Neutral Citation Number: [2014] EWCA Civ 254

Case No: C1/2013/2250

IN THE COURT OF APPEAL (CIVIL DIVISION)

CASE C1/2013/2250:
ON APPEAL FROM THE DIVISIONAL COURT, ADMINISTRATIVE COURT, QUEEN'S BENCH DIVISION
THE LORD CHIEF JUSTICE, LORD JUSTICE DAVIS , MR JUSTICE GLOBE
CO1882013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE PITCHFORD

- -

Between:
C1/2013/2250

THE QUEEN ON THE APPLICATION OF EVANS	**Appellant**
- and -	
HER MAJESTY'S ATTORNEY GENERAL	**Respondent**
- and -	
THE INFORMATION COMMISSIONER	**Interested Party**

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- -

Dinah Rose QC, Aidan Eardley and Stephanie Palmer (instructed by **Guardian News and Media Ltd, Editorial Legal Services**) for the **Appellant**
Jonathan Swift QC and Julian Milford (instructed by **the Treasury Solicitor**) for the **Respondent**
Timothy Pitt-Payne QC (instructed by **the Information Commissioner**) for the **Interested Party**

Hearing dates: 24, 25 & 26 February 2014

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Approved Judgment

Master of the Rolls:

1. Mr Evans is a journalist employed by *The Guardian* newspaper. He sought disclosure under the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations ("EIR") of a number of written communications which passed between The Prince of Wales and various Government Departments during the period between 1 September 2004 and 1 April 2005. The Departments refused disclosure and their decisions were upheld by the Information Commissioner ("the Commissioner"). Mr Evans appealed to the First-Tier Tribunal against the ruling of the Commissioner. The appeals were transferred to the Upper Tribunal ("UT") with the agreement of the parties pursuant to regulation 19 of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009.

2. By a decision dated 18 September 2012, after a hearing at which factual and expert evidence was considered, and after examining the communications themselves in closed session, the UT (Walker J, Upper Tribunal Judge Angel and Ms Suzanne Cosgrave) ruled that the communications should be disclosed to the extent that they fell into a category which the UT defined as "advocacy correspondence".

3. The Departments did not seek permission to appeal against this decision. Instead, on 16 October 2012 the Attorney General (as an "accountable person" within the meaning of section 53(8) of the FOIA) issued a certificate pursuant to section 53(2) which purported to override the decision of the UT and render it ineffective on the basis that, in his opinion, there was no failure on the part of the Government Departments to comply with section 1(1)(b) of the FOIA and regulation 5(1) of the EIR.

4. Mr Evans sought judicial review of the Attorney General's certificate. His application was dismissed by the Divisional Court (Lord Judge CJ, Davis LJ and Globe J).

5. The questions that arise on this appeal are the same as were in issue before the Divisional Court. These are: (i) what is the test for determining whether an accountable person has shown that he had "reasonable grounds" for forming the opinion that a public authority has not failed to comply with section 1(1)(b) of the FOIA or regulation 5 of the EIR; (ii) whether the Attorney General has failed to show reasonable grounds for his opinion contrary to section 53(2) of the FOIA; (iii) whether the issue of a section 53(2) certificate to override a decision of the UT is compatible with EU law, in particular (a) the Environmental Information Directive 2003/4/EC ("the Directive") to which the EIR gave effect and (b) article 47 of the EU Charter of Fundamental Rights ("the Charter"); and, if not, (iv) whether the unlawfulness of the decision of the Attorney General relating to environmental information taints the entirety of his certificate.

Legal framework

The FOIA

6. Section 1(1) of the FOIA provides:

> "Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

7. This right is subject to the exemptions set out in Part II. Section 2 provides that some of the exemptions are absolute and others are qualified (ie they are subject to the test that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"). Until it was amended with effect from 19 January 2011, section 37 provided a qualified exemption in relation to communications with Her Majesty, other members of the Royal Family or the Royal Household. Section 37 now provides an absolute exemption in relation to such communications. It is, however, common ground that the original version of section 37 is applicable in the present case. Absolute exemptions apply to personal information (section 40) and information provided in confidence (section 41).

8. Where an applicant is dissatisfied by the public authority's response to a request for information, he can complain to the Commissioner (section 50(1)). Where the Commissioner considers that a public authority has failed to communicate information or to provide confirmation or denial where required to do so by section 1(1), a decision notice must specify what the authority must do (section 50(4)). Either the applicant or the public authority can appeal to the Tribunal against the Commissioner's decision notice (section 57). If the Tribunal considers (a) that the notice against which the appeal is brought is not "in accordance with the law" or (b) "to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently", the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner (section 58(1)). On an appeal, the Tribunal may "review any finding of fact on which the notice in question was based" (section 58(2)). Appeals are usually heard by the First-Tier Tribunal with a right of appeal to the UT.

9. Section 53(2) confers a power on an "accountable person" to override certain decision notices or enforcement notices served under the FOIA. It provides that a notice:

> "shall cease to have effect if, not later than the twentieth working day following 'the effective date', the accountable person in relation to that authority gives the Commissioner a

> certificate stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b) [ie a failure to comply with section 1(1)(a) or (b)]."

The "effective date" is defined in section 53(4). The "accountable person" is defined in section 53(8).

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention")

10. Article 4(1) provides:

> "Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public within the framework of national legislation…."

11. Article 9 provides:

> "1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
>
> ……
>
> Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.
>
> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) Having a sufficient interest
>
> or, alternatively,
>
> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

> have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
>
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.
>
> ……..”

The Directive

12. The purpose of the Directive is to provide public access to environmental information and to ensure that provisions of Community law are consistent with the Aarhus Convention (recital 5). Article 3 provides that Member States shall ensure that public authorities are required to make available environmental information held by them. Article 4 provides that Member States may provide for a request to be refused in specified cases. It states that the grounds for refusal shall be interpreted in a “restrictive way, taking into account for the particular case the public interest served by disclosure”. In every particular case, “the public interest served by disclosure shall be weighed against the interest served by the refusal”. Article 6 is of central importance to this appeal. So far as material, it provides:

> “1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law……
>
> 2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final….

