



**Hilary Term**

**[2015] UKSC 21**

On appeal from: [2014] EWCA Civ 254

**JUDGMENT**

**R (on the application of Evans) and another ( Respondents ) v Attorney General ( Appellant )**

**before**

**Lord Neuberger, President**

**Lady Hale, Deputy President**

**Lord Mance**

**Lord Kerr**

**Lord Wilson**

**Lord Reed**

**Lord Hughes**

**JUDGMENT GIVEN ON**

**26 March 2015**

**Heard on 24 and 25 November 2014**

Appellant  
James Eadie QC  
Karen Steyn QC  
Josh Holmes  
(Instructed by Treasury  
Solicitor)

Respondent (1)  
Dinah Rose QC  
Ben Jaffey  
Aidan Eardley  
(Instructed by Jan Clements, Editorial Legal Services, Guardian  
News & Media Ltd)

Respondent  
Timothy Pitt-  
QC  
(Instructed by  
Informati  
Commissio  
Interven  
(Campaign

**LORD NEUBERGER: (with whom Lord Kerr and Lord Reed agree)**

Introductory

1.

This is an appeal brought by HM Attorney General against the decision of the Court of Appeal quashing a certificate which he issued on 16 October 2012 pursuant to section 53(2) of the Freedom of Information Act 2000 (“the FOIA 2000”) and regulation 18(6) of the Environmental Information Regulations 2004 (“EIR 2004”). The underlying question in this appeal is whether communications passing between HRH The Prince of Wales and ministers in various government departments (“the Departments”) between September 2004 and March 2005 (which I shall call “the letters”) should be disclosed pursuant to a request made by Rob Evans, a journalist who works on the Guardian newspaper. The effect of the Attorney General’s certificate (“the Certificate”) would be to prevent such disclosure, but the effect of the Court of Appeal’s decision would be to permit such disclosure.

2.

It is worth explaining at the outset of this judgment that, if valid, the effect of the Certificate would be to override a decision of the Upper Tribunal, which is a judicial body and which has the same status as the High Court. The first argument raised by Mr Evans is that the statutory provision giving the Attorney General, a member of the executive, the power to overrule a judicial decision should, as a matter of constitutional principle, be interpreted restrictively, and that the Certificate is therefore invalid. His second argument is that, at least so far as the Certificate applies to “environmental information”, it is invalid, as the provisions of an EU Directive prevent a decision of a judicial tribunal ordering disclosure of such information being overridden by a member of the executive.

The background facts and law

The procedural history in summary

3.

The procedural history is unusual, but it can be briefly summarised. Mr Evans requested disclosure of the letters from the Departments, pursuant to both the FOIA 2000 and the EIR 2004, in April 2005. After initially refusing to state whether or not they had any of the letters, the Departments in due course admitted that they did, but refused to disclose them on the ground that they considered the letters were exempt from disclosure under sections 37, 40 and/or 41 of the FOIA 2000 and the equivalent provisions of the EIR 2004. Mr Evans complained to the Information Commissioner (“the Commissioner”), who upheld the Departments’ refusal in reasoned determinations promulgated in December 2009. Mr Evans then appealed to the tribunal, and the matter was transferred to the Upper Tribunal (Walker J, UT Judge Angel and Ms Cosgrave) (“the UT”), who conducted a full hearing, with six days of evidence and argument. The UT issued their determination on 18 September 2012, and it was to the effect that many of the letters, which they referred to as “advocacy correspondence”, should be disclosed – [2012] UKUT 313 (AAC).

4.

The Departments did not appeal against this determination. However, on 16 October 2012, the Attorney General issued the Certificate stating that he had, on reasonable grounds, formed the opinion that the Departments had been entitled to refuse disclosure of the letters, and set out his reasoning.

5.

Mr Evans then issued proceedings to quash the Certificate, on two grounds, namely (i) the reasons given by the Attorney General were not capable of constituting “reasonable grounds” within the meaning of section 53(2) of the FOIA 2000, and/or (ii) because the advocacy correspondence was concerned with environmental issues, the Certificate was incompatible with Council Directive 2003/4/EC (“the 2003 Directive”) and/or article 47 of the EU Charter of Fundamental Rights (“the EU Charter”). The Divisional Court (Lord Judge CJ, Davis LJ and Globe J) dismissed his claim – [\[2013\] EWHC 1960 \(Admin\)](#), [\[2014\] QB 855](#). However, the Court of Appeal (Lord Dyson MR and Richards and Pitchford LJJ) allowed his appeal on both grounds ([\[2014\] EWCA Civ 254](#); [\[2014\] QB 855](#)), and, unusually but rightly, gave the Attorney General permission to appeal to this court.

6.

The position in practice is as follows. If the Attorney General’s appeal to this court fails on the first ground, then all the advocacy correspondence would have to be disclosed, and the second ground would be moot. If the Attorney General’s appeal on the first and second grounds both succeed, then the Certificate would stand and none of the advocacy correspondence would have to be disclosed. If the Attorney General’s appeal succeeds on the first ground but fails on the second ground, then to the extent that the advocacy correspondence contains environmental information, it would have to be disclosed, but there is a dispute as to whether that would also apply to the other information in the advocacy correspondence (“the non-environmental information”). There is also an argument as to the extent to which the advocacy correspondence contains environmental information, but that is not before us, and therefore the meaning of “environmental information” does not have to be considered on this appeal.

7.

