

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

B E T W E E N:-

THE QUEEN on the application of SCRAP2U

Claimant

- and -

ENVIRONMENT AGENCY

Defendant

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SKELETON ARGUMENT OF THE  
CLAIMANT

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**Introduction**

1. This is a challenge to the Defendant's decision of 1 July 2011 to deregister the Claimant's exemption under reg. 5(1) of the Environmental Permitting Regulations ("EPR") 2007 (as amended) with effect from 15 August 2011. The factual background has been set out in an agreed statement of facts ("ASF").
2. With the Defendant's permission, the Claimant has amended its grounds of challenge. The two grounds now advanced are as follows:
  - a) Ground 1: Breach of Legitimate Expectations
  - b) Ground 2: Breach of Article 6(1) ECHR(Ground 3 is no longer pursued)

**Ground 1: Breach of Legitimate Expectations**

*Representations*

3. At a meeting of 1 December 2010, the Defendant's officers, including its Chief Regulatory Officer, informed the Claimant that no deregistration would take place as long as two conditions were met: (i) a Noise Management Plan ("NMP")

was implemented; and (ii) the Council was satisfied that best practicable means (“BPM”) were being used [ASF, §16].

4. In a later visit to the site, the Defendant’s officers agreed that the NMP had been implemented and BPM were being used. There is no indication that that situation has changed [ASF, §19].
5. The Defendant’s officers have also written to the Claimant stating that: “ultimately *we will rely on the position adopted by the Environmental Health Department*. If they say that you are using best practicable means to counteract or reduce noise emissions, then we will adopt their advice.” [emphasis added][ASF, §19].
6. These statements constituted clear and unambiguous representations that no deregistration would occur for as long as (i) the NMP was implemented and (ii) the council stated, or indicated by its conduct, that it was satisfied that BPM was being used.

#### *Detrimental Reliance*

7. In reliance upon these representations, the Claimant implemented the NMP and BPM. It also incurred substantial financial expenditure: £120,000 on a new grabber and the acquisition of a leasehold interest in land adjacent to the site to house equipment [ASF, §17].

#### *Council Conduct*

8. The Council’s failure to issue an abatement notice indicates that it is satisfied that the activity is not causing a statutory nuisance, and thus the condition has not been breached. Under s. 80(1) of the Environmental Protection Act (“EPA”) 1990, the LPA has a *duty* to issue an abatement notice in the event that it is satisfied that a statutory nuisance exists or is likely to occur.

9. Alternatively, the Council is likely to have concluded that the Claimant would have a complete defence in any potential proceedings because of its use of BPM. Under s. 80(7) EPA it is a defence “to prove that the best practicable means were being used to prevent, or counteract the effects of, the nuisance.”
10. Consequently, at the present time, there is no basis for the Defendant to consider that there has been anything other than compliance with the conditions specified in their earlier representations.

### *Breach*

11. The decision of 1 July 2011 to deregister the Site as of 15 August 2011 was therefore a clear breach of the Claimant’s legitimate expectations. Simply put, the Defendant did exactly what it had agreed not to do.

### *Relief*

12. It is well established that the court should protect legitimate expectations to uphold standards of good administration. There is no lawful reason why the legitimate expectations should not be upheld (*R (Niazi) v Secretary for State for the Home Department* [2008] EWCA Civ 755, §51; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA 1363, §68).

### **Ground 2: Breach of Article 6(1) ECHR**

13. The decision to deregister the exemption from 15 August 2011 constituted a breach of the Claimant’s right under Article 6(1) ECHR, to a fair and public hearing by an independent and impartial tribunal in the determination of its civil rights and obligations. The Defendant’s request that the Claimant submit to its internal complaints procedure did not discharge that requirement.

### *Determination of Civil Rights and Obligations*

14. The “exemption” is a *licence* to carry out the specified activity (the recovery of scrap metal). It is therefore a *civil right*, provided for in domestic legislation (EPR 2007 and 2010, reg. 5(1)(a); Schedule 2, paragraph 3(1); Schedule 3, Part 1, article 45).
15. In deregistering the exemption, the Defendant will deprive the Claimant of that right. The Claimant strongly opposes that decision and the Defendant’s view of the facts which support it. There is clearly a dispute requiring *determination*.

### *Fair and Public Hearing by an Independent and Impartial Tribunal*

16. There is a statutory appeal available against most decisions taken by the Defendant with respect to the EPR, notably the revocation of a permit (reg. 31(2)(f)). A statutory appeal takes place before an inspector, who is professionally separate from the Agency and has full jurisdiction to make findings of fact and as to compliance with the law. There are also substantial procedural protections: including notification, the possibility of a public hearing, the opportunity to call evidence and suspension pending outcome.
17. By contrast, the Defendant now proposes that the Claimant submit to its own *internal* complaints process. No hearing has been offered, nor any details about the process that will be undertaken. No information has been offered as to who will look at the matter or how it can be looked at afresh. The only benefit to the Claimant from submission to that procedure is the proposed revocation of its decision, but in the circumstances there is no guarantee that this could amount to anything more than a temporary stay.
18. In the Guidance offered by the Agency’s sponsoring Department, no reason has been given for the failure to extend the conventional appeals procedure to the deregistration of exemptions (DEFRA, *Environmental Permitting Guidance, Exempt Waste Operations* (March 2010), p. 30, §§10.2-10.3). However the

deficiency is clearly recognised, as the system is currently being monitored and will be re-assessed by October 2013. (§§ 10.7, 13.10).

19. The Guidance demonstrates a complacent and erroneous assumption that industry merely requires “sufficient safeguards...*to address concerns*” (paragraph 10.3). The Claimant, whose business activities will be effectively stopped, wishes to do more than express concerns. It seeks an authoritative determination as to its rights to protect its business on a long-term basis.

#### *Judicial Review*

20. It is accepted that a hearing is available by way of judicial review. However in the environmental/planning sphere, judicial review has only been regarded as an adequate protection of Article 6(1) rights in circumstances where there is a prior appeal on the merits before a body with full fact-finding jurisdiction. The court will be restricted to findings on the law and will likely consider itself obliged to defer to the facts presented by the Defendant (*Bryan v UK* [1995] 21 EHRR 342, §47; *R(Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, per Lord Hoffmann at §128).

#### *Alternative Remedy*

21. Contrary to the Defendant’s submissions, the complaints procedure does not provide an alternative *remedy* to judicial review.
22. The Claimant seeks remedies available only via judicial review: first, a declaration in respect of the above breach of legitimate expectations; second, that the court “read down” reg. 31(2)(f) EPR to include the deregistration of an exemption in order to ensure compliance with Article 6(1) ECHR pursuant to s. 3 Human Rights Act (“HRA”) 1998; third, in the alternative to s. 3 HRA, a declaration of incompatibility pursuant to s. 4 HRA 1998.
23. Those remedies are clearly not available through any other route. The current proceedings are therefore justified at the present time.

## **Conclusion**

24. For the reasons above, the Court is respectfully requested to:

- (a) quash the decision to deregister contained in the letter of 1 July 2011
- (b) issue a declaration that the Defendant has acted unlawfully in breaching the Claimant's legitimate expectations;
- (c) issue a declaration that reg. 31(2)(f) EPR should be read to include: "deregistration of an exemption" pursuant to s. 3 HRA 1998
- (d) issue a declaration of incompatibility with respect to reg. 31(2)(f) EPR pursuant to s. 4 HRA 1998