> 3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access is refused under this Article."

The EU Charter of Fundamental Rights

13. Article 47 provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law…."

14. Article 52(3) provides:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The EIR

15. The EIR gives effect to the United Kingdom's obligation to implement the Directive. Regulation 5 of the EIR provides that a public authority that holds environmental information shall make it available on request. Regulation 12 contains exceptions to this general duty which correspond with article 4 of the Directive.

16. Regulation 18 provides that, with certain modifications, the enforcement and appeals provisions of the FOIA shall apply for the purposes of the EIR as they apply for the purposes of the FOIA. In particular, paragraph (6) provides that section 53 of the FOIA applies to a decision notice or enforcement notice served under Part IV of the FOIA as applied to the EIR on any of the public authorities referred to in section 53(1)(a); and in section 53(7) for the reference to "exempt information" there shall be substituted a reference to "information which may be refused under these Regulations".

17. It follows that the EIR incorporate the certification provisions contained in section 53 into the regime applicable to requests for environmental information.

The decision of the UT

18. The decision runs to 65 pages and 251 paragraphs. Appended to it are substantial annexes (both open and closed). Open Annex 3 runs to 109 pages and 297 paragraphs. On any view, the decision is a most impressive piece of work. The UT decided that Mr Evans was entitled to have disclosure of the "advocacy correspondence", that is correspondence in which The Prince of Wales advocated certain causes which were of particular interest to him. These included causes which related to the environment. The UT said:

> "4. For reasons which we explain below, we conclude that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of "advocacy correspondence" falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure.
>
> 5. It is important to understand the limits of this ruling. It does not entitle Mr Evans to disclosure of purely social or personal correspondence passing between Prince Charles and government ministers. It does not entitle Mr Evans to correspondence within the established constitutional convention that the heir to the throne is to be instructed in the business of government. Nor does it involve ruling on matters which do not arise in the present case. Thus, for example, it is conceivable that there may be correspondence which, although outside the established constitutional convention, can properly be described as preparation for kingship. Or it may be that correspondence concerns an aspect of policy which is fresh and time needs to be allowed for a "protected space" before disclosure would be in the public interest. While they do not in our view arise in the present case it is possible that for these or other reasons correspondence sought in other cases may arguably not be disclosable."

The Attorney General's certificate

19. On 16 October 2012, the Attorney General issued his certificate stating that he had "on reasonable grounds" formed the opinion that the Departments had been entitled to refuse the requests for disclosure. The effect of the certificate, if lawfully made, was that the relevant decision notice of the UT requiring the Departments to disclose the information ceased to have effect. There is some room for debate as to whether the UT's Decision of 18 September 2012 was a "decision notice" for the purposes of section 53, or whether the Attorney General issued his certificate prematurely. That is because the UT had not, at the time, issued any notice requiring the Departments to provide the relevant parts of the correspondence and some issues remain to be resolved before it can do so. But it is common ground that nothing turns on this for the purposes of this appeal.

20. The full certificate and statement of reasons are appended as Annex II to the judgment of Davis LJ. The following is the briefest of summaries. Essentially, the Attorney General agreed with the reasoning of the Commissioner. He considered that the public interest favoured withholding the information, *inter alia*, so as to preserve The Prince of Wales's political neutrality and ensure that he was not inhibited from corresponding frankly with Ministers: frank correspondence assisted his preparation for the exercise of the Sovereign's duties on his accession to the throne. The Attorney General recognised that some details of The Prince of Wales's communications with the Departments had been placed in the public domain by his consent, but, in his opinion, this had not entailed wholesale disclosure of copies of all The Prince of Wales's letters to Ministers without his consent. Disclosure would have a "chilling effect" on the frankness with which he and Ministers could communicate with each other. The Attorney General also believed that disclosure would undermine The Prince of Wales's dignity by invading his privacy. This added further weight to the public interest in withholding the information.

The first issue: the correct approach to section 53(2) of the FOIA

The case for Mr Evans

21. Miss Rose QC submitted to the Divisional Court (as she has done to us) that, once an independent and impartial tribunal has determined, after a fully contested hearing including oral evidence, that a public authority has failed in its statutory duty to communicate requested information, its determination is definitive and can be departed from by the executive only on cogent grounds. Examples of such grounds are some demonstrable error or change of circumstances, which would show that the tribunal's judgment could no longer be safely relied on. It is not reasonable for an accountable person simply to disagree with the evaluation of the tribunal.

22. In support of this submission, Miss Rose relied on three authorities which she contended, although not directly in point, provide strong support for this approach.

23. *R v Warwickshire County Council ex p Powergen plc* (1998) 96 LGR 617 concerned the refusal by a county council to enter into an agreement under section 278 of the Highways Act 1980. Previously, the district council (relying on the opinion of the county council) had refused planning permission on the grounds that the proposed access arrangements would be detrimental to road safety. On appeal, the inspector had decided that the arrangements were not unsafe and had granted planning permission. The county council, as highway authority, refused to enter into a section 278 agreement to carry out the proposed works, maintaining its original view that the proposed access arrangements were unsafe. The applicant sought judicial review of the refusal. The Court of Appeal held that, where planning permission was granted following a local inquiry at which the road safety objections of the relevant highway authority to proposed highway works had been fully considered and rejected, it was not *reasonable* for the highway authority to maintain its original objection and refuse to enter into a section 278 agreement.

24. At p 624, Simon Brown LJ said that he preferred to adopt a "*Wednesbury* analysis". The question was whether it was "reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the inspector's independent factual judgment on the issue, nevertheless to maintain its own original view". To this question the answer was a categorical "No". At p 625, he said that there were no new facts or changed circumstances which might have made it reasonable for the county council to maintain its original objection. It was unreasonable to do so where the council's refusal was based on the identical considerations that had previously been relied on in seeking to sustain the planning objection before the inspector. Simon Brown LJ concluded at p 626:

> "…the inspector's conclusion on that issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only properly tenable view on the issue of road safety and this is determinative of the public benefit."

