill gas (by, for example, capping areas of the landfill site) and extracting gas and destroying it by using it for electricity generation or burning it off. Steps had been taken to achieve those aims. Further, the operator had been required to submit a revised landfill gas risk assessment and landfill gas management plan by 31 July 2021 which the appellant would review. Following the increase in complaints in late 2020 and early 2021, the appellant had established monitoring stations to obtain data as to the levels of landfill gas including hydrogen sulphide at and in the vicinity of the landfill site. It also took advice from PHE.

91 As at mid-August 2021, the levels of hydrogen sulphide exceeded the WHO 30-minute average and that would give rise to odour complaints and affect well-being but was not considered of itself to be a threat to life. The level of hydrogen sulphide did not exceed acceptable levels for medium-term exposure (14 to 364 days). That was the advice from PHE. So far as long-term exposure was concerned, it was only with the advice given on 5 August 2021 that PHE recommended the reduction of concentrations of hydrogen sulphide to levels below those in the USEPA guidelines. The appellant would necessarily need to have time to consider the 5 August 2021 advice, consider whether or not the measures taken would be sufficient or decide whether further steps could and would need to be taken and if so, within what timescale. Ms Dennis, in her witness statement dated 6 August 2021, confirms that the appellant would continue to review the position and the response from the operator. The appellant cannot be criticised for not addressing the fourth PHE report in its evidence. It was required to provide its evidence by 12 noon on 6 August 2021 and the fourth PHE report was published on 5 August 2021. Furthermore, the appellant had also sought advice from PHE on Dr Sinha's 4 July 2021 report and his addendum report. PHE had advised that those reports did not affect its risk assessment.

92 In all those circumstances, the Judge was correct not to find that the appellant was in breach of its obligations under article 2 of the Convention as at the date of the hearing in August 2021. There was no proper basis upon which a court could end such a breach on the evidence

before the court at that date. I would go further. There was no proper evidential basis for concluding, at that date, that the appellant was proposing to act unlawfully in the sense that it was proposing to act in breach of its obligation under article 2 of the Convention. At that stage, it had accepted that there was a serious problem at the landfill site with landfill gases, it had taken relevant action and had proposed further action, and it had required the operator to submit a revised risk assessment and landfill gas management plan. It established a monitoring system in March 2021 to obtain reliable data. It had sought advice from PHE. The latest advice was provided shortly before the hearing. The evidence was that the appellant was reviewing matters.

93 Dealing with article 8 of the Convention, the Judge found that the effects of the hydrogen sulphide gas were having a direct impact on Mathew's home and private and family life and that that effect had attained the relevant level of severity. There is no appeal against that finding. That was capable of amounting to an interference within the meaning of article 8(1) of the Convention which would need to be justified under article 8(2). The measures pursued a legitimate aim in managing a landfill site for the deposit of waste. They were in accordance with the requirements of domestic law. The real question is whether the actions taken were
necessary in a democratic society and, in particular, whether the appellant had struck a fair balance between the interests of the respondent and other competing interests.

94 In that regard, the appellant knew of the complaints about the landfill site from late 2020. It had established monitoring stations from March 2021. The reports published by PHE showed that the levels of hydrogen gas consistently exceeded the WHO 30-minute average by a considerable margin and there was the potential for significant odour complaints over the period from March 2021 when monitoring began. We do not know when the first three reports were published. The first two reports recommended that all measures be taken to reduce the off-site odours from the landfill site. The third report strongly recommended this. The fourth report, published on 5 August 2021, strongly recommended that this be done as early as possible. On two days in March 2021, the levels also exceeded the WHO 24-hour average guideline at one of the monitoring stations. Against that background, the appellant had taken steps to ensure that certain areas of the landfill site were capped and that

> certain points where landfill gas was known to be emitted were also capped. It had sought an increase in the capacity for collection and destruction of landfill gas. It had required the operator to provide a revised risk assessment and a revised landfill management plan by 31 July 2021 which was under review. Again, the Judge was correct not to find that the appellant was in breach of its obligations under article 8 of the Convention as at the date of the hearing in August 2021. There was no proper basis upon which a court could find such a breach on the evidence before the court at that date. Further, the appellant was obtaining relevant information and advice, was ensuring that the operator took appropriate steps to address the problem, and was keeping matters under review. The appellant was seeking to address the problem and, in so doing, was striking a fair balance between competing interests and was acting with due diligence. There is no basis for inferring from the evidence available at the hearing in August 2021 that the appellant was proposing to act in breach of its obligations under article 8 of the Convention. For those reasons, I would dismiss the cross-appeal."

109. Lewis LJ accordingly concluded that

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

Lally

110. In ***Lally***, another local claimant, a disabled man who lived with his wife and son in a nearby village, sought permission to bring a threefold challenge as follows. The first limb of challenge was to what he said was the unlawful failure of DEFRA to ensure that there was in place a regulatory framework which effectively protected people such as himself from the effects of pollution from industrial activities. Secondly, he sought to challenge DEFRA's failure to exercise its powers to direct the EA to take the necessary action to provide effective protection from pollution from the quarry operated by the interested party ("the IP" or "the operator"). Thirdly, he sought to challenge what he said was the irrational continuing reliance by the EA on self-regulation by the operator of the site to prevent unsafe pollution from the quarry.

111. Permission was refused by Sir Ross Cranston on the papers and was again refused by Kerr J after an oral renewal of the application. Kerr J held that

> "57. As I have said, the first ground of challenge is that there has been an unlawful failure of the Secretary of State to ensure there is in place a regulatory framework that effectively protects people, such as the claimant, from the effects of pollution from industrial activities. In his reply at para.10 Mr Wise KC says (with my emphasis) this:
>
> > "It is notable that neither the defendants nor the interested party begin to grapple with the central issue that this ground raises, namely whether the regulatory framework in place is 'effective' *in ensuring that the population is protected from the harmful effects of pollution*. This is because they are unable to do so. As the evidence in the case shows the regulatory framework does not provide effective protection from the harmful effects of industrial pollution."
>
> 58 This, with respect, elevates the obligation to provide an effective regulatory framework into something close to a warranty that operation of that framework will always succeed in reducing pollution to acceptable levels. That is to overstate the Secretary of State's obligation. It is not to ensure that the population is protected from the harmful effects of pollution; it is to have in place a legislative and administrative framework to provide an effective deterrent

to risk to life (see the observations of Lewis LJ in *Richards* at [12]).

59 In the context of industrial processes that can be dangerous, it is (ibid at [13]) an obligation to:

> "have regulations dealing with the licensing, setting up, and operation of the activity which, amongst other things, makes it compulsory for those concerned to take practical measures to safeguard citizens against the risks inherent in such activities".

60 So, it is wrong to test the effectiveness of a regulatory framework by asking whether the emissions at the site have stopped; that is not the test.

61 It seems to me obvious that the problem at the moment is not that the necessary framework is not in place, nor, as the Court of Appeal's decision in *Richards* shows, that the operational duty is not being performed. The problem is, manifestly, that the existence of the statutory framework and performance of the operational duty has not yet led to cessation of the noxious emissions and consequent risk to and damage to health of those with the misfortune to be exposed to them.

62 I accept that, in theory, a person such as the claimant may contend that the existence of the regulatory framework does not, of itself, necessarily show that the framework duty is being performed. You could, in principle, have a framework in place that is a dead letter because, though on the statute book, it is not used.

