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R (Richards) v Environment Agency [2022] EWCA Civ 26: A Return to Normalcy

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Case Note: Judgment of the Court of Appeal on 17 January 2022

The Court of Appeal has allowed the appeal and dismissed the cross-appeal against the judgement of Fordham J in R (Richards) v Environment Agency [2021] EWHC 2501 (Admin). For a case note on the High Court judgment and a summary of the facts, see Esther Drabkin-Reiter's blog post from 6 October here.

The Grounds of Appeal

The Environment Agency ("EA") brought the appeal on two grounds. First, that Fordham J ("the Judge") erred in deciding that judicial intervention was appropriate or justified, as it was for the EA to evaluate and determine what further action needed to be taken in light of the guidance and recommendations made by Public Health England ("PHE"). Second, that the Judge erred in making a declaration in circumstances where there was no finding of past or current breach of the obligations imposed on the appellant by Articles 2 and 8 of the European Convention on Human Rights ("the Convention").

The respondent cross-appealed on one ground, that having found that the appellant had not complied with its obligations under Articles 2 and 8 of the Convention, the Judge erred in deciding it was not necessary or appropriate to declare that the appellant was in breach of its obligations. Alternatively, if no breach had been found, then the Judge erred in light of his own findings.

The Court of Appeal's Decision

The Court of Appeal allowed both grounds of appeal and dismissed the cross-appeal.

For the first ground of appeal concerning the role of the court, Lewis LJ (giving the main judgment) held that it was not for the court to prescribe precise outcomes and timescales, and that the Judge had gone beyond the proper limits of adjudicating on the dispute between the parties. Further, the Judge had gone against established case law of the European Court of Human Rights ("the European Court") on the

latitude for judgment to be accorded to public authorities regulating dangerous activities by elevating the advice given by PHE to a legally binding standard.

Separately, the first ground of appeal was also allowed because the Judge had misinterpreted the case of Fadeyeva v Russia. *Fadeyeva* established that it was not for the European Court to determine exactly what should have been done to reduce pollution; it was for the Court to assess whether the public authority had approached the problem with due diligence. The Judge therefore erred in elevating the specific facts of *Fadeyeva* to a general definition, applicable to all other cases, of the legal content of the obligations in Articles 2 and 8 for bodies regulating polluting activities.

The Court of Appeal also allowed the second ground of appeal on the basis that, at the time of the hearing in August 2021, the Judge did not find that the appellant had acted or was proposing to act unlawfully by failing to comply with its obligations under Articles 2 and 8. The Judge therefore erred in granting a declaration where the declaration was not required to remedy any unlawful act or failure to act.

Finally, on the cross-appeal, it was held that there had been no breach of Article 2 because the appellant had accepted that there was a serious problem at the landfill site and the evidence showed that the appellant was reviewing matters. Similarly, there was no breach of Article 8 because 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.*' [1]

Implications

The High Court judgment understandably attracted substantial interest last year when it was handed down, as it seemed to mark a shift in the willingness of the judiciary to support human rights claims in an environmental context. In particular, the fact that the Judge drafted an order which was mandatory and prescriptive was noteworthy in demonstrating a willingness to intervene in a highly technical area. It is important to emphasize, however, that the High Court judgment was so noteworthy precisely because it was so unusual. The Court of Appeal judgment has not introduced any new principles by defining the role of the court as '*determining the claim on the facts as they were at the time*.' [2]

This is especially true because the claim for judicial review in this case was made '*not merely promptly, but also, at best, prematurely.*' [3] The evidence shows that at the time of the hearing last year the EA was taking the issue of hydrogen sulphide emissions seriously and was reviewing the recent recommendations of PHE. In light of this evidence, it was extremely difficult to argue that the EA had acted unlawfully because the EA had not yet made any final decision as to how to respond to the recent advice given by PHE. Depending on what action the EA eventually decides to take (or not take) in response to PHE's most recent advice, then there might be the potential to bring a claim for judicial review, but at the time of the hearing last year it was too early to say what any such decision would look like, let alone if the hypothetical future decision would be lawful or not.

The fact that the claim was made prematurely means that the only way the claim could have succeeded at the time of the hearing last year was if the EA had completely ignored the advice given by PHE. The evidence shows that this had not occurred. The High Court's solution to this dilemma was to define precisely the EA's legal obligations under Articles 2 and 8 of the Convention going forward without finding that any breach of the Convention had in fact occurred. The Court of Appeal instead did what a court is supposed to do and adjudicated on the dispute between the parties based on the facts as they were at the time of the hearing.

The High Court judgment adopted a prescriptive, interventionist approach in a highly technical area in

response to a premature claim. The quashing of the High Court judgment therefore represents a return to the status quo ante, and it is impossible to say, based on the Court of Appeal judgment, whether the English courts will at some point follow the example of other courts around the world, which have been increasingly willing to find in favour of claimants alleging that their human rights have been breached by inaction over climate change (for a summary of such cases and the rise in climate change litigation in general, see the blog post of Merrow Golden here). After this judgment from the Court of Appeal, we are not any closer to following the example set by some other courts around the world, but equally we are not any further away. We are in essentially the same position we were in before Matthew Richards brought his claim in the first place.

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[1] R (Richards) v Environment Agency [2022] EWCA Civ 26, [94].
[2] Ibid, [100].
[3] Ibid, [99].