25. In *R v Secretary of State for the Home Department ex p Danaei* [1998] INLR 124, a claim had been advanced by an Iranian asylum-seeker that he was at risk of persecution in Iran because he had been discovered in an adulterous relationship. The Secretary of State did not believe his account and refused the application. On appeal, the special adjudicator accepted that the applicant had been in such a relationship and that he had left Iran because he feared that, in consequence, his life was in danger. His appeal was nevertheless dismissed for other reasons. His subsequent application for exceptional leave to remain was rejected by the Secretary of State on the grounds that he did not accept the account of the facts which had been accepted by the special adjudicator.

26. The applicant sought judicial review of this decision. Collins J decided that it was *Wednesbury* unreasonable for the Secretary of State to maintain his original view of the facts in the face of the special adjudicator's contrary view, given that there was no material additional evidence on which the Secretary of State had relied. This decision

was upheld by the Court of Appeal. Simon Brown LJ said at p 133 that on an issue of fact (such as whether the applicant was an adulterer):

> "…it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who heard all the evidence unless only:
>
> (1) the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones—none of which is suggested here;
>
> (2) fresh material has since become available to the Secretary of State such as could realistically have affected the adjudicator's finding—this too was a matter we considered in *Powergen*…."

27. Judge LJ said:

> "The desirable objective of an independent scrutiny of decisions in this field would be negated if the Secretary of State were entitled to act merely on his own assertions and reassertions about relevant facts contrary to express finding made at an oral hearing by a special adjudicator who had seen and heard the relevant witnesses. That would approach uncomfortably close to decision-making by executive or administrative diktat. If therefore the Secretary of State is to set aside or ignore a finding on a factual issue which has been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on *Wednesbury* principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible."

28. The third case is *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114, [2008] EWCA Civ 36. The Parliamentary Commissioner for Administration had conducted a statutory investigation into certain alleged maladministration. The Secretary of State rejected her findings of maladministration and her recommendation. His decision was the subject of a judicial review challenge. The Court of Appeal applied *Powergen* and *Danaei*. Sir John Chadwick summarised his approach in the following terms at para 91:

> "I am not persuaded that the Secretary of State was entitled to reject the ombudsman's finding merely because he preferred another view which could not be characterised as irrational. As I have said earlier in this judgment, it is not enough that the

> Secretary of State has reached his own view on rational grounds; it is necessary that his decision to reject the ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act: he must have a reason (other than simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act."

The Divisional Court

29. The Divisional Court said that, in the light of the highly unusual nature of the section 53(2) power, the court's power to review its exercise was not limited to determining whether the reasoning of the Attorney General was unreasonable in the *Wednesbury* sense. Lord Judge said at para 14:

> "….the aggrieved applicant is not required to go so far as to demonstrate that the minister's decision is 'unreasonable' in the familiar *Wednesbury* sense. Rather, the principle of constitutionality requires the minister to address the decision of the Upper Tribunal (or whichever court it may be) head on, and explain in clear and unequivocal terms the reasons why, notwithstanding the decision of the court, the executive override has been exercised on public interest grounds."

30. Davis LJ (who gave the leading judgment with which the other members of the court agreed) said (para 89) that the situation was very sensitive "calling for appropriately close scrutiny by the courts on a judicial review challenge". He added (para 90) that the reasons given in a section 53(2) certificate must be "cogent" and they should be the subject of "appropriately close scrutiny by the court".

31. Davis LJ said that the words "on reasonable grounds" mean what they say and should be applied without any gloss or other refinement (para 87). They do, however, connote that an objective test is to be applied (para 85).

32. He did not consider that the three authorities relied on by Miss Rose were of any assistance. He pointed out at paras 107 and 108 that what is being disputed in the present case is not a challenge to a primary finding of fact (such as in *Danaei*) but an exercise of evaluative judgment. Nor is the issue of a certificate under section 53(2) a "potential subversion of the legislative scheme of the kind exemplified in *Powergen"*. At para 109 he said that issues of the public interest of the kind that arise in the present case and questions of the applicability and extent of conventions can "given their constitutional and political overtones fairly be said to lie, in practical terms, at least within the domain of government ministers: albeit of course not to the exclusion of review by the courts."

33. At para 111, he rejected the submission that it was not open to the accountable person simply to prefer his own view to that of the tribunal. In the context of the FOIA, Davis LJ asked rhetorically: why not? He continued:

> "111. It is inherent in the whole operation of section 53 that the accountable person will have formed his own opinion which departs from the previous decision (be it of Information Commissioner, tribunal or court) and may certify without recourse to an appeal. As it seems to me, therefore, disagreement with the prior decision (be it of Information Commissioner, tribunal or court) is precisely what section 53 contemplates, without any explicit or implicit requirement for the existence of fresh evidence or of irrationality etc. in the original decision which the certificate is designed to override. Of course the accountable person both must have and must articulate reasons for that view. And as I have said, it is for the accountable person in practice to justify the certification. But if he does so, and that justification comprises "reasonable grounds", then the power under section 53(2) is validly exercised. Accordingly, the fact the certificate involves, in this case, in effect reasserting the arguments that had not prevailed before the Upper Tribunal does not of itself mean that it is thereby vitiated."

34. At paras 113 to 116, he then considered whether the Statement of Reasons appended to the section 53(2) certificate demonstrated "reasonable grounds". He concluded that the views and reasons expressed by the Attorney General as to where the balance of public interest lay were "proper and rational". They "made *sense*" (original emphasis). They were "cogent". It was perfectly possible for each of two diametrically opposed arguments and conclusions to be cogent: "[t]hat one conclusion may be proper and reasonable does not mean that the contrary conclusion is improper and unreasonable". Section 53(2) did not require that the decision to be overridden was itself unreasonable or otherwise flawed in a public law sense. Davis LJ said that the position "is demonstrably put on an altogether more open basis by the wording of section 53".