63 In principle, performance of the framework duty could be lacking or defective if it was shown to be manifestly ineffective to prevent noxious emissions of the kind complained of here so that it was, in the words of Lewis LJ in *Richards* at [12], not "an effective deterrent against risk to life".

64 I accept also that it is, in principle or in theory, possible for a litigant such as Master Richards, then represented by the same leading counsel, to have accepted in his claim the framework as effective in 2021; but for it to be shown by 2022 to have been exposed as ineffective through supervening evidence for a change of circumstances.

65 But the difficulty the claimant has is this. I respectfully agree with Sir Ross Cranston that the evidence now

before the court does not begin to establish as an arguable proposition that 12 to 18 months on from the *Richards* litigation, the framework is a dead letter or ineffective. The evidence shows the contrary. The framework is not only in place, it is being operated. The results in the case of this troublesome site may disappoint so far, but that is not enough to establish the arguability of ground 1.

66 Further, the framework includes the remedy of abatement which has been invoked in this case and that has, no doubt, increased the pressure on the IP to play its part in doing what is necessary to bring down the emissions levels. In sum, the effectiveness of the framework that is admitted to be in place is being put to the test at present but the fact that it has not yet been able to stop the emissions in this instance does not arguably mean that it is wholly ineffective and that there is therefore a breach of the framework duty.

67 I therefore broadly accept the submissions of the Secretary of State, the Agency and the IP and agree with the judge dealing with permission on the papers that the evidence does not show anything different from the position in the *Richards* case, in which performance of the framework duty was not disputed. I agree that ground 1 is unarguable.

68 The second ground is that the Secretary of State has irrationally failed to exercise her powers to direct the Agency to take the necessary action to provide effective protection from pollution from the site.

69 I can deal with that more briefly. It is, in my judgment, a pretty hopeless contention. It would mean the court telling the Secretary of State to exercise her discretion under regulation 62 of the Permitting Regulations, i.e., that exercise of the so-called discretion had become, in practice, mandatory by force of circumstances: a “discretion” exercisable only one way. I shrink from such an illegitimate intervention by the court into the performance of governmental functions.

70 As the judge dealing with the matter on the papers said, the threshold of irrationality is high. I am satisfied that the steps now being taken by the Agency are amply sufficient to negate the proposition, wholly unarguable in my judgment, that the Secretary of State is bound to give a direction. The view that to do so would achieve nothing is not arguably irrational.

71 The third ground of challenge is that there is an irrational continuing reliance by the Agency on self-regulation by the operator of the site to prevent unsafe pollution from the landfill. I accept the submission of the defendants and the IP that this proposition is unarguable. Indeed, it is difficult to distil it into a concrete proposition at all.

72 I can well understand the frustration of those exposed to the vile odours and dangerous emissions of hydrogen sulphide, who believe the Agency is being too soft on the operator. They believe it is allowing the operator to get away with illegal practice and then mark its own homework or, to alter the metaphor, grant itself absolution. The evidence of Ms Prince lends some support to that state of affairs.

73 But once again, it is not arguable that that state of affairs, shocking if true, but disputed by the operator, should impel the intervention of the court. The Agency says it is looking into the matter. Whether that is being done with as much zeal as it ought to be does not assist the claimant's argument. I cannot accept as arguable the proposition that its current practice with regard to the site is irrational and unlawful.

74 That proposition, if accepted, would mean that no reasonable agency in the position of this Agency could do other than suspend or revoke the permit or undertake constant supervision of the site and the operator, effectively running the operator's business. The Agency can no more do that than I can undertake its (the Agency's) functions. Again, in agreement with Sir Ross Cranston, I reject the third ground as unarguable. It follows that I find no arguable basis for a judicial review and will refuse permission.

75 That does not mean, I emphasise, that the court is necessarily satisfied with what is happening any more than are the victims of the emissions and odours. Refusal of permission does not mean that the regulatory bodies involved and the operator are either doing well or doing badly in their so far not wholly successful efforts to stop the emissions. There may be legitimate political concerns, for which the Secretary of State will answer in the political arena. That is not a matter for the court and I express no view on them.

> 76 As for the law and the court, as Sir Ross Cranston observed, there are other potential remedies. One of them, as I have already said, has been invoked with service by the local authority of an abatement notice. That is provided for under section 79(1)(d) of the Environment and Protection Act 1990. The notice in this case related to that subparagraph which refers to "any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance".
>
> 77 There are other remedies which arise in private law. Judicial review is a public law remedy, not always well suited to the righting of wrongs, if any, done by private parties to other private parties. I do not go into those remedies. There are plenty of lawyers in court today who know all about them. I merely mention that they exist in case people who do not know about them think that the law leaves without any remedy at all those such as this claimant, who is suffering from exposure to the emissions."

112. Permission to appeal to the Court of Appeal was refused by Stuart-Smith LJ on 18 March 2023. The claim is now being pursued before the European Court of Human Rights in Strasbourg.

Richards II

113. In February 2025, Mathew Richards, the claimant in ***Richards I***, issued further judicial review proceedings ("***Richards II***") challenging the EA's compliance with the operational duties under Articles 2 and 8 of the ECHR for a later period than had been the case in ***Richards I***. The claim was heard by Lieven J in November 2025 and judgment was handed down on the afternoon of 8 December 2025, just before the hearing in the present case: [2025] EWHC 3129 (Admin).

114. Lieven J explained the basis of this second claim:

> "4. The Claimant now brings a further judicial review. It is submitted that the EA is in breach of its positive operational obligations under Articles 2 and 8 of the European Convention on Human Rights (ECHR) for the period January 2022-November 2024 when the Closure

> Notice (CN) was served. The remedies that the Claimant was seeking by the end of the hearing were:
>
> a. A declaration that the EA was in breach of its positive obligations under Articles 2 and 8 ECHR between January 2022-November 2024 ("the relevant period");
>
> b. A declaration that EA owes positive obligations under Articles 2 and 8 ECHR to take reasonable and appropriate measures to reduce Hydrogen Sulphide (H_2S) emissions from the Site to accepted health guidance levels and must exercise its powers under Regulation 57 Environmental Protection Regulations 2016 (EPR) compatibly with those ongoing obligations."

115. The claim failed. The Judge held that Article 2 was not engaged and Article 8 was not breached and she declined to grant any declaratory relief.

116. As to Article 2 she concluded that

> "130. The test for whether the positive obligation under Article 2 is triggered was set out by the Court of Appeal in *Richards (1)*. The authority must know of a real and immediate risk to life, see [12]. Although the ECtHR authorities show that there is no clear "bright line" between obligations under Articles 2 and 8, there must be a distinction. This is both because Article 2 concerning the right to life must involve more serious cases where there is evidence of a real and immediate risk to life, but also because Article 8 is a qualified right, where proportionality applies, whereas Article 2 is not. This necessarily becomes a difficult distinction to apply when it comes to positive obligations, because they will always to some degree be subject to questions of "due diligence" and therefore proportionality. However, there remains the need for a principled distinction between when the obligations arise.
>
> 131. That distinction between the Articles lies behind the requirement to show a real and immediate risk to life. I accept that a diminution of life expectancy could, in extreme cases, amount to the engagement of the positive obligation under Article 2. A real and immediate risk to life could be characterised as an immediate and extreme diminution of life expectancy. However, such an impact on life expectancy would have to be at the most serious end of any spectrum.