Before explaining the legislative and procedural background and then turning to the issues, it is, I think, right to mention that the points which this court has to decide involve determining issues of legal principle. Accordingly, like the Divisional Court and the Court of Appeal, we have not seen the letters, and our only knowledge of their contents is based on what the Commissioner and the UT considered it appropriate to reveal in their reasoned determinations (as I have called them in order to avoid any confusion with a “decision notice”, which is a defined term in the FOIA 2000, as explained below). Unlike us, they had the function of deciding whether the letters should be disclosed on “the merits”, ie in the light of all the relevant facts and competing public interests for and against disclosure, and that required them to consider the content of the letters.

The Freedom of Information Act 2000

8.

Part I of the FOIA 2000 is concerned with “Access to Information Held by Public Authorities”. Section 1(1) states that:

“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.”

9.

Section 2 explains that this right is subject to the exemptions set out in Part II, and that some of the exemptions are absolute, which is self-explanatory, while others are “qualified”, which means that 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”. Sections 3-7 are concerned with identifying what is a “public authority”, and sections 8-17 deal with the procedures (including time limits and fees) for making and answering requests for information. Section 17(1) requires any notice of refusal to “specify” both the exemption relied on, and “(if that would not otherwise be apparent) why the exemption applies”. Section 18 creates the post of Information Commissioner.

10.

As stated in section 2, Part II deals with “Exempt Information”. Sections 37, 40 and 41 are directly in point for present purposes. Section 37 provides for an exemption in relation to communications with the Sovereign, other members of the Royal Family or the Royal Household. Until January 2011, this was a qualified exemption, but, as a result of an amendment to the FOIA 2000 by section 46 of, and Schedule 7 to, the Constitutional Reform and Governance Act 2010, the exemption in section 37 is now absolute in relation to communications with the Sovereign, the heir to the throne, and the next in line. It is common ground that the original, qualified, version of section 37 is applicable in the present case.

11.

Section 40 of the FOIA 2000 (“section 40”) contains an absolute exemption in relation to “personal information”, subject to the data protection principles set out in the Data Protection Act 1998. Section 41 of the FOIA 2000 (“section 41”) exempts information which, if disclosed, “would constitute an actionable breach of confidence”. Although that is an absolute exemption, public interest in disclosure is normally a defence to a claim for breach of confidence, and it appears to be accepted that it could, in principle, operate as an effective answer to reliance on section 41. It is also right to refer to section 35(1), which exempts “[i]nformation held by a government department if it relates to” certain issues, and they include “(a) the formulation or development of government policy” or “(b) Ministerial communications”, which, by section 35(5) would extend to “any communications ... between Ministers of the Crown”.

12.

Part III of the FOIA 2000 deals with the “General Functions of Lord Chancellor and Information Commissioner”. The Commissioner’s general functions are set out in section 47, and they include promoting, disseminating, teaching, and assessing good practice in connection with the provision of information to the public by public authorities.

13.

Part IV of the FOIA 2000 is concerned with “Enforcement”. It starts with section 50 (“section 50”), which provides that an applicant, ie a person who has made an application for information under section 1(1), may apply to the Commissioner for a determination whether “a request for information made ... to a public authority has been dealt with in accordance with the requirements of Part I”. If that happens, then, by virtue of section 51, the Commissioner can require the public authority to

provide him with information by serving an “information notice” on it. Once the Commissioner has considered a section 50 application and concluded that a public authority has wrongly failed (i) to confirm or deny that it has information as required by section 1(1)(a), (ii) to communicate information, as required by section 1(1)(b), or (iii) to comply with another obligation under Part I of the FOIA 2000, section 50(4) requires him to issue a “decision notice” specifying what the authority must do to rectify the failure. Section 50 is stated by subsection (7) to be subject to section 53.

14.

In addition to that specific power, section 52 states that, if the Commissioner is satisfied that a public authority has failed to comply with any obligation under Part I of the FOIA 2000, he can serve it with an “enforcement notice” requiring it to comply.

15.

Under subsection (1) of section 57 (“section 57”), either the applicant or the public authority can appeal to the tribunal against a decision notice, and a public authority is given the right to appeal against an information notice or enforcement notice under section 57(2). Subsection (1) of section 58 (“section 58”) provides that, if, on an appeal under section 57, 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”, they shall allow the appeal or substitute such other notice as could have been served by the Commissioner. Section 58(2) specifically provides that, on such an appeal, the tribunal may “review any finding of fact on which the notice in question was based”.

16.

Such appeals are usually heard by the First-tier Tribunal with a right of appeal to the Upper Tribunal, but only where there is claimed to be an error of law in the determination of the First-tier Tribunal – see section 11 of the Tribunals, Courts and Enforcement Act 2007. However, an appeal from the Commissioner under section 57 can be referred direct to the Upper Tribunal, as happened in this case. The Upper Tribunal is an independent court, which is both an expert tribunal and a superior court of record, effectively with the same status as the High Court of Justice – see section 3(5) of the 2007 Act. In general, there is a right of appeal on a point of law, subject to permission, from the Upper Tribunal to the Court of Appeal – see section 13 of the 2007 Act.

17.

Section 53 of the FOIA 2000 (“section 53”) is of central relevance to the first issue on this appeal. It confers a power on an “accountable person” to override a decision notice or an enforcement notice served under the FOIA 2000 on, inter alia, any government department. Section 53(2) provides that such 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 signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure [to comply with section 1(1)(a) or (b)].”

18.