35. I have set out the reasoning of Davis LJ at some length because Mr Swift QC supports it. Mr Swift adds that, if Parliament had intended that the accountable person should be permitted to depart from a tribunal's assessment only on proof of a change of circumstances or some material error of fact, it would have said so. He also submits that the three cases on which Miss Rose relies are distinguishable for the reasons given by Davis LJ. He makes the further point that a tribunal's conclusion on the public interest balance and the Attorney General's certificate under section 53(2) are but two elements of a single coherent statutory scheme. Section 53(2) explicitly permits the accountable person to disagree with a tribunal's assessment on appeal if he or she, on reasonable grounds, takes a different view of where the balance of public interest lies. The very premise of the section 53(2) power is that a democratically accountable Government Minister is particularly well placed to

evaluate the public interest and should be entitled to disagree with the Tribunal (or the Commissioner) about what the public interest requires.

Conclusion on the first issue

36. I respectfully disagree with Mr Swift's analysis and the reasoning of the Divisional Court. It is (rightly) common ground that what constitutes "reasonable grounds" must be determined objectively. Section 53(2) does not, however, provide any guidance as to how to judge what constitutes "reasonable grounds". To say (as Lord Judge does at para 14 and Davis LJ does at para 90) that the reasons given in a section 53(2) certificate must engage with the reasons of the tribunal and be subject to close scrutiny by the court does not tell us how the reasonableness of the grounds relied on by the accountable person is to be judged. But as we have seen, Davis LJ did say that "reasonable grounds" are grounds that are rational and make sense and that it is no bar to the grounds being reasonable that they differ from other reasoning which also is rational and makes sense.

37. In my view, whether a decision is "reasonable" depends on the context and the circumstances in which it is made. I agree with the Divisional Court that two opposing decisions or opinions may both be objectively reasonable. But whether it is reasonable for X to disagree with the reasonable decision or opinion of Y depends on the context and circumstances in which X and Y are acting. That is well illustrated by the three authorities on which Miss Rose relies. In each case, the court asked whether it was *reasonable* for Y to make a decision which was contrary to the earlier decision of X. In each case there was a judicial review challenge to the *reasonableness* of the later decision. In my view the cases provide a helpful analogy. In each of them, the context in which the reasonableness of Y's decision was to be judged was that it was contrary to the earlier decision of X, which was an independent and impartial body that had conducted a full examination of the very issues that Y later had to determine. In each case, the court emphasised as being of particular importance the fact that the earlier decision had been made by an independent and impartial body, after a thorough consideration of the issues. In these circumstances, the court held that there had to be something more than a mere disagreement on the same material for it to be reasonable for Y to disagree with X. In the present case, the Attorney General disagreed with the decision of the UT (an independent court chaired by a High Court judge) on the very question which the UT had examined in meticulous detail. The Attorney General did not have any additional material and it has not been suggested that the UT made any error of law or fact. It is accepted that the UT's decision was a reasonable decision.

38. I do not consider that it is reasonable for an accountable person to issue a section 53(2) certificate merely because he disagrees with the decision of the tribunal. Something more is required. Examples of what would suffice are that there has been a material change of circumstances since the tribunal decision or that the decision of the tribunal was demonstrably flawed in fact or in law. This was the approach suggested by Simon Brown LJ in *Danaei* in relation to the Secretary of State's decision which contradicted the earlier decision of the special adjudicator. It seems to

me to be particularly apt in relation to section 53(2). I do not agree with the reasons given by Davis LJ for distinguishing the three cases (see para 32 above). The fact that a section 53(2) certificate involves making an evaluative judgment (rather than a finding of primary fact) is not material to whether the accountable person has reasonable grounds for forming a different opinion from that of the tribunal. Nor do I consider that the basis for the decision in *Powergen* was that the decision of the highway authority was "subversive of the legislative scheme".

39. On the approach of the Divisional Court to section 53(2), the accountable person can override the decision of an independent and impartial tribunal which (i) is reasonable, (ii) is the product of a detailed examination (fairly conducted) of the issues after an adversarial hearing at which all parties have been represented and (iii) is not challenged on appeal. All that is required is that the accountable person gives sensible and rational reasons for disagreeing with the tribunal's conclusion. If section 53(2) has that effect, it is a remarkable provision not only because of its constitutional significance (the point emphasised by the Divisional Court), but also because it seriously undermines the efficacy of the rights of appeal accorded by sections 57 and 58 of the FOIA.

The second issue: did the Attorney General have reasonable grounds for issuing the certificate?

40. The UT decided that the balance of the section 2(2)(b) FOIA public interests lay in favour of disclosure of the documents. It reached its decision after a six day hearing during which it heard evidence (including expert evidence) and argument at which Mr Evans, the Commissioner and the relevant Departments were all represented by leading counsel. The tribunal considered all the material and even went into closed session during part of the hearing. Its decision was not appealed by the Departments. Mr Swift has not suggested that it contained any errors of fact or law or that its conclusion was not a reasonable conclusion. The arguments originally put forward by the Government Departments before the UT had depended on assertions of fact which were disputed and on which findings were made by the UT which were adverse to the Departments. These findings were not challenged by the Attorney General in his decision. The Attorney General simply disagreed with the evaluation made by the UT. For the reasons that I have already given, this was insufficient to amount to "reasonable grounds".

41. It is therefore unnecessary to consider the detailed submissions advanced by Miss Rose challenging the reasonableness of the views expressed by the Attorney General (in disagreement with the UT) that (i) so-called advocacy correspondence formed part of The Prince of Wales's preparation for kingship; (ii) The Prince of Wales and Ministers would feel "seriously inhibited" from exchanging views candidly and frankly if advocacy correspondence were not kept confidential; (iii) disclosure would jeopardise the perception of the Prince as politically neutral; (iv) the advocacy correspondence had a "constitutional function"; and (v) the correspondence reflected The Prince of Wales's "most deeply held personal views and beliefs".

The third issue: is section 53(2) compatible with EU law?