132. In my view the facts of the Claimant's case do not cross that Article 2 threshold. The facts relating to the Claimant suggest that the impacts upon him, although serious, did not, at least by the time period relevant to this claim, engage Article 2. At 3.3.2 of the Addendum Report 2025, Dr Sinha said, "Mathew's clinical history demonstrates clear temporal patterns. His symptoms worsen in proximity to the landfill and improve when he is away from it". He noted that the Claimant had experienced fewer infections and hospital admissions since the first report in 2021, which could be explained by the fact that (i) the Claimant's new school was several miles away from Silverdale; (ii) the Claimant was older; (iii) the Claimant was taking higher doses of medication; (iv) the Claimant lived further away from WQL. By March 2023, he was living 1.3 miles from the Site, rather than 200-400 metres away, meaning the level of impact was materially lessened.

133. Dr Sinha's evidence points to a very real impact on the Claimant's health, and to a probable impact on his life expectancy. However, the 2025 Addendum Report does not indicate any "immediate" risk to life, but rather a longer term impact on quality of life and life expectancy. Putting together the original report, considered by Fordham J, and the Addendum Report, it appears that the Claimant's lungs were very seriously impacted by the early exposure, but the ongoing exposure after "early childhood" does not, on a fair reading of the reports, show a real and immediate risk to life. Dr Sinha says in the Addendum Report:

> "Mathew's life expectancy remains shortened due to ongoing exposure to pollution from Walley's Quarry. His failure to achieve catch-up lung growth, demonstrated by his reduced lung function, keeps him on a trajectory to develop COPD at an early age … Although the major structural injury has already occurred, continued exposure to airborne pollutants from Walley's Quarry would accelerate his lung function decline, worsening his long-term prognosis, and reducing his life expectancy."

134. I do not in any way wish to minimise the impact of the Site emissions over the period in question on the Claimant's quality of life and health, but it is important to maintain the distinctions between the duties that arise under different Articles in the ECHR. The Claimant's case does not reach the threshold for engagement of Article 2 positive obligations as explained in *Rabone* and *Richards*

> *(1)*. I appreciate that I am, to some degree, disagreeing with the conclusion reached by Fordham J, that was not expressly overruled by the Court of Appeal. However, I have Dr Sinha's Addendum Report, the factual changes since 2021, and the legal tests set out by the Court of Appeal.
>
> 135. For these reasons I find that the positive obligation under Article 2 was not triggered in respect of the Claimant in the period from January 2022 until the closure of the Site in November 2024."

117. Article 8 she found to be engaged, but not breached:

> "136. There is no dispute that the EA's positive obligations under Article 8 were engaged in the regulation of the Site. The impact on the Claimant's (and many others') private life is manifest. The number of complaints about this Site over a prolonged period is extremely striking. The figures of complaints, breaches of licence conditions, and the EA resources committed to the Site, all suggest that this was the most problematic Landfill Site in England. This was the only Landfill Site which fell within Band F (more than 150 non-compliance points) in every year between 2021-24. It also had by far the highest number of complaints of any site in England.
>
> 137. The test under Article 8 is whether the authorities, here the EA, have acted with due diligence, whilst ensuring that the Court respects the role of the regulator in choosing the means to apply and does not impose a disproportionate burden. In applying that test the effectiveness of the action that was taken is material. This is apparent from a number of the Strasbourg authorities, including *Stoicescu* and *Kapa*. The degree to which the efforts or diligence of the regulator is effective will necessarily go to whether or not those efforts amounted to "due" or sufficient diligence. However, there is no simple linear relationship between the fact that the regulatory efforts were ineffective, as was the case here by the summer of 2024, and there necessarily being a breach of Article 8.
>
> 138. In determining whether there was a breach of Article 8, some assistance can be drawn from applying the tests set out in in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 (at [20] (Lord Sumption JSC) and [74] (Lord Reed JSC)), on whether the requirements of proportionality

under Article 8 have been met. There are four questions to be asked:

(i) Is there a sufficiently important objective which the measure pursues?

(ii) Is there a rational connection between the means chosen and that objective?

(iii) Are there less intrusive means available?

(iv) Is there a fair balance struck between the rights of the individual and the general interests of the community?

139. In deciding whether the EA has acted with due diligence it is, in my view, relevant to consider whether if the EA had taken more draconian action against the IP there would have been a valid argument that less intrusive means should have been employed; and whether a fair balance has been struck between the interests of the local residents, those of the operator, and the resource implications for the EA in terms of its overall regulatory functions.

140. Further, the determination of whether the EA acted with due diligence has to be applied to the evidence available to the EA at the time the actions were taken, rather than with the benefit of hindsight. That is, in my view, critical in this case. With the benefit of hindsight, it is apparent that the IP was (certainly by 2023/4) bringing large amounts of contaminated material onto the Site and was, in all likelihood, deliberately avoiding regulatory control, and that this new material was a primary cause of the emissions. The issue for the purpose of determining whether there was a breach of Article 8 is the degree to which the EA knew or ought to have realised the relationship between the breaches of regulatory control and the cause of the emissions, and therefore whether they acted with due diligence at the relevant times.

141. In my view, throughout the relevant period the EA knew or ought to have known that it was likely that significant quantities of waste contaminated with gypsum were being brought onto the Site. The evidence, not least that relied upon by Mr Lewis, points inexorably to that conclusion.

142. The Waste Producers Audit in April 2022 showed that waste operators using the Site were not conducting proper screening of the material that they were sending

to the Site, and that the material was, or was likely to be, contaminated. The audits in respect of JJC are set out above, and they show a series of breaches of screening procedures in the first half of 2022 and a lack of effective action by the EA. As far as I can tell from the material, there was no reason to believe that by June 2022 JJC, as but one example, had effective screening processes in place. Mr Lewis submits that that showed contaminated material at the transfer sites and not the Site itself. But once the EA knew that the producers were not screening properly, then it logically followed that contaminated material was coming onto the Site in material amounts.

143. Quite apart from that evidence, the EA knew that the very nature of the material being handled on Site was of a type where there was a significant risk of contamination.

144. Next, the EA knew that the IP did not have effective screening processes at the Site gate to ensure that if contaminated material was sent by the producers it would not be allowed onto the Site. That was apparent from the Site Audits.

145. Further, the EA had the evidence of the whistleblower that the IP was an operator that was prepared to knowingly breach regulatory control, and to work with waste producers to avoid effective scrutiny. I do not accept that the fact that the whistleblower's evidence did not directly relate to gypsum contamination changes that conclusion. The EA was on notice of the type of operator it was dealing with and therefore the obvious risk that serious breaches were occurring.

146. In terms of considering due diligence by the EA, there is no doubt that they put a great deal of regulatory resource into this Site. The evidence of Mr Hitchings suggests that a very significant proportion of enforcement and regulatory assets held by the EA in the relevant region were devoted to actions concerning the Site. In terms of the proportionality of the effort and resources devoted to the Site, I do not think the EA can be criticised.

147. Under both Grounds, the issue comes down to whether the lack of effectiveness, in other words the fact that by 2024 the emissions were little better than they had been in 2021, meant that the EA had failed to meet their positive obligation under Article 8(2). There are, in effect, two parts to the EA's defence.