The “effective date” is defined in section 53(4) as the day on which (a) the notice was given to a public authority or (b) “an appeal under section 57 ... is determined or withdrawn”. The “accountable person” is defined in section 53(8), and, for present purposes, it is a Cabinet Minister or the Attorney General. Under section 53(6), the reasonable grounds have to be communicated to the applicant, not necessarily at the same time as the certificate, but “as soon as reasonably practicable”, and the

communication does not have to include “exempt information” – section 53(7). Any section 53 notice has to be laid before Parliament “as soon as practicable [after it is issued]”, by virtue of section 53(3).

19.

Two points are worth making about the section 53 power to certify (or veto, as it is sometimes referred to). Both points are mentioned in the Ministry of Justice’s publication Statement of HMG Policy: Use of the executive override under the [FOIA 2000] in relation to ministerial communications. Although the Statement of HMG Policy is therefore concerned with the section 35 exemption rather than the section 37 exemption (see paras 10 and 11 above), it is of relevance in relation to the Certificate in the present case.

20.

First, as was acknowledged in the Certificate, the Government’s view is that “the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet”. This reflects a ministerial assurance given to the House of Commons during the passage of the Bill which became the FOIA 2000. Secondly, it is appropriate to identify the reason for the inclusion of the Attorney General in section 53(8), and indeed the reason that the Certificate was issued by the Attorney General in this case. Normally, a section 53 certificate would be issued by the Secretary of State for the relevant Department. However, where (as here) the information concerned is contained in documents which were created or sent under a previous administration, there is a well-established convention that “on papers of a previous administration only the Attorney General will have access to the information being considered” (to quote from the Statement of HMG Policy). So in this case, before he issued the Certificate, the Attorney General saw the letters and discussed them with those who were the relevant ministers at the time.

Council Directive 2003/4/EC

21.

According to recital (5), the purpose of the 2003 Directive is to provide public access to environmental information and to ensure that provisions of Community law are consistent with the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention”).

22.

The Aarhus Convention, through article 4(1), requires each signatory state to ensure that “public authorities” are obliged to comply with any “request for environmental information” by “mak[ing] such information available to the public, within the framework of national legislation”. Article 9(1) of the Aarhus Convention requires that a person who considers that a request has not been “dealt with in accordance with” article 4 should be able to invoke a “review procedure before a court of law or other independent and impartial body”, and that “[f]inal decisions” of that body should be “binding on the public authority holding the information”.

23.

Article 3 of the 2003 Directive provides that member states shall ensure that public authorities are required to make available environmental information held by them. Article 3.1 is in these terms:

“Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.”

24.

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 5 is concerned with charges.

25.

Article 6 of the 2003 Directive (“article 6”) is of central importance to the second issue on 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 Environmental Information Regulations 2004 (SI 2004/3391)

26.

The EIR 2004 are intended to give effect to the United Kingdom’s obligation to implement the 2003 Directive. Regulation 5 of the EIR 2004 provides that a public authority that holds environmental information shall make it available on request. Regulations 12 and 13 of the EIR 2004 contain exceptions to this general duty which correspond with article 4 of the Directive, and which for present purposes can be treated as closely mirroring the exceptions in sections 37, 40 and 41.

27.

Regulation 18 of the EIR 2004 provides that, with certain modifications, including enforcement and appeals, the provisions of the FOIA 2000 shall apply for the purposes of the EIR 2004. In particular, regulation 18(6) provides that section 53 applies to a decision notice or enforcement notice served under Part IV of the FOIA as applied to the EIR 2004 on any of the public authorities referred to in section 53(1)(a). Regulation 18 also provides that in section 53(7) for the reference to “exempt information” there should be substituted a reference to “information which may be refused under these Regulations”.

The EU Charter

28.

Turning now to the EU Charter, 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 ....”

29.

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 determination of the Commissioner

30.

The proceedings before the Commissioner were protracted, and, after exchanges of written submissions and evidence, he issued his determinations in December 2009. The determination concerning the letters held by the Cabinet Office ran to 192 paragraphs plus annexes, and Davis LJ in the Divisional Court rightly described it as “thorough and carefully reasoned”. As an initial point, the Commissioner decided that some of the contents of the letters constituted “environmental information” within the meaning of the 2003 Directive and the EIR 2004 (and, as explained above, that is not in dispute).

31.

He next addressed the arguments as to whether or not he should direct the Departments to disclose any or all of the letters under the FOIA 2000. He first decided that, in so far as the letters included confidential information, disclosure should not be ordered because a public interest defence would, in his view, not be available if the confidential information was published. In considering this aspect, he effectively took sections 40 and 41 together, and reached his conclusion partly because of the “weighty public interest in maintaining confidences”, and partly because of the “specific arguments relevant in this case in relation to the Prince of Wales”, which he went on to consider in relation to the section 37 exemption.

32.

The Commissioner then turned to the arguments relating to section 37, and said at para 129 that he considered that there were four reasons justifying non-disclosure, namely (i) protecting the “tripartite convention”, namely the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government, (ii) protecting the “education convention” that the Heir to the Throne should be instructed in the business of government in preparation for when he is King, (iii) preserving the political neutrality of the Royal Family, and (iv) protecting the privacy and dignity of the Royal Family. He noted that the Prince of Wales had approved the release of some communications with Government Ministers already.

33.