The case for Mr Evans

42. Miss Rose (supported by Mr Pitt-Payne QC) repeats the submissions that she made to the Divisional Court which I shall now summarise. Article 6(2) of the Directive obliges Member States to provide access to a court (or equivalent independent and impartial body established by law) which can review the acts and omissions of the public authority which has refused to disclose the information. The court must be able to make *final* decisions which, by article 6(3), are to be *binding* on the public authority holding the information. In order to be effective, such a court or body must have the power to review and evaluate the substance of the reasons for refusal to disclose given by the public authority in question. Miss Rose relies on what Sullivan LJ said in *Birkett v DEFRA* [2011] EWCA Civ 1606, [2012] Env LR 24 at para 23:

> "23. Notwithstanding the need for a speedy decision as to whether or not, and if not why not, environmental information is to be released, it is to be noted that the Directive does not set a precise time limit for reconsideration and/or administrative review under Article 6. Although that stage of the procedure must be "expeditious", there is no such requirement for the next stage: legal review under Article 6(2). This reflects the, inevitable, tension between the need for a speedy answer, and the need to obtain a correct answer which properly balances the important public interests which may be in conflict. Article 6 recognises the potential importance of these issues by providing for a thorough review process in which the merits, both factual and legal, of a decision to refuse to release environmental information will be reconsidered afresh by independent and impartial bodies, both administrative and legal. The Court or other legal body conducting the review under Article 6(2) is not reviewing the decision made by the administrative reviewer under Article 6(1), it is reviewing "the acts or omissions of the public body concerned." Thus, the court must consider de novo the propriety of releasing the information. Such a process is bound to discover errors and omissions in the exceptions relied upon in initial decisions, and it would be surprising, given the balancing exercise required by the Directive, if those errors were incapable of subsequent correction."

43. Anyone whose EU law rights are violated has the right to an effective remedy before a tribunal which complies with the requirements of article 47 of the Charter. By article 52, that right is equivalent to the right of access to a court under article 6 of the European Convention on Human Rights ("the Convention"). That right includes (i) the right of access to a court or tribunal which can give decisions binding on all parties, including the Government; (ii) the right to legal certainty and the finality of judgments; and (iii) the right to a fair hearing (including the right to equality of arms). A provision which permits one party (and particularly a public authority) to override a

decision of a court merely because he disagrees with it is incompatible with the rule of law and the principle of equality before the law. Such a provision transforms the binding decision of a court into no more than an opinion, with which the State may disagree if it so chooses.

44. The accountable person under section 53(2) is neither independent nor impartial, but is part of the executive arm of Government to which the requests for information were made. His intervention subverts the final binding character of the tribunal decision to which his intervention relates (or prevents an appeal to the tribunal in the first place).

45. The availability of judicial review to challenge the section 53(2) decision is not sufficient to save the legislative scheme from incompatibility with the Directive and the Charter. First, a judicial review challenge cannot address the substance of the refusal of the public authorities holding the documents to disclose them. It can only address the reasonableness of the opinion expressed by the Attorney General that the refusal decision was in accordance with the EIR. The decision to which the judicial review is addressed is not the relevant decision for the purposes of the Directive and the scope of the power of review does not satisfy the requirements of the Directive as analysed in *Birkett.*

46. Secondly, the section 53 process violates the rights guaranteed by article 47 of the Charter. Such an intervention by the State in the judicial process (by-passing any obligation to appeal) is contrary to basic principles of the rule of law, access to court, finality and fairness. Moreover, the availability of the section 53(2) power to one party to the proceedings (the Government) but not to the other party, breaches the principles of equality of arms and equality before the law. The court's ability to supervise the exercise of this power by judicial review does not meet these fundamental objections.

47. In summary, Miss Rose submits that any exercise of the section 53(2) power in relation to a decision by a tribunal to require the disclosure of environmental information is a breach of EU law. In consequence, section 53(2) must be read and given effect as being without prejudice to the directly enforceable Community rights of persons having the benefit of those rights: see per Lord Nicholls in *Autologic Holdings plc v IRC* [2006] 1 AC 118 at para 16. It must, therefore, be read as not permitting the power to be exercised where, as here, a tribunal has ruled that environmental information must be disclosed and the public authority against which the ruling was made has chosen not to appeal.

The Divisional Court

48. The submissions of Miss Rose were comprehensively rejected by Davis LJ (with whom the other members of the court agreed). He said that article 6(2) of the Directive required a review procedure by an impartial and independent body, but how this requirement was to be met was left to national law. It was sufficiently met by the

courts having the power of judicial review of the reasonableness of the grounds given by the accountable person in issuing the certificate. He said at para 128:

> "… to conclude otherwise would be to put form over substance. It seems to me that it will inevitably be an integral part of a review by the court of the reasonableness of the grounds given by an accountable person that there be included a review of the decision to withhold the information in the first place: the act or omission of the public authority concerned. After all, the certificate itself is required, by the very terms of s.53(2) and Regulation 18, to direct itself as to whether there has been a failure to comply with s.1(1)(b) or Regulation 5(1) of the 2004 Regulations. Inevitably, therefore, the reasons for the certificate will have to engage with the substance of the original decision of the public authority to withhold. The court will thus review that; and that is so even where the court is not required to replicate the entire exercise undertaken by the decision-maker. It may be that such a review of the act or omission of the public authority will have been at one remove, as it were. But there will still, in my view, have been a substantive review of that act or omission of the public authority."

49. At para 133 he said that judicial review is a procedure consistent with the requirements of article 9 of the Aarhus Convention. It is a flexible procedure enabling an appropriate intensity of review (in the present case, a close scrutiny).

50. Finally, none of the authorities relied on by Miss Rose (to which I shall come) compelled a different approach.

51. Mr Swift supports the reasoning of Davis LJ. He adds that the issue of a certificate is subject to the strict limits prescribed by section 53(2) and (4). The existence of these limits and the protection afforded by judicial review ensures that the requirements of article 6(2) of the Directive are satisfied.