148. Firstly, Mr Lewis submits that the EA had good reason to believe that the actions it was taking, in terms of improving the capping and management of the Site, were being largely effective. This led them to believe that it was existing contamination on the Site that was the principal reason for the ongoing emissions problems. Having examined the monitoring results, the heat maps, and the overall state of knowledge, I consider this to have been a reasonable conclusion. The monitoring showed considerable improvements in terms of emissions until they spiked again in the winter of 2023/24. The heat maps, as I have explained above, seemed to indicate that the primary problem was not in the area of new deposits, again until the winter of 2023/24.

149. In my view the EA can be criticised for being too focused on there being one principal reason for the emissions and not taking more robust action in respect of new material. However, in circumstances where there was evidence suggesting that capping was being reasonably effective in reducing fugitive emissions, their actions were not unreasonable.

150. Although I am sure that from the residents' perspective the time involved must have seemed interminable, if one judges the time periods in this case against those cases where the ECtHR has found a breach of Article 8, the delay in taking effective action here was significantly less. The Court of Appeal ruled in *Richards (1)* in January 2022, and the CN was ultimately served in November 2024. In that period the EA took multiple actions and in the period leading up to the summer of 2023 those actions appeared to have significantly improved the situation.

151. In respect of Ground One, it is particularly important not to judge the EA's actions with the benefit of hindsight. It is now apparent that new contaminated material was being brought onto the Site, probably in large quantities, certainly by 2023. But during the period 2021-23 that was not apparent from the limited sampling that was done, and the evidence pointed to the primary cause being emissions from existing waste.

152. In respect of Ground Two, the failure to ensure proper capping of the Site, the EA took many regulatory steps to try to ensure that this was done. One might criticise, particularly with the benefit of hindsight, the focus of some of their efforts, but within the parameters of Article 8(2) they acted with due diligence.

> 153. With the benefit of hindsight it is easy to see that the EA should have moved more quickly to close the Site, to stop new material entering and to force the IP to properly cap. However, the duty on the EA was to act proportionately. On the evidence that they had before 2023 there was a significant risk that if they had served a CN, or taken other steps, to absolutely stop new material coming on Site, they would not have been successful on appeal. Applying *Bank Mellat*, the IP would inevitably have argued that there were less intrusive means open to the regulator and might well have been successful on the evidence.
>
> 154. For all those reasons I do not find that there has been a breach of Article 8(2) by the EA through the relevant period.
>
> 155. In terms of the declaration of on-going duties under Article 2, I do not consider it appropriate to grant such a declaration.”

118. Lieven J refused permission to appeal on 8 December 2025. An application for permission to appeal was made to the Court of Appeal on 22 January 2026, but remains to be determined.

Analysis

119. To put the request in the present case in context, it is important to note, as the Respondents argued, what is *not* being challenged in the appeal. What the Tribunal found was that

> “66. Having regard to *Craven*, we note that, even with the presumption in favour of disclosure, it should not be easier to get a request accepted under EIR than under FOIA. Furthermore, a public authority is entitled to refuse a single extremely burdensome request.
>
> 67. The request seems to have come about because the Appellant believed nothing was being done to prevent the pollution from the site (her WS para 2, p52 CB), and the EA and Defra were not being honest and transparent. However, it is unclear why asking for so much information would answer that question.

68. The request is extremely broad and we find it difficult to see what would be a larger request. It simply asks for all information held with respect to the quarry without any qualification whatsoever. This would include matters wider than the pollution issue and the impact on the community.

69. It is accepted by the Commissioner and Defra, and indeed by this tribunal, that the health and environmental impacts from the quarry are serious. In response, the EA, as the main regulatory body for the quarry, has been taking enforcement action and had commenced criminal investigations. Therefore, contrary to the Appellant's belief, things were being done.

70. The EA has been continuously ensuring that the public was informed about the regulatory action being undertaken, and about other environmental concerns including emission levels. This has been achieved through the EA's website, which was regularly updated with information. Furthermore, the *Richards* and *Lally* litigation has put more information into the public domain.

71. Consequently, there has been transparency, and disclosure of a considerable amount of information, and it is unclear what incremental value the requested disclosure would give.

72. It is not disputed that at least 122 hours of work would be needed to comply with the disclosure request, although this is a conservative estimate and it is likely to be more in the region of over 300 hours. Defra has shown its workings on how it reached this figure, explaining how it estimated the timings for each activity. The Appellant has not challenged whether this looked reasonable.

73. There is no need to consider how much this might cost. It is clear from the time it would take to comply with the request that this would be a substantial burden on Defra. However, the Commissioner was entitled to refer to the FOIA costs limit of £600 as an indicator of an appropriate threshold and did not err in law by doing so.

74. Whilst Defra is a large government department, it operates under significant resource constraints and dealing with the request would involve a significant diversion of public resources, including diverting staff away from substantive work relating to the quarry.

> 75. Taking account of all the above factors, and weighing in the balance what was already in the public domain, we find that the request was disproportionate. Accordingly, bearing in mind the presumption in favour of disclosure, we conclude that the request for information was manifestly unreasonable and regulation 12(4)(b) is engaged."

120. There was no challenge to any or those findings or any of those conclusions.

121. Thus it is accepted by the Appellant that

(1) the request is extremely broad and asks for "all" information held with respect to the quarry without any qualification whatsoever, which would include matters wider than the pollution issue and the impact on the community

(2) there has been transparency and disclosure of a considerable amount of information and it is unclear what incremental value the requested disclosure would give

(3) at least 122 hours of work would be needed to comply with the disclosure request, although that is a conservative estimate and likely to be more in the region of over 300 hours. Whilst DEFRA is a large government department, it operates under significant resource constraints and dealing with the request would involve a significant diversion of public resources, including diverting staff away from substantive work relating to the quarry

(4) taking account of all of those factors and weighing in the balance what was already in the public domain, the request was disproportionate. Accordingly, bearing in mind the presumption in favour of disclosure, the request for information was manifestly unreasonable and regulation 12(4)(b) was engaged.

122. It is not therefore in dispute that, as Upper Tribunal Judge Wikeley found in ***Craven v IC*** [2012] UKUT 442 (AAC)

> "22. I accept Mr Cross and Mr Cornwell's principal submission that in practice there is no material difference between the two tests under section 14(1) and regulation 12(4)(b). Plainly the two decision-making processes are conceptually different in the three ways described by Mr Cross. However, like the IC, I find it very hard to see how an identical request might "pass" under FOIA but "fail" under EIR, or vice versa. In particular, given that the same sorts of considerations should apply, I do not believe that the existence of the explicit public interest test in the EIR and the statutory presumption of a restrictive interpretation of regulation 12(4)(b) should mean that, even at the margins, it is in some way "easier" to get a request accepted under the EIR than under FOIA. Indeed, the concept of "misuse of rights" identified by the ECJ in *Commission v France*, or what in English law we might characterise as an "abuse of process", seems to me to be entirely consistent with my conclusions in *Dransfield* on the construction of section 14.
>
> …
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> 30. It follows that, in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" within FOIA. The conceptual structure for decision-making is different, but the outcome will surely be the same, whichever route is adopted. Insofar as a request is for environmental information, it therefore follows that the meaning of the expression "manifestly unreasonable" is essentially the same as "vexatious" (on which see *Dransfield* at paragraphs 24-39)."