The Commissioner concluded that the four factors which he had identified in para 129 meant that, under the FOIA 2000, in so far as “the information ... falls within the scope of the [education] convention ... the public interest in maintaining the exemption is very strong” and justified non-disclosure. However, in so far as any information fell outside the [education] convention, the position was, he said, “more finely balanced”, but, even there “the public interest favours maintaining the exemption”. Finally, he held that the same conclusion applied to the environmental information essentially for the same reasons as he had given in relation to the FOIA 2000.



## The determination of the Upper Tribunal

34.

Mr Evans exercised his right to appeal under section 57, and his appeal was referred to the Upper Tribunal, which heard the appeal over six days. Again, the proceedings were rather protracted. The issues were the same as before the Commissioner, but there was substantially more evidence, and much of it was subject to cross-examination. The UT's determination ran to 65 pages and 251 paragraphs, and there were appended to it substantial annexes (both open and closed). Open Annex 3 ran to 109 pages and 297 paragraphs. As Lord Dyson said in the Court of Appeal, the determination is "a most impressive piece of work".

35.

The UT decided that Mr Evans was entitled to disclosure of the advocacy correspondence, which, as they explained, meant 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 this near the start of their determination:

"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."

36.

The UT then proceeded to explain why they had reached this conclusion. They considered in some considerable detail the evidence and arguments relating to the effect and relevance of the three constitutional conventions, the cardinal convention (whereby the monarch is normally expected to act in accordance with ministerial advice), the tripartite convention and the education convention. They pointed out that the Prince of Wales had "strongly held views" on a number of matters, including politically controversial issues and proposed legislation, that his communication of those views to government ministers was well known (not least because he, ministers and others had mentioned this

publicly), that he had a “self-perceived role” which was “representational” and involved expressing “views in danger of not being heard”, that some of the letters had been published, and that “a high degree of publicity” had not stopped his education about government or his correspondence with ministers. They then referred to the expert evidence on the three constitutional conventions. Contrary to the view of the Commissioner, they considered that, in the light of the expert evidence and argument, the education convention did not extend to charitable or personal matters.

37.

The UT then summarised the competing arguments in para 123 as follows (ignoring some numbering):

“Factors in favour of disclosure

Governmental accountability and transparency;

The increased understanding of the interaction between government and monarchy;

A public understanding of the influence, if any, of Prince Charles on matters of public policy;

A particular significance in the light of media stories focusing on Prince Charles's alleged inappropriate interference/lobbying;

Furthering the public debate regarding the constitutional role of the monarchy and, in particular, the heir to the throne; and

Informing the broader debate surrounding constitutional reform.

Factors against disclosure

Potential to undermine the operation of the education convention;

An inherent and weighty public interest in the maintenance of confidences;

Potential to undermine Prince Charles's perceived political neutrality;

Interference with Prince Charles's right to respect for private life under article 8; and

A resultant chilling effect on the frankness of communication between Prince Charles and government ministers.”

38.

The UT recorded that the parties differed as to the weight to be accorded to these factors, and then went on to discuss them in some detail. They observed that the Commissioner had given insufficient weight to the public interest, and had “overestimated the extent to which disclosure would undermine the [education] convention”. The UT expressed the view that the education convention would actually be assisted by “recognition that advocacy communications will generally be disclosable if requested”. The UT then carefully assessed and weighed the various factors which they had identified in para 123, and reached the conclusion that the advocacy correspondence should be disclosed. In very summary terms, the UT’s conclusion was that, in relation to section 37 the public interest outweighed the argument for the exemption, in relation to section 40 this meant that para 6(1) of Schedule 2 to the Data Protection Act applied, and in relation to section 41 the public interest prevented the disclosure being a breach of confidence. Further details of the UT’s reasoning is set out in Lord Mance’s judgment.

39.

In the course of the discussion the UT considered “the date at which the position must be tested”, and discussed this at paras 46-63 of their determination. At para 58, they stated that “the reference date cannot be later than 28 February 2006”, which was the latest date by which any of the Departments ought to have concluded their internal review of the decision to refuse Mr Evans’s request. However, the UT added that “later-occurring matters” could be taken into account “if they cast light on the circumstances at the reference date”.

The Attorney General’s certificate

40.

A few weeks later, the Attorney General issued the 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 was that any decision notice of the UT requiring the Departments to disclose the advocacy correspondence ceased to have effect. As the Court of Appeal pointed out, it may be that the Attorney General issued the Certificate prematurely (unsurprisingly in the light of the strict time limit in section 53(2)), because the UT had not formally issued a decision notice, although they had published their final determination. However, nothing hangs on that.

41.

The Certificate summarised the background and then, over more than five pages, explained why the Attorney General had decided to exercise his power under section 53(2). After accurately encapsulating the UT’s reasoning and conclusions, he set out the arguments for and against disclosure as he saw them.

42.

Against disclosure, he thought, was the important basis for the section 37 exemption, namely the three constitutional conventions and their particular significance in the context of the letters. The Attorney General explained that it was important that the Prince of Wales should be able to “engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments” as “such correspondence and dialogue will assist him in fulfilling his duties under the tripartite convention as King”. He went on to explain that “[d]iscussing matters of policy with Ministers, and urging views upon them, falls within the ambit of ‘advising’ or ‘warning’ about the Government’s actions”. He then said that if “such correspondence is to take place at all, it must be under conditions of confidentiality”. He added that the advocacy correspondence deserved protection from disclosure given that it was clearly conducted on a confidential basis. The Attorney General thought that the recent nature of the letters, and the fact that they revealed “deeply held personal views” which were often “particularly frank”, but not at all “improper”, militated against disclosure.

43.