Conclusion on the third issue

52. In my view, section 53(2), unless read in the way contended for by Miss Rose (see para 47 above) is incompatible with article 6(2) and (3) of the Directive in so far as the information which is the subject of a decision notice is environmental information. The natural and ordinary meaning of article 6(2) and (3) is clear. It requires that an applicant has access to a review by a court of law or another independent and impartial body established by law in which (i) the acts or omissions of the "public authority concerned" can be reviewed and (ii) the decisions of the court or other body may become "final" and "binding". The "public authority concerned" is the authority which is considered not to have dealt with the request for information in accordance with the provisions of articles 3, 4 or 5. On the facts of the present case, the public

authorities concerned are the Departments which refused disclosure to Mr Evans. The right of appeal to a tribunal accorded by section 57 of the FOIA and regulation 18 of the EIR is a paradigm example of the proper implementation of article 6(2). That is not in dispute.

53. But Mr Swift submits that, despite the natural and ordinary meaning of article 6(2) and (3), the Directive contemplates that the decision of such a court or independent and impartial body may cease to be final and binding if a third party (the accountable person) issues a certificate which purports to have that effect. The argument is that, where a certificate is issued, the right to a review of the acts or omissions of the public authority concerned is satisfied by a right of judicial review of the certificate. The decision of the court on a judicial review will be "final" and it will also be "binding" on the public authority holding the information. In this way, it is said that in substance, although not in form, the requirements of article 6(2) and (3) are satisfied. This is because, in reality, any judicial review of the certificate of the accountable person will inevitably entail a review of the decision of the public authority concerned.

54. In my view, there are three reasons why the existence of the right to seek judicial review of a section 53(2) certificate is not sufficient to meet the requirements of article 6(2).

55. First, I do not accept that the right to a judicial review of a section 53(2) certificate involves a departure from article 6(2) and (3) which can be characterised as merely a matter of form. A judicial review of the certificate of an accountable person is substantively different from a review by a court or other independent body of the acts or omissions of "the public body concerned". The focus of the two reviews is different. It is true that, in a judicial review of a section 53(2) certificate, the underlying decision of the public authority concerned will necessarily be scrutinised. But the direct and central question on a judicial review is not whether the public authority concerned failed to act in accordance with its FOIA/EIR duties. Rather, it is whether the accountable person had reasonable grounds for forming the opinion that the public authority had not failed so to act. On a judicial review, the court may conclude that the accountable person had reasonable grounds for forming such an opinion although it would itself have decided the issue differently. That difference is not a mere matter of form. The difference is particularly significant where article 6(2) is implemented domestically by a review process which provides a full merits appeal by an independent and impartial tribunal (as has been done by sections 57 and 58 of the FOIA and regulation 18 of the EIR). In short, for the purposes of article 6(2), the focus of a judicial review of a section 53(2) certificate is on the wrong decision.

56. Secondly, where a Member State provides a procedure in accordance with article 6(2), it is incompatible with article 6(3) for that state to confer on the executive a right to override a decision that is made in accordance with that procedure. Such a right would necessarily mean that the decision was not final and binding. It is no answer to say that the executive veto is itself subject to judicial review and the decision of a court on such a review is final and binding. First, there may be no judicial review

challenge. In that event, there can be no doubt that the decision of the tribunal ceases to be final and binding. Secondly, a judicial review challenge may be dismissed, possibly for procedural reasons without any consideration by the court of the underlying merits. In that event too, the decision of the tribunal ceases to be final and binding. It is only if a judicial review challenge succeeds and the certificate is quashed that the final and binding effect of the tribunal's decision will be restored. It is true that the decision of the court in judicial review proceedings is final and binding as between the parties to those proceedings and as to the issue raised in those proceedings, ie the lawfulness of the certificate. But that cannot satisfy the requirements of article 6(2) and (3) because (i) the focus of the proceedings is the wrong decision (see above) and (ii) the decision of the court is not binding on the "public bodies concerned" (in this case, the Departments), since they are not parties to the proceedings.

57. Thirdly, anyone whose EU law rights are violated has the right to an effective remedy before a tribunal which complies with the requirements of article 47 of the Charter. By article 52, the scope of that right is equivalent to the right of access to a court under article 6 of the European Convention on Human Rights. I have referred above to Miss Rose's submission that section 53(2) violates (i) the right of access to a court or tribunal which can give decisions binding on all parties; (ii) the right to legal certainty and the finality of judgments; and (iii) the right to a fair hearing including the right to equality of arms.

58. As regards the right of access to a court or tribunal which can give decisions binding on all parties, including the Government, Miss Rose relies on *Van der Hurk v The Netherlands* (1994) 18 EHRR 481. In that case, a statutory provision allowed the Government to decide that judgments of the Tribunal should not be implemented. The ECtHR said (para 45) that the power:

> "to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a 'tribunal, as is confirmed by the word 'determination' ("*qui decidera"*). This power can also be seen as a component of the 'independence' required by Article 6(1)".

59. But as Mr Swift points out, it seems from paras 51 to 53 that, if the applicant had been able to seek a review of the Government's decision in the domestic courts that afforded all the guarantees required by article 6 of the Convention, the complaint would have been rejected. For these reasons, I do not consider that this decision is of assistance.

60. As regards the right to legal certainty and finality of judgments, Miss Rose also relies on two Russian decisions of the ECtHR: *Ryabykh v Russia* (2005) 40 EHRR and *Borshchevskiy v Russia* (App no 14853/03.) In *Ryabykh,* a court had given judgment in the applicant's favour. The judgment was the subject of a "supervisory review" by the Presidium of the Belogrod Regional Court who set it aside. The applicant had not

been informed of the review proceedings. Her claim that her rights under article 6 of the Convention had been violated was upheld. The ECtHR said (para 51) that one of the fundamental aspects of the rule of law is the "principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question". Legal certainty presupposes respect for the principle of finality of judgments: "the mere possibility of two views on the subject is not a ground for re-examination" (para 52). The court also said that the right of a litigant to a determination by a court would be illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official (para 56). By using the supervisory review procedure to set aside the judgment, the Presidium of the Regional Court infringed the principle of legal certainty and the applicant's "right to a court" under article 6(1) of the Convention (para 57). Miss Rose submits that the present case is *a fortiori* since section 53(2) permits a member of the executive to quash a court decision without even the intervention of the court.