123. Notwithstanding the foregoing, it is the Appellant's case that she is entitled by law to impose such a burden on DEFRA and to do so solely on the basis that ECHR rights are relevant to the public interest balancing test and that, when such rights are taken into account, the public interest in maintain the exception is outweighed by the public interest in disclosing the information.

124. But if that is the Appellant's case, it is not easy to divine the basis for such a submission. There is no mention of human rights considerations in Directive 2003/4/EC. That is why I set out material parts of the Directive at some length in paragraphs 55 to 62 above. That is to be contrasted with the GDPR which expressly states in recital 1 that

> "The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her"

and in recital 73 that

> "Restrictions concerning specific principles and the rights of information, access to and rectification or erasure of personal data, the right to data portability, the right to object, decisions based on profiling, as well as the communication of a personal data breach to a data subject and certain related obligations of the controllers may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or manmade disasters, the prevention, investigation and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, or of breaches of ethics for regulated professions, other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, the keeping of public registers kept for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes. Those restrictions should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms".

125. The point is not of itself a decisive one against the Appellant, but it is indicative that, where legislators consider that human rights consideration are directly relevant, they say so. They chose not to do so in the EIR regime; instead they simply adopted a public interest test.

126. That leads to Mr Hopkins' additional point. There is no linguistic indication in the EIR themselves which supports the importation of ECHR considerations or an ECHR analysis, either expressly or by necessary implication. The legislature did not as a matter of language import ECHR considerations into the EIR regime. Instead it simply adopted a public interest test:

> "12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
>
> (a) An exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure".

127. If it had been intended to import ECHR considerations into the EIR regime, the legislature could easily have made express provision to that effect. It chose not to do so and instead adopted a straightforward public interest test:

128. From this it must follow that the ECHR is not relevant to an EIR request. If the factual matters which are said to engage the relevant rights under the ECHR are taken into account as part of the public interest balancing test, the characterisation of those matters as engaging or interfering with ECHR rights adds nothing to the public interest balancing test. The balancing test has been carried out and the scales will come down on one side or the other, an exercise which the Tribunal undertook in this case. Mr Hopkins suggested an accurate hypothetical example. If an EIR request engages concerns that members of the public were injured by a public authority's actions, those factors (namely the actions of the public authority and the injury caused) would be relevant to the public interest, but it would make no difference to the public interest analysis or the weighing of the balance of the public interest that the public authority's actions could be characterised as torts. Nor can it make a difference that they could be characterised as engaging articles 2 and 8.

129. Given that the terms of the Directive and the linguistic analysis do not aid the Appellant's argument, whence comes the basis for her submissions? The Appellant significantly does not contend that she has a freestanding legal right to be provided with the requested information pursuant to Articles 2 or 8 of the ECHR. That was recorded in the judgment of the Tribunal at [125] and was confirmed in the Appellant's skeleton argument (as recorded in paragraph 45 above).

130. In that event, however, I agree with Mr Hopkins that the Appellant's reliance on ***Oneryildiz*** is misplaced. That case established that Article 8 may in certain specific circumstances impose a legal obligation on the state (and bestow a corresponding legal right on individuals) to provide individuals with access to certain information about environmental matters, but the Appellant's own case is that no such obligation or right exists here.

131. Moreover, both the ***Guerra*** and ***Oneryildiz*** decisions are clearly distinguishable from the present case.

132. In ***Guerra*** the ECtHR found that

> "60. The Court reiterates that severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.
>
> The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.
>
> There has consequently been a violation of that provision."

133. In ***Oneryildiz*** the ECtHR found that

> "87. The Court therefore arrives at the conclusion that in the present case the administrative authorities knew or ought to have known that the inhabitants of certain slum areas of Ümraniye were faced with a real and immediate risk both to their physical integrity and their lives on account of the deficiencies of the municipal rubbish tip. The authorities failed to remedy those deficiencies and cannot, moreover, be deemed to have done everything that could reasonably be expected of them within the scope of their powers under the regulations in force to prevent those risks materialising.
>
> 88. Furthermore, they failed to comply with their duty to inform the inhabitants of the Kazim Karabekir area of those risks, which might have enabled the applicant—without diverting State resources to an unrealistic degree—to assess the serious dangers for himself and his family in continuing to live in the vicinity of the Hekimbasi rubbish tip.
>
> In these circumstances a violation of Art.2 of the Convention should be found under this head, unless the applicant's complaints can be considered to have been dealt with at domestic level by effective implementation of the relevant judicial machinery."

134. The Grand Chamber held that

> "101. The Grand Chamber accordingly agrees with the Chamber that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations on the matter. Furthermore, the Court likewise regards it as established that various authorities were also aware of those risks, at least by May 27, 1991, when they were notified of the report of May 7, 1991.
>
> It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Art.2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals, especially as

> they themselves had set up the site and authorised its operation, which gave rise to the risk in question.
>
> 102. However, it appears from the evidence before the Court that the city council in particular not only failed to take the necessary urgent measures, either before or after March 14, 1991, but also—as the Chamber observed—opposed the recommendation to that effect by the Prime Minister's Environment Office. The Environment Office had called for the tip to be brought into line with the standards laid down in regs 24 to 27 of the Regulations on solid waste control, the last-mentioned of which explicitly required the installation of a "vertical and horizontal drainage system" allowing the controlled release into the atmosphere of the gas accumulated.
>
> …
>
> 108. The Court will next assess the weight to be attached to the issue of respect for the public's right to information. It observes in this connection that the Government were unable to show that any measures were taken in the instant case to provide the inhabitants of the Ümraniye slums with information enabling them to assess the risks they might run as a result of the choices they had made. In any event, the Court considers that in the absence of more practical measures to avoid the risks to the lives of the inhabitants of the Ümraniye slums, even the fact of having respected the right to information would not have been sufficient to absolve the state of its responsibilities."

135. In marked contrast to those cases, significant and detailed information about the quarry had already been placed in the public domain at the time of the request (see [39] and [70] of the judgment). The information in the public domain was sufficient to enable local residents to assess the risks associated with living near the quarry. The Appellant and others in the locality may not have agreed that sufficient information was in the public domain, but that is another matter. There is therefore nothing in the cases on which Ms Kelleher sought to rely to support the proposition that the Appellant (or anyone else) is entitled to more than that, still less that she has an entitlement to "all information" about the quarry. In short, neither ***Guerra*** nor ***Oneryildiz*** will bear the weight which the Appellant seeks to put on them.

136. Moreover, as ***Guerra*** and ***Oneryildiz*** make clear, any right to information under Article 2 or 8 of the ECHR arises as part of the state's positive obligations to protect the right to life and the right to a private and a family life. Here, however, the problem for the Appellant is that the domestic courts have repeatedly rejected claims that DEFRA and/or the EA have breached their obligations under Article 2 or 8 in respect of their handling of the situation at the quarry. That is why I have set out the effect of the decisions in ***Richards I***, ***Lally*** and ***Richards II*** at some length earlier in this decision.

137. The Appellant does not contend that she has a freestanding right to the relevant information under Article 2 and 8 of the ECHR, but in that event the argument that DEFRA, or the IC, or the Tribunal on appeal, were obliged to take rights under the ECHR into account when conducting the public interest assessment is not easy to understand. The Appellant sought to rely on s.3 and s.6 of the HRA, but as Mr Hopkins said those provisions operate only to prevent legislation being interpreted, or actions being taken, in a manner which is incompatible with an ECHR right. If there is no relevant right, then there can be no incompatibility.