He then turned to the argument for disclosure, which included “governmental accountability and transparency”, improving public understanding of government, and furthering public debate about the role of the monarch and the heir to the throne. However, he made it clear that, while these were “good generic arguments”, they could only succeed in the present instance “at the expense of the strong public interest arguments against disclosure”, and that he disagreed with the UT’s view that the Prince of Wales “was in no different position from any other lobbyist”.

44.

The Attorney General then said that in his view “the public interests in non-disclosure of the disputed information in this case substantially outweigh the public interests in its disclosure”. He then went on to say that the same conclusion applied to the environmental information as well as to the non-

environmental information. He also took the view that there would be a breach of the Prince of Wales's data protection rights if the advocacy correspondence was made public.

45.

The Attorney General then acknowledged that the section 53 power "should be exercised only in exceptional cases", but said that he was satisfied that "this is such an exceptional case", for reasons which he summarised as being the following:

" The fact that the information in question consisted of private and confidential letters between The Prince of Wales and Ministers.

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The fact that the request in this case was for recent correspondence.

- 

The fact that the letters in this case formed part of The Prince of Wales's preparation for kingship.

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The potential damage that disclosure would do to the principle of The Prince of Wales's political neutrality, which could seriously undermine the Prince's ability to fulfil his duties when he becomes King.

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The ability of the Monarch to engage with the Government of the day whatever its political colour, and maintain political neutrality as a cornerstone of the UK's constitutional framework."

Further details of the contents of the Certificate are set out in Lord Mance's judgment.

The instant judicial review proceedings

46.

Mr Evans sought judicial review of the Certificate, arguing that it was invalid on two grounds. First, in domestic law, he contended that section 53 did not permit a certificate to be issued simply because, on the same facts and arguments, the accountable person took a different view of the public interest from the Upper Tribunal when it came to the issue of disclosure. Secondly, in EU law, because the advocacy correspondence included environmental information, he contended that, once the UT had issued its determination, it was contrary to the provisions of article 6, supported by the EU Charter, for anyone, especially a member of the executive, to overrule that determination.

47.

The Divisional Court rejected both lines of argument in a judgment given by Davis LJ, with which Lord Judge CJ (who delivered a short concurring judgment) and Globe J agreed. They held that "reasonable grounds" in section 53(2) simply meant grounds which, when viewed on their own, were "cogent", and there was no reason to constrain the expression to exclude the accountable person from forming his own view simply because it differed from that of a court or tribunal. As to the EU law argument, the Divisional Court rejected the contention that invoking section 53 fell foul of the 2003 Directive or the EU Charter in a case where a court or tribunal had ruled that the information concerned should be disclosed. Mr Evans appealed to the Court of Appeal, and in a judgment given by Lord Dyson MR (with which Richards and Pitchford LJJ agreed) they allowed his appeal on both points. They also gave the Attorney General permission to appeal to this court.

48.

I turn then to the two arguments which are said on behalf of Mr Evans, and were held by the Court of Appeal, to undermine the Certificate.

The Certificate's validity under the FOIA 2000

Validity under the FOIA 2000: introductory

49.

The argument for the Attorney General under the FOIA 2000 proceeds as follows. First, section 53 clearly envisages that an "accountable person", ie the Attorney General or a Cabinet Minister, can override a decision notice ordering disclosure; secondly, it is clear, especially in the light of section 53(4)(b) (referring as it does to the power being exercised after any appeal has been determined) and section 58(1) (which enables the tribunal to confirm or issue a decision notice), that the power can be exercised even after a tribunal or any court has ordered disclosure; and, thirdly, while "reasonable grounds" for the certificate have to be given, it cannot be said that the Attorney General's grounds were unreasonable in this case, as (a) they reflected the views of the Commissioner, and (b) the UT acknowledged that there were "cogent arguments for non-disclosure".

50.

The only point of dispute to which this argument gives rise is at the third stage. Ms Rose QC, on behalf of Mr Evans, contends that, construed in its context (as of course it must be) the expression "reasonable grounds" does not permit the accountable person to issue a certificate simply because, on the basis of the same facts and issues as were before a judicial tribunal (particularly a court of record), he takes a different view from that which was taken by the UT in its determination. On this basis, she contends, once a judicial tribunal, or at any rate a court of record, has ruled on the question, there has to be something more than a mere different assessment on the part of the accountable person of where the balance falls before a certificate can be justified.

Validity under the FOIA 2000: the constitutional aspect

51.

When one considers the implications of section 53(2) in the context of a situation where a court, or indeed any judicial tribunal, has determined that information should be released, it is at once apparent that this argument has considerable force. A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.

52.

First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the

executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.

53.

In *M v Home Office* [1994] 1 AC 377, 395, Lord Templeman in characteristically colourful language criticised “the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [as] a proposition which would reverse the result of the Civil War”. The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive’s overruling can be judicially reviewed. Indeed, the notion of judicial review in such circumstances is a little quaint, as it can be said with some force that the rule of law would require a judge, almost as a matter of course, to quash the executive decision.

54.

The constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary lay behind the majority judgments in the famous case, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, where the House of Lords held that a statutory provision, which provided that any “determination by the commission” in question “shall not be called in question in any court of law”, did not prevent the court from deciding whether a purported decision of the commission was a nullity, on the ground that the commission had misconstrued a provision defining their jurisdiction. Lord Reid said at p 170D that if it had been intended “to prevent any inquiry [in all circumstances] I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law”. And see per Lord Diplock in *In re Racal Communications Ltd* [1981] AC 374, 383, where he held that there is a presumption that Parliament did not intend an administrative body to be the final arbiter on questions of law.