61. The same approach was applied in *Borshchevskiy*.

62. Mr Swift submits that these two Russian cases are concerned with entirely different circumstances. Under "supervisory review", it was possible for a judgment in one court to be set aside and remade by another court on application by a state official, without the claimant even having notice of the fact. This was contrary to the principle of *res judicata*. The situation here is not analogous. A section 53(2) certificate renders a decision notice ineffective; it does not set aside a court judgment, or call into question a court ruling. It is subject to safeguards contained within the FOIA itself and is reviewable on judicial review.

63. I consider that the Russian cases cannot be so easily put to one side. I can see no difference *in principle* between rendering a court decision ineffective and setting it aside. In each case, the result is that the court decision is of no effect and cannot be relied on. The principle of legal certainty (an important aspect of the rule of law) requires that a court decision (including any decision on appeal by a higher court) is final and binding. That principle can be infringed by the act of an official or by another court (other than on appeal). In my view, the fact that the section 53(2) power is subject to safeguards and is subject to judicial review is not a material ground for distinguishing these cases.

64. As regards the right to equality of arms, Miss Rose relies in particular on *Stran Greek Refineries v Greece* (1994) 19 EHRR 293. In this case, an arbitration award in favour of the applicants was challenged by the Greek State. While the proceedings were pending, an act was passed which rendered the award invalid and unenforceable. The ECtHR held that the right to a fair hearing included the right to equality of arms, in the sense of a fair balance between the parties. In litigation involving a dispute between opposing private interests, the equality of arms implies that each party must be afforded a reasonable opportunity to present his case—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (para 46). The principle of the rule of law and the notion of fair trial enshrined in article 6 preclude

any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute. Miss Rose submits that this principle applies *a fortiori* to any interference by the executive.

65. Mr Swift responds that no principle of equality of arms is infringed here. The court on judicial review operates equally as between the claimant and defendant. There is no analogy between the present case and *Stran.* That was a case where the Greek Parliament passed a statute in the middle of the case, designed specifically to ensure that the final outcome of the case favoured the Government.

66. I acknowledge that the analogy between *Stran* and the present case is far from exact. For example, the fact that judicial review is available and the section 53(2) power is subject to certain safeguards does provide a complainant with more protection than was available to the applicants in *Stran.* But these differences do not provide a complete answer to the lack of equality of arms point. A tribunal decision can be set at nought by an accountable person provided only that he has on reasonable grounds formed the opinion that there was no failure falling within section 53(1)(b). There is, of course, no corresponding right in a person who has requested information to set aside a tribunal decision that is adverse to him if he has on reasonable grounds formed the opinion that there *has* been a failure to comply with section 1(1)(a) or (b) of the FOIA.

67. For these reasons, I would hold that the certificate is incompatible with EU law in so far as the information to which it relates is environmental information.

Nature of the review required by article 6(2)

68. We heard a good deal of argument on the question whether article 6(2) requires a full reconsideration of the merits by the court *de novo* or whether some form of judicial review is sufficient. I have reached a decision on the third issue without addressing this question. In deference to the submissions of counsel, however, it is right that I should say something about it. Miss Rose relies on the statement of Sullivan LJ in *Birkett* (see para 42 above) and submits that article 6(2) requires the court to consider *de novo* for itself the propriety of releasing the information. Mr Swift submits that this statement by Sullivan LJ was *obiter dictum* and should not be followed. In my view, the statement by Sullivan LJ formed an essential part of his reasoning. The issue in that case was whether, when a public authority had initially relied on one exception when refusing to release environmental information under the EIR, it was able to rely on a different exception in proceedings before the Commissioner and/or on appeal to the tribunal. In order to resolve this issue, the court was, therefore, required to decide what nature of review was required by article 6(2). The point that Sullivan LJ was making was that, *because* the article 6(2) stage involves a *de novo* consideration, it can be expected to reveal errors in the initial decisions and it would be surprising if those errors could not be corrected.

69. Mr Swift says that we should prefer the approach of Beatson LJ in *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114. This case involved a different directive (the "EIA Directive") which concerned Environmental Impact Assessments and which contained provisions derived from the Aarhus Convention. Beatson LJ (with whom the other members of the court agreed) decided that orthodox *Wednesbury* review is compatible with the requirements of the "access to justice" provisions in the EIA Directive. But since (i) the case involves a different directive and (ii) the statement of Sullivan LJ is binding on us, I shall not lengthen this judgment by elaborating on the differences between the two directives to which Miss Rose drew our attention.

70. Miss Rose also relies on *Hospital Ingenieure Krankenhaustechnik Planungs-GMBH (HI) v Stadt Wien* [2004] 3 CMLR 16 in support of her submission that article 6(2) requires a full merits review. In that case, the CJEU held that national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender for a public service contract to mere examination of whether the decision was arbitrary was not compatible with Directives 89/665 and 92/50. Having regard to the aim of strengthening remedies pursued by Directive 89/665, the scope of the judicial review contemplated by the directive could not be interpreted "restrictively". The national courts must be able to check the compatibility of a decision to withdraw an invitation to tender with the relevant rules of Community law. Thus, the scope of judicial review required by the directive was influenced by the policy that the directive sought to implement.

71. Miss Rose seeks to apply that approach here. She draws attention to (i) the importance of access to justice which is emphasised by article 9 of the Aarhus Convention; (ii) the fact that the fifth recital to the Directive states that provisions of Community law must be consistent with the Aarhus Convention; and (iii) the need to interpret article 6 of the Directive consistently with, and so as to promote the policy objectives of, the Aarhus Convention. She submits that these factors point in favour of a full merits court review under article 6(2) of an article 6(1) decision. She also relies on the Implementation Guide to the Aarhus Convention in support of this submission.

72. On the other hand, Mr Swift relies on *Sison v Council of European Union* C-266/07 [2007] 2 CMLR 17. In that case, the Council refused to grant the applicant access to certain documents on the grounds that to do so would undermine public security. It invoked article 4(1)(a) of Regulation 1049/2001. At para 32 of its judgment, the CJEU said that the scope of the review of legality incumbent on Community courts varied according to the matters in issue. At para 33, it said:

> "With regard to judicial review of compliance with the principle of proportionality, the court has thus said that the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments."