138. The Appellant herself accepted that it would not be in every case that ECHR rights would always be relevant to the carrying out of the public interest balancing test; context would dictate whether any of the relevant rights were engaged (see paragraph 37 above), but in that event the question arises as to precisely *when* one should factor in ECHR rights and by whom they should be factored in. Must the public authority, or the IC, or the Tribunal in each case decide whether relevant ECHR rights were engaged? Or is it the case that the High Court or the County Court must have previously determined that rights were engaged (not necessarily breached) in another case so that a requester could piggy-back on that decision (in this case ***Richards I***)? Should the public authority, or the IC, or the Tribunal decide such questions of their own motion or only when ECHR rights are raised by the parties? Which rights are relevant to the public interest balancing test? The Appellant obviously contends for Articles 2 and 8, but the logic of her position is that all ECHR rights must come into play when the public interest balancing test is carried out. For example,

would Article 1 to the First Protocol ("A1P1") have to be weighed in the balance in planning or compulsory purchase or procurement requests for information? Should more weight be given to unqualified rights than qualified rights?

139. The Tribunal correctly held at [80] of the judgment that the EIR is intended to protect public interests, not private rights. It is well-established that the EIR, like FOIA, is applicant-blind and motive-blind. In that event the balance of the public interest test under the EIR should not alter or change depending on the particular identity of the individual requester. The public interest test is sufficiently flexible to accommodate a wide range of issues, including risks to the health and wellbeing of individuals and I am satisfied (as to which see below) that those factors were expressly taken into account by the Tribunal. It would be contrary to the EIR and the freedom of information regime generally to introduce special considerations, or give certain issues additional weight, by reference to the rights which an individual requester might or might not have under a separate legal regime. The correct forum for an individual complaining of a breach of human rights by a public authority is to bring a civil claim under s.7 of the HRA in the High Court or the County Court, or by way of judicial review proceedings in the Administrative Court. The correct form for the applicant-blind and motive-blind requester of information under the EIR is the First-tier Tribunal, which will determine under regulation 12(1)(b) whether the public interest in maintaining the exception does or does not outweigh the public interest in disclosing the information. They are separate regimes which are designed to enforce separate rights and they should be pursued separately.

140. I therefore reject the Appellant's fundamental contention (see paragraph 36 above) that the legislature has put in place a regulatory framework which enables the public to access information held by public authorities, including FOIA and EIR and that "the obvious mechanism in EIR and FOIA by which any rights under Articles 2 and 8 can be considered and weighed by the public authority is in the operation of the public interest balancing test, when considering the interests which militate in favour of disclosure of information". That is to conflate separate regimes designed to vindicate separate rights and governed by separate enforcement procedures.

141. Given that the Appellant eschewed any freestanding right to the information under the ECHR (see paragraph 128 above) and that I have found that there is nothing in the EIR to support the importation of such considerations, it is not necessary to deal with the argument that, even if the Appellant could establish that she had a right to access the requested information under the ECHR, it would not follow that the refusal of her EIR request by DEFRA (or the upholding of that decision by the IC and the Tribunal) was incompatible with that right, but in deference to the arguments addressed to me I shall state my conclusions on that point.

142. In doing so, I do not need to embark on a detailed exegesis of the decisions in ***Sugar (No.2)*** and ***Kennedy*** since that furrow has already been extensively ploughed by Upper Tribunal Judge Wright in ***Moss***, in which he addressed the question of whether the existence of a right to information under the ECHR affected the ordinary application of FOIA.

143. Judge Wright rejected Mr Moss's contention that he had a right to receive the requested information under Article 10 of the ECHR and that the refusal of his FOIA request breached that right. He held that binding domestic authority established that, contrary to the position adopted by the ECtHR in ***Magyar***, Article 10 did not entail a right to receive information from public authorities:

> "59. The case Mr Moss seeks to advance is one that depends on his Article 10(1) right being engaged precisely because he says that right includes the right of access to public information. He is not arguing for a right to receive or impart information but to gain access to information in order to receive and then impart it. As demonstrated above, *Magyar* has expanded the understanding of Article 10(1) so that as matter ECtHR law it now covers, albeit in limited circumstances, a right of access to information. This was not disputed before me. However, the view of five members the Supreme Court in *Kennedy*, as well as the Court of Appeal in *Kennedy* and two if not three members of the Supreme Court in *Sugar (No.2)*, in my judgment, is that domestic law does not consider Article 10(1) extends to include a

> right of access information, and I consider myself bound by the rules of precedent to follow this view."

144. He also concluded that, even if Mr Moss did have a right to the requested information under Article 10, the application of an exemption from disclosure under FOIA was not incompatible with that right:

> "104. I turn therefore to the third aspect of the first ground of appeal arising from *Magyar*. This aspect of the first ground of appeal assumes, contrary to the above, that *Magyar* does apply in domestic law and that Mr Moss's right to freedom of expression under Article 10(1) was engaged as that right had been interfered with because the information requested was 'ready and available'. The argument here is whether it is section 12 of FOIA which causes this interference and thus may breach Mr Moss's Article 10 rights (ignoring justification under Article 10(2)).
>
> 105. Both respondents argue section 12 does not have this role because FOIA is not the exclusive manifestation in domestic law of a right to access information. If Part 1 of FOIA is satisfied then it requires that the information be provided by the public authority. However, so the respondents argue, the dissatisfaction of Part 1 of FOIA because the exemption in section 12 of FOIA applies does not mean Kingston upon Thames was precluded as a matter of law, including under FOIA, from providing the information. Section 12 being satisfied simply meant that the Kingston on Thames was not required to provide the information under FOIA but it did not prohibit Kingston on Thames from choosing to provide it.
>
> 106. Moreover, even this is only the position under FOIA and section 78 of that Act expressly provides that nothing in FOIA may limit the powers of a public authority to disclose information under any other legal powers vested in it. The respondents argue that the ratio of the Supreme Court's decision in *Kennedy* applies equally here and rely on the Localism Act 2011 as a source of a legal power under which the public authority could have been asked to disclose the information.
>
> 107. The headnote to *Kennedy* in the official law reports (see paragraph 48 above) supports the respondents' arguments on this point about FOIA not being an exhaustive scheme for disclosure of information …

> …
>
> 109. Although the issue in *Kennedy* was concerned with an absolute exemption under section 32 of FOIA, I do not read its ratio as being confined to such cases. At this stage in the analysis in Mr Moss's case (on the assumption it can be reached) his request for information under FOIA had been refused because of section 12 of FOIA and that was to the same effect as Mr Kennedy being denied information under section 32 of FOIA. The central ratio of *Kennedy* is that the structure of FOIA is not such that a refusal to provide information under it is exhaustively determinative of the right to the information in domestic law. As such FOIA alone cannot necessarily be said to breach any Article 10 rights.
>
> 110. I broadly accept the respondents' arguments that this analysis applies in this case. It is for Mr Moss to show that it is section 12 of FOIA which interferes with his right under Article 10 of the ECHR. However, he is unable to do so because it has not been shown that FOIA provided Mr Moss with the sole legal basis for obtaining the information he was seeking. *Kennedy* is plainly authority that FOIA does not provide the exclusive and exhaustive legal means of accessing information in domestic law. Moreover, section 78 of FOIA makes clear that nothing in FOIA may limit a public authority from using other powers to disclose information held by it. Mr Moss's case on this statutory appeal brought under FOIA is, and must be, that it is section 12 of FOIA alone which causes the interference with his right under Article 10(1). However, following and applying *Kennedy*, the argument ends at this point because he has failed to establish that this is the case. Put another way, section 12 of FOIA did not as matter of domestic law prohibit the information being provided to Mr Moss (it merely removed any obligation for it to be provided under FOIA), and so cannot be said to be the source or cause of the interference with any Article 10(1) rights of Mr Moss."