55.

This is scarcely a recent development. In *R v Cheltenham Commissioners* (1841) 1 QB 467, a statute provided that any decision of the Quarter Sessions as to the levying of certain rates was to be “final, binding, and conclusive to all intents and purposes whatsoever”, and that no order made in that connection “shall ... be removed or removable by certiorari, or any other writ or process whatsoever, ... ; any law or statute to the contrary thereof in anywise notwithstanding”. Despite this, Lord Denman CJ robustly stated at p 474 that

“[T]he clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed; and, here, I am clearly of opinion that justice has not been executed.”

56.

The importance of the right of citizens to seek judicial review of actions and decisions of the executive, and its consequences in terms of statutory interpretation, was concisely explained by Lady Hale in *Jackson v Her Majesty’s Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 159. She said that “[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear”. The same point had been made, albeit in more

general terms, by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131E-F, where he said:

“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document”

57.

At least equally in point is the proposition set out by Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 152, that:

“The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.”

In support of this proposition, Lord Reed cited two passages from the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539. At p 575, Lord Browne-Wilkinson said that

“A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

To much the same effect, Lord Steyn said at p 591 that “[u]nless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”.

58.

Accordingly, if section 53 is to have the remarkable effect argued for by Mr Eadie QC for the Attorney General, it must be “crystal clear” from the wording of the FOIA 2000, and cannot be justified merely by “general or ambiguous words”. In my view, section 53 falls far short of being “crystal clear” in saying that a member of the executive can override the decision of a court because he disagrees with it. The only reference to a court or tribunal in the section is in subsection (4)(b) which provides that the time for issuing a certificate is to be effectively extended where an appeal is brought under section 57. It is accepted in these proceedings that that provision, coupled with the way that the tribunal’s powers are expressed in sections 57 and 58, has the effect of extending the power to issue a section 53 certificate to a decision notice issued or confirmed by a tribunal or confirmed by an appellate court or tribunal. But that is a very long way away indeed from making it “crystal clear” that that power can be implemented so as to enable a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it.

59.

All this militates very strongly in favour of the view that where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the

public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view.

Validity under the FOIA 2000: previous authority

60.

There are three previous decisions of the Court of Appeal which bear on the question whether Parliament can have intended a member of the executive to be able freely to consider, or reconsider, for himself the very issues, on the same facts, which had been determined by another person or a tribunal. I agree with Lord Wilson that (quite apart from the fact that they are not binding on us) none of these decisions, or the reasoning which they contain, would be directly determinative of the instant appeal. However, they cast some light on the appropriate approach to be adopted in a case where two separate bodies are called on by statute to determine the same issue.

61.

In *R v Warwickshire County Council, Ex p Powergen plc* (1997) 96 LGR 617, it was held that a county council, as highway authority, was precluded from refusing to agree to access works to a proposed development on the ground that the access was unsafe, because that was a ground which a planning inspector, after a full enquiry, held that the district council (adopting the view of the county council) had not made out as a reason for refusing planning permission for the development. Simon Brown LJ stated at p 626 that “because of its independence and because of the process by which it is arrived at”, the inspector’s conclusion had become “the only properly tenable view on the issue of road safety”.

62.

In *R v Secretary of State for the Home Department, Ex p Danaei* [1998] INLR 124, an immigration adjudicator, after a hearing, had rejected the applicant’s asylum appeal, but accepted that he had left Iran because he had had an adulterous relationship; it was held that the applicant’s subsequent application for special leave to remain could not be rejected by the Home Secretary on the ground that he did not accept that the applicant had had such a relationship. Simon Brown LJ suggested that, unless “the adjudicator’s ... conclusion was ... demonstrably flawed” or “fresh material has since become available”, the Home Secretary had to accept the adjudicator’s finding.

63.

In *R (Bradley) v Secretary of State for Work and Pensions (Attorney General intervening)* [2009] QB 114, the Secretary of State was held to have wrongly rejected findings of maladministration made by the ombudsman. The ombudsman’s investigation had been carried out in private, as required by the relevant legislation, and she had adopted a full, albeit not adversarial, written procedure. Sir John Chadwick said at para 51 that the Secretary of State was not bound to follow the ombudsman’s view, but that “his decision to reject the ombudsman’s findings in favour of his own view” must not be “irrational having regard to the legislative intention which underlies the [relevant] Act”. At para 91, Sir John said that it was “not enough that [the Secretary of State] has reached his own view on rational grounds”, and that “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 [statutory] powers”. It seems to me that this involved setting a somewhat lower threshold for departing from the earlier decision than *Powergen* or *Danaei*.

64.



In Bradley, as in this case, the two decisions were provided for in the same statute as part of an overall procedure, whereas in Powergen the two decisions arose under different statutory codes – relating, respectively, to planning law and highways law. Danaei was something of a hybrid, as the two decisions were made under different statutes (the Asylum and Immigration Appeals Act 1993 and the Immigration Act 1971), but they were both part of the overall statutory asylum and immigration code, although not part of the same overall procedure. As in Bradley, it seems to me to follow from the fact that the two decisions in this case are provided for in the same statute and as part of a single procedure, that the second decision-maker, the accountable person, cannot always be obliged to follow the view of the first decision-maker, the Commissioner (or, on an appeal, the tribunal or the courts): otherwise there would be no point in providing for a second decision. However, that does not ultimately assist on the issue between the parties, namely the circumstances in which the accountable person is allowed to refuse to follow the earlier decision.

65.

As to that aspect, Mr Evans's case here is, at least in principle, significantly stronger than that of the successful applicant in the three Court of Appeal cases. The first decision (the equivalent of the Upper Tribunal's decision in this case) was reached after a hearing in Powergen and in Danaei and after a full investigation in Bradley. However, in none of those three cases was there a hearing before a judicial body, as in the present case. Even the inspector in Powergen and the adjudicator in Danaei were not judicial entities (as an immigration adjudicator was not at that time a member of the judiciary). Additionally, unlike the applicant in Powergen and in Danaei, Mr Evans had no opportunity to make submissions to the second decision-maker. I am unimpressed by the point that the accountable person under section 53 is in a stronger position than the Secretary of State in Bradley, because he has express statutory power to disagree with a certificate: it was inherent in the statutory provisions, indeed it was essential to the reasoning of the Court of Appeal, in Bradley that the Secretary of State could disagree with the decision of the ombudsman.

Validity under the FOIA 2000: provisional view

66.

Such comparisons with other cases can, however, only be of limited assistance: what is of more importance is to seek to identify the relevant principles. In Bradley at para 70, Sir John Chadwick did just that and suggested that there were five applicable propositions. At least for present purposes, I would reformulate and encapsulate those propositions in the following two sentences. In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (eg, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme.

67.

Although Sir John expressed his propositions so as to apply to "findings of fact", it seems to me that they must apply just as much to opinions or balancing exercises. The issue is much the same on an appeal or review, namely whether the tribunal was entitled to find a particular fact or to make a particular assessment. Anyway, it is clear from Powergen that an assessment as to whether an access

onto a highway would be safe fell within the scope of his propositions. Indeed, the ombudsman's decision in Bradley itself seems to me to have involved issues as to which she had to make assessments or judgements, such as whether the department concerned should have done more and whether some failures amounted to maladministration – see at para 27 of Sir John's judgment.

68.

In these circumstances, it appears to me that there is a very strong case for saying that the accountable person cannot justify issuing a section 53 certificate simply on the ground that, having considered the issue with the benefit of the same facts and arguments as the Upper Tribunal, he has reached a different conclusion from that of the Upper Tribunal on a section 57 appeal. I would summarise my reasons as follows.

69.

First, and most importantly, the two fundamental principles identified in para 52 above. Secondly, (i) the fact that the earlier conclusion was reached by a tribunal (a) whose decision could be appealed by the departments, (b) which had particular relevant expertise and experience, (c) which conducted a full hearing with witnesses who could be cross-examined, (d) which sat in public, and had full adversarial argument, and (e) whose members produced a closely reasoned decision, coupled with (ii) the fact that the later conclusion was reached by an individual who, while personally and ex officio deserving of the highest respect, (a) consulted people who had been involved on at least one side of the correspondence whose disclosure was sought, (b) received no argument on behalf of the person seeking disclosure, (c) received no fresh facts or evidence, and (d) simply took a different view from the tribunal.

70.

However, before one can fairly conclude that a section 53 certificate cannot be issued to override a decision of a court simply because the accountable person disagrees with the conclusion reached by the court on a section 57 appeal, it is necessary to address two questions. First and most obviously, if this constraint applies to the issue of a section 53 certificate after a determination by the Upper Tribunal, in what circumstances could such a certificate be issued once the Upper Tribunal (or an appellate court) has issued or approved a decision notice? Secondly, does the same constraint apply when there has been no appeal from the Commissioner, and, if so, how does the power to issue a certificate under section 53 interrelate with the right of appeal under section 57?

Validity under the FOIA 2000: implications of provisional view

71.

If section 53 does not entitle an accountable person to issue a certificate simply on the ground that he disagrees with the determination of a court to uphold, or issue, a decision notice, then, given that it is agreed that section 53 can be invoked once a court has reached such a determination, the question arises: on what grounds can it be issued in such circumstances? The specific examples mentioned by the Court of Appeal in answer to this question may be found in para 38 of Lord Dyson's judgment, and they are "a material change of circumstances since the tribunal decision or that the decision of the tribunal was demonstrably flawed in fact or in law" (cf what Simon Brown LJ said in *Danaei*, quoted in para 62 above).

72.

As to the first example, the likelihood of a material change in circumstances at first sight seems almost vanishingly slight, given the very short period of 20 days for the issue of the certificate under section 53(2). However, the position is rather more subtle than that point suggests. It is common

ground, in the light of the language of sections 50(1), 50(4) and 58(1), which all focus on the correctness of the original refusal by the public authority, that the Commissioner, and, on any appeal, any tribunal or court, have to assess the correctness of the public authority's refusal to disclose as at the date of that refusal. The same is true of the accountable person considering the issue of a certificate under section 53(2).

73.

However, although the question whether to uphold or overturn (under section 50 or sections 57 and 58) a refusal by a public authority must be determined as at the date of the original refusal, facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal – see Coppel on Information Rights 4th ed (2014), paras 28-022 and 28-024, and *Department for The Environment, Food and Rural Affairs v Information Comr (Birkett)* [2011] EWCA Civ 1606, [2012] PTSR 1299. Although Birkett was a decision on the 2003 Directive and EIR 2004, it seems clear that the reasoning of Sullivan LJ (summarised at para 21 of the decision) applies with equal force to the procedures under sections 50, 57 and 58. Given the language of section 53(2), when compared with that of section 50(4) and section 58(1), it seems to me that it must also apply to the accountable person when issuing a section 53 certificate.

74.

Therefore, before the Commissioner on a section 50 application, or before the tribunal on a section 57 appeal, it would often be open to the parties (as they did in this case) to rely on factual evidence, expert evidence, or assessments of possible risks, or even exemptions, which may not have been known to, or in the mind of, the person who was responsible for the original decision to refuse the section 1 request. However, it would not be open to the parties, or at least not nearly so easily open to them, to rely on such matters on an appeal from the First-tier Tribunal to the Upper Tribunal or from the Upper Tribunal to the Court of Appeal, which can only be brought on a point of law (see para 16 above).

75.

As already mentioned, at first sight, it would appear to be very unlikely that relevant new evidence or grounds, which would not have been available before the Commissioner on a section 50 application or before the First-tier Tribunal on a normal section 57 appeal, would be available to an accountable person considering issuing a section 53 certificate, given that it has to be issued within twenty days. However, it is by no means impossible that new evidence or grounds could come to the accountable person's attention after the submissions to, but before the determination of, the Commissioner or the tribunal. Or it could happen that the accountable person might rely on evidence or grounds which were excluded by the Commissioner or the tribunal. Of more direct relevance to the point at issue, however, is the fact that the possibility of new evidence or grounds coming to the attention of the accountable person would be decidedly less unlikely in a case where there was an appeal to the Upper Tribunal or the Court of Appeal. That is because new evidence and grounds could not, or at least could much less easily, be put before the Upper Tribunal or the Court of Appeal on an appeal, and therefore there would anyway be no question of the facts or evidence only having to come to light during the twenty day window.

76.

Lord Dyson's second example also looks questionable at first sight, in the light of the available appeal process described in paras 15-16 above. One would have thought that if a tribunal or court gives a "demonstrably flawed" determination to issue a decision notice directing a government department to give disclosure, then (unless, I suppose, the determination concerned is that of the Supreme Court), if the department wished to challenge the decision notice, it should be expected to appeal against it, rather than resorting to a section 53 certificate.

77.

However, the position is not quite as simple as that. As just mentioned, it is only possible to appeal against a determination of the First-tier Tribunal to the extent that it has gone wrong in law. Further, not only is that true of an appeal from the Upper Tribunal, but such an appeal would normally be a second appeal, which is generally only permitted on an important point of law or practice. There is therefore a real possibility that there could be facts or matters which come to light at some point and indicate that there have been serious flaws in the determination of the First-tier Tribunal or the Upper Tribunal which could not be the subject matter of an appeal and could not be brought before a higher tribunal or court, but which could be taken into account by the accountable person when considering whether to issue a section 53 certificate.

78.

Accordingly, I agree with Lord Dyson as to two types of circumstances in which a section 53 certificate could be issued even after a decision notice had been issued or confirmed by a judicial tribunal or court on an appeal. The totality of applications under section 1 of the FOIA 2000 could potentially lead to such a myriad of possibilities that it is far from impossible that other circumstances could arise. It therefore appears to me that, if Mr Evans's case is correct, section 53 would have some potential function where a court or judicial tribunal had determined or confirmed that disclosure should be given, but it would be likely to be on few occasions and on limited grounds.

79.

The second question is whether the same degree of constraint applies to a section 53 certificate if it had been the Commissioner's determination, rather than the Upper Tribunal's determination, which required disclosure, and there had been no appeal. Ms Rose contends that the answer is that the constraints on invoking section 53 would be significantly less. In the first place, neither of the fundamental constitutional principles referred to in para 52 above would apply because the Commissioner is part of the executive not the judiciary. Secondly, the Commissioner does not hold public hearings with cross-examination and oral argument. However, the Commissioner is an expert who gives reasoned and appealable decisions, and he often receives detailed evidence and arguments. As I understood it, Ms Rose's contention was that the accountable person could issue a section 53 certificate following a decision notice issued by the Commissioner, even though there was no new evidence or grounds, provided that the accountable person gave cogent reasons for disagreeing with the Commissioner.

80.

That raises a point of some difficulty: in a case where the Commissioner has determined that disclosure should have been given and issues a decision notice, it could plainly be argued, as a matter of statutory interpretation, that the executive would be free to choose between appealing under section 57 and issuing a section 53 certificate. There must, however, be a powerful case for saying that it would at least often be a misuse of the section 53 power to issue a certificate on certain grounds when it would be possible to appeal to the tribunal under section 57 on the same grounds. That is an issue which was hardly addressed in argument, and it does not need to be resolved for the

purpose of determining this appeal, but it was raised by the intervener and it is worth briefly discussing.

81.

If the constraint on issuing a certificate under section 53 after a determination of the Commissioner is the same as I have suggested in para 68 above after a determination of the Upper Tribunal, then it would be difficult to envisage circumstances in which a certificate could be issued after a determination of the Commissioner (given what is said in paras 71-78 above), particularly if a further restriction existed because of the right to appeal (see paras 79-80 above).

82.

On the other hand, if the constraint is less, so that a certificate could be issued if the accountable person does not agree with the Commissioner for cogently argued reasons but without any new material, then there would be an arguable anomaly. This is because, if the applicant's section 50 application to the Commissioner succeeded, the executive would find it much easier to issue a defensible section 53 certificate than if the executive succeeded before the Commissioner, and the applicant then won on appeal to the