And at para 34:

> "The Court of First Instance also correctly held….that the Community Court's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers."

73. If I had considered that it was necessary to decide what kind of review is required by article 6(2), I would have been inclined to hold that it was not *acte clair* and to make a reference to the CJEU. It seems to me that it is not clear that in relation to article 6(2) the approach of Sullivan LJ in *Birkett* is to be preferred to that of Beatson LJ in *Evans*. The policy imperatives of the Aarhus Convention and the Directive are clear enough in broad terms. The difficult question is whether a *Wednesbury* review is sufficiently flexible to meet the requirements of article 6(2).

Does the unlawfulness of in the Attorney-General's certificate in relation to environmental information taint the entire certificate?

74. Precisely how much of the advocacy correspondence is "environmental" for the purposes of the EIR is not known to Mr Evans or to this court. This is a matter which was dealt with by the UT in closed session. But it is common ground that significant parts of the correspondence consisted of environmental information.

75. Miss Rose submits that the entire certificate is tainted by the illegality which relates to the environmental information. Her argument proceeds as follows. When considering the public interest detriment which could flow from disclosure of the information, it was relevant for the Attorney General to consider whether information of essentially the same character was already in the public domain or would enter the public domain contemporaneously with the proposed disclosure. For example, he had to consider to what extent any interference with The Prince of Wales's preparation for kingship would arise in any event from disclosure of the environmental information and to consider whether any additional interference caused by releasing the remainder of the information would be sufficiently significant to outweigh the public interest in disclosure in those circumstances. Thus, his approach to the environmental information contained an error of law which led him to approach the other information on a mistaken basis and/or led him to fail to take into account a relevant consideration. Accordingly, the entirety of the section 53(2) decision should be quashed.

76. Davis LJ rejected this argument (para 139). He said that the Attorney General's Statement of Reasons gives consideration to the request for environmental information "further to and separately from that given to non-environmental information".

77. At paras 6 to 12 of the Statement of Reasons, the Attorney General set out the public interests against disclosure of the entirety of the withheld information and in maintaining the exemptions (ie drawing no distinction between environmental and non-environmental information). At paras 13 to 15, he set out the public interests in favour of disclosure of the entirety of the information (again without drawing the distinction). He then said:

> "16. I take the view that, for the reasons I have set out above, the public interests in non-disclosure of the disputed information in this case substantially outweigh the public interests in its disclosure.
>
> 17. In those circumstances, I conclude that all the non-environmental information in the correspondence falls within the exemption in section 37(1) of the Act for information relating to members of the Royal Family (as it applies to requests made prior to 19 January 2011); and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
>
> 18. I also conclude (to the extent necessary) that the non-environmental information in the correspondence is exempt from disclosure under the absolute exemptions in sections 40 and 41 of the Act. In particular:
>
> (1) The information is personal data relating to The Prince of Wales for the purposes of section 40 of the Act. Its disclosure would breach data protection principles, because it would be unwarranted by reason of prejudice to The Prince of Wales's rights, freedoms and legitimate interests, for the same reasons I have set out above. In those circumstances, the information is exempt from disclosure under section 40; and
>
> (2) The information consists of confidential information obtained from The Prince of Wales. The disclosure of the information otherwise than under the Act would constitute an actionable breach of confidence, because against the public interests I have outlined above, there would be no public interest defence to such an action. Accordingly, the information also falls within the absolute exemption for confidential information in section 41 of the Act.
>
> 19. For the same reasons, I have concluded that the environmental information within the disputed correspondence is exempt from disclosure under regulation 12(5)(f) and regulation 13 EIR:
>
> (1) Disclosure of the information would adversely affect the interests of its provider (The Prince of Wales) for the purposes of regulation 12(5)(f); the information satisfies the

other conditions in the regulation; and the public interest is in favour of maintaining the exemption; and

(2) The information is exempt from disclosure under regulation 13 EIR (personal data) for the same reasons that non-environmental information within the correspondence is exempt from disclosure under section 40 of the Act."

78. It will be seen from this passage that he first dealt with all the non-environmental information. He then dealt separately with the environmental information. He gave the same reasons for his conclusion in relation to both classes of information, but he considered them sequentially and separately. He did not, however, explicitly address the question of how the competing public interests should be weighed in relation to the non-environmental information *if it was necessary to disclose the environmental information in any event.* If the environmental information was to be disclosed in any event, that would be a material factor to be taken into account in deciding whether it was in the public interest to disclose the non-environmental information. I did not understand Mr Swift to contest this. *Prima facie,* the case for non-disclosure of the non-environmental information would be weaker if the environmental information was to be disclosed than if it was not.

79. I am not persuaded that the Statement of Reasons given by the Attorney General shows that he took this point into account when he issued his certificate. It is clear that he recognised that the distinction between environmental and non-environmental information was of some relevance. That is why he dealt with them separately, although he did not explain why he did so. But there is nothing in the Statement of Reasons to indicate that he was of the opinion that the non-environmental information should be withheld even if the environmental information was to be disclosed. Still less has he explained why he was of that opinion (if indeed he was). The Attorney General could have dealt with this point in a statement, but he has chosen not to do so.

80. In these circumstances, I consider that the submission of Miss Rose is well founded. It is not a sufficient answer to point to the fact that the Attorney General dealt separately with the non-environmental and environmental information. This mere fact does not demonstrate that he had considered how to strike the public interest balance in relation to the non-environmental information even if (contrary to his preference) the environmental information was to be disclosed.

Overall conclusion

81. For the reasons that I have given, the section 53(2) certificate must be quashed. The Attorney-General did not have reasonable grounds for forming the opinion on which the certificate was based. The mere fact that he reached a different conclusion from the UT in weighing the competing public interests involved was not enough. He had no good reason for overriding the meticulous decision of the UT reached after six days of hearing and argument. He could point to no error of law or fact in the UT's

decision and the Government Departments concerned did not even seek permission to appeal it. The certificate is also unlawful because it is incompatible with EU law.

Lord Justice Richards:

82. I agree.

Lord Justice Pitchford:

83. I also agree.