145. Ms Kelleher sought to distinguish ***Kennedy*** on the basis that it was concerned with an absolute exemption under s.32 of FOIA, but I agree with Judge Wright that its ratio is not to be read as being confined to such cases. For the same reason I do not accept her attempt to distinguish ***Sugar (No.2)*** on a similar basis.

146. Indeed it is not open to me to depart from that understanding of the decision of Judge Wright in ***Moss*** in that respect since both his reasoning and his conclusions were approved by a three judge panel in ***FCDO*** (Farbey J and Upper Tribunal Judges Mullan and Wikeley) which is binding on me:

> "82 We decline to reach the conclusion that a right of access to information exists in English law. There is no binding domestic authority to that effect. We agree with the conclusion of Judge Wright in *Moss* and would gratefully adopt his reasoning which is detailed and thorough. We agree with Mr Knight that there would be no purpose in revisiting the reasoning in *Moss* which would amount to revisiting the reasoning in *Kennedy* [2015] AC 455 and *Sugar* [2012] 1 WLR 439 which followed full argument in the Supreme Court. We agree with Sir James that Mr Callus's submissions in any event fail to deal with the qualified nature of article 10 rights and fail to deal with how the carefully calibrated scheme of FOIA yields any disproportionate interference with the rights in article 10(1) which would be a necessary condition of any infringement. We do not agree that anything in FOIA is capable of lessening (as opposed to enhancing) the right to information contained in sensitive material, and do not accept that the interpretation which we have reached is incompatible with the requester's article 10 rights."

147. I can see no relevant difference between the position under FOIA as established in ***Moss*** and the position under the EIR, which is not an exhaustive scheme for the disclosure of environmental information. If the Appellant believed that the information already in the public domain was insufficient to discharge positive obligations that she was personally owed by the state pursuant to the ECHR, there was nothing to prevent her from bringing a claim under s.7 of the HRA to that effect or a claim for judicial review.

148. In my judgment, Mr Davidson was right to assert (see paragraph 63 above) that the EIR provide a comprehensive, self-contained scheme whereby certain information is to be made available (or not, as the case may be) for certain statutory purposes, all calibrated in order to achieve the overarching objective(s) of the legislation. That does not exclude such information being available by another route or mechanism, but there is no basis in the EIR for

importing extraneous considerations nor can they be co-opted or repurposed to give effect to parallel rights.

149. Thus, given that the EIR does not prohibit the disclosure of the requested information by other means, so the reliance by DEFRA on an exception under the EIR cannot be said to be the cause of any incompatibility with any relevant rights which the Appellant may have under the ECHR.

150. Ms Kelleher argued that the decisions in ***Sugar (No.2)***, ***Kennedy*** and ***Moss*** were to be distinguished from this case since they all concerned Article 10 rights while this case was concerned with rights under Articles 2 and 8. The former was concerned with rights to information, not the right to life and the right to privacy and family life.

151. It is correct that the trilogy of cases concerned Article 10 rights rather than Article 2 and Article 8 rights, but no principled basis was articulated by the Appellant as to why it is Article 2 and Article 8 alone which should be weighed in the public interest balanced under the EIR. Why not, for example, A1P1? Article 10 is after all the quintessential right about the provision of information, in contrast with Articles 2 and 8 where the essential focus is elsewhere. As Mr Hopkins argued, one can see why the Appellant wished to put distance between her case and the Article 10 cases since they were so squarely against her, but that revealed the underlying incoherence in her case.

152. It follows from this that, even if the Appellant had a relevant right under the ECHR to the requested information, there would be no basis under either s.3 or s.6 of the HRA for interpreting the EIR exceptions or the public interest test more generously than would otherwise be the case. In short, even if she did have a right to information under the ECHR, that would not assist her to obtain a result more beneficial to her than would otherwise apply under the EIR.

153. I am therefore satisfied that the Tribunal was correct to hold that

> “80. With respect to the Appellant’s submissions concerning Articles 2 and 8 of the Human Rights Convention, we take the view that these Articles are irrelevant to the public interest test under EIR, which is intended to protect public interests and not private rights. Consequently, we have not factored them into our considerations.”

154. But, even on the assumption that I were with Ms Kelleher on her primary argument, it is difficult to see how the decision of the Tribunal would in any event have been affected by consideration of Articles 2 and 8 on the facts of this case.

155. As Mr Hopkins noted, the true nature of the Appellant’s objection to the judgment is revealed by the statement in Ms Kelleher’s submissions (set out on paragraph 49 above, but with emphasis added) that

> “The Appellant does not accept that the *seriousness* of the underlying subject matter was *appropriately* considered by the decision-makers in this case. That is the *essence* of her case.”

156. Thus formulated, the Appellant is in essence asserting that the Tribunal failed to take account of the seriousness of the underlying subject matter (i.e. the environmental and health impacts of emissions from the quarry). The problem with that argument, however, is that the Tribunal expressly *did* take account of the serious health, wellbeing and environmental issues caused by the situation at the quarry when undertaking the public interest assessment as required by the EIR. Wisely, in the light of the Practice Direction of the Senior President of Tribunals dated 4 June 2024 on Reasons for Decisions (which predated the decision of the Tribunal in this case), there was no challenge to the decision of the Tribunal on the basis of alleged inadequacy of reasons.

157. In its decision the Tribunal expressly adverted to the substantial environmental and health issues surrounding the site and the resultant public law cases taken by residents, namely ***Richards I*** and ***Lally***, see [30] and [40]:

> "30. The Appellant refers to the substantial environmental and health issues surrounding the site and the resultant public law cases taken by residents. She refers to *R (Richards) v Environment Agency* [2022] Env LR 14 where the health impacts from the landfill emissions were set out.
>
> …
>
> 40. The quarry has been the subject of two applications for judicial review, which sought unsuccessfully to establish that the management of the situation by the EA and/or Defra was unlawful or in breach of the state's positive obligations under Articles 2 and 8 of the Human Rights Convention (see *R (Richards) v Environment Agency* [2022] EWCA Civ 26; *R (Lally) v Secretary of State for Environment, Food and Rural Affairs and the Environmental Agency* (unreported, 27 October 2022)."

158. It specifically found that

> "69. It is accepted by the Commissioner and Defra, and indeed by this tribunal, that the health and environmental impacts from the quarry are serious. In response, the EA, as the main regulatory body for the quarry, has been taking enforcement action and had commenced criminal investigations. Therefore, contrary to the Appellant's belief, things were being done.
>
> 70. The EA has been continuously ensuring that the public was informed about the regulatory action being undertaken, and about other environmental concerns including emission levels. This has been achieved through the EA's website, which was regularly updated with information. Furthermore, the *Richards* and *Lally* litigation has put more information into the public domain."

159. In other words, the Tribunal did recognise the seriousness of those matters and gave weight to them, but ultimately it concluded that they were outweighed by other factors which militated in favour of the maintenance of the exception:

> "76. We again took account of the factors set out under Ground 1, given the overlap of considerations.
>
> 77. Whilst we accept that the health and wellbeing issues are serious, taking account of what was already in the

> public domain at the time, we are unclear as to what benefit there would be to the public interest in disclosing the requested information.
>
> 78. On the other hand, diverting such significant public resources away from Defra to deal with the request would clearly not be in the public interest.
>
> 79. Balancing the two, we conclude that the public interest in maintaining the exception outweighs the public interest in disclosing the information."

160. I do not, therefore, accept the Appellant's contention (at paragraph 52 above) that the Tribunal "fail[ed] to grasp the true acuteness of the impacts in question". As Mr Hopkins submitted, it heard evidence about and understood the situation at the quarry and was aware of the litigation in ***Richards I*** and ***Lally***, but concluded that it did not justify wasting DEFRA's time on responding to a manifestly unreasonable request. The Appellant may disagree with that conclusion, but it was plainly one which was open to the Tribunal.

161. Moreover, I agree with Mr Davidson and Mr Hopkins that the factual matters which were expressly considered by the Tribunal are precisely the same matters which were found in ***Richards I*** to engage Articles 2 and 8 of the ECHR, but not to breach them. The Court's basis for finding that the relevant ECHR rights were engaged was that emissions from the quarry were causing serious health and environmental issues for the claimant, but the Court did not find that that amounted to a breach of the rights.

162. In summary, I accept the submissions of Mr Davidson and Mr Hopkins that the relevant facts which are said to engage the ECHR had *already* been taken into account by the Tribunal and duly weighed against the countervailing considerations and they would not gain additional weight simply by adding an ECHR label to them. As Mr Davidson pithily put it, Articles 2 and 8 are a synonym for serious environmental factors and that analysis has already been done by the Tribunal.

163. Ms Kelleher submitted that the height of the Tribunal's consideration of the issue was limited to a recognition that "the health and environmental impacts from the quarry are serious" (at [69] and [77]), but when one reads the decision as whole and in particular the passages which I have cited at [30], [40], [69-70] and [76-79] it is clear that the Tribunal did understand the seriousness of the situation at the quarry and was fully aware of the litigation in ***Richards I*** and ***Lally***, but concluded that it did not justify wasting DEFRA's time on responding to a manifestly unreasonable request.

164. Ms Kelleher submitted that, in the IC's decision notice, the public interest benefits of disclosure were that disclosure would contribute to the transparency of government, aid public debate, aid public understanding of the "discussions that are taking place" (at [31]), assist with the concerns raised in respect of the impact of the site on public health, enable the local community to understand more closely what is being done to mitigate the impacts of this site and further the public's understanding "in this area and the debate around it" (at [34]). Her criticism was that the closest reference to those rights was the elliptical reference to "concerns" about "public health".

165. However, when one reads the decision of the IC in context, it is apparent that the IC likewise did fully understand the seriousness of the situation at the quarry and their effects on the Appellant and local inhabitants and factored them appropriately into the public interest balancing equation which it carried out:

> "**The public interest test**
> 30. Defra acknowledged the public interest in disclosure of information concerning the Walley's Quarry Landfill site. It stated that this is why the EA prepares a weekly update to help the community of Newcastle under-Lyme and the wider area keep informed about developments concerning its regulation of the site.
>
> 31. It recognised that disclosure would contribute to the transparency of government and that releasing information in relation to this matter would aid public debate and aid the public to understand more closely the discussions that are taking place.

32. However, Defra considers the public interest rests in maintaining the exception despite the compelling arguments in favour of disclosure in this case. It said that the request is so broad, it incorporates a substantial amount of recorded information. The estimate detailed above is significant, yet it still does not identify and take account of all the potential recorded information it holds on the matter. Identifying, gathering information in scope, then reviewing it and carefully considering any potential exceptions under the EIR as a result on the current and ongoing EA investigation would place a substantial and manifestly unreasonable burden on Defra in terms of time and cost. It would need to consult the EA on the information too and considering the mass array of information in scope this would be a huge task. Defra argued that compliance would, therefore, disproportionately divert Defra's resources away from the provision of other services and key functions.

33. Defra also said that there are regular updates on the EA's website about the site and what is being done. The local authority also provides similar updates on its website. The EA are currently investigating matters at the site as well. It considers these actions go some way to meeting the public interest arguments identified.

34. The Commissioner considers there are very compelling arguments in favour of disclosure in this case, considering the concerns the complainant has raised in respect of the impact of the site on public health. Disclosure would enable the local community to understand more closely what is being done to mitigate the impacts of this site and further the public's understanding in this area and debate around it. Where environmental information is concerned, the Commissioner expects public authorities to accept a higher level of burden in terms of complying with requests for information to those considered under FOIA due to nature of the information at hand.

35. However, the Commissioner considers this is a balancing exercise – weighing up the impact compliance would have on the public authority's time and resources and the identified public interest arguments in favour of disclosure. There are clear and significant public interest arguments in favour of Defra complying with this request and disclosing what information it is able to. That being said there still remains weighty public interest arguments in favour of protecting the resources and time of a public

> authority where a request would be so burdensome, costly and time consuming to process. It is not in the public interest to divert resources away from the public authority's other functions and services when compliance would take such a significant amount of time.
>
> 36. In this case, it has been shown that at a rate of two minutes per document (which is very conservative) it would take Defra 122 hours to collate and review the recorded information it has identified so far and this is not all the recorded information Defra potentially holds. This is significant and only goes to highlight just how much recorded information potentially falls within the broad nature of this request and what compliance would involve. Despite the clear public interest in the information, this would place an overwhelming burden upon Defra in terms of time and expense and despite its size and the resources available to it this cannot be justified. It would have to disproportionately divert a huge amount of time and resources away from other functions in order to comply and on this scale, the Commissioner is satisfied that this is not in the wider interests of the public.
>
> 37. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception."

166. The weight to be accorded to evidence is pre-eminently a matter for the tribunal of fact which hears the evidence in the case, as Lewison LJ made clear in ***Volpi v Volpi*** [2022] EWCA Civ 464. In particular an appellate court or tribunal is bound, unless there is compelling reason to the contrary, to assume that the fact-finding judge or panel has taken the whole of the evidence into consideration; the mere fact that a judge or panel does not mention a specific piece of evidence does not mean that it was overlooked:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

…

65. This appeal demonstrates many features of appeals against findings of fact:

i) It seeks to retry the case afresh.

ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").

iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.

> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
>
> v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.
>
> 66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done."

167. I do not therefore accept that the Tribunal mischaracterised or understated the impact on the Appellant of the activities at the quarry and that that distorted the entire balancing exercise by understating the true weight which should be afforded to those considerations.

168. As Mr Hopkins rightly submitted, the Appellant was really essaying a perversity challenge and the case comes nowhere near the threshold for such a successful challenge.

Conclusion

169. For these reasons, and notwithstanding Ms Kelleher's polished and eloquent advocacy on behalf of the Appellant, the appeal is dismissed.

Mark West
Judge of the Upper Tribunal

Authorised for issue on 12 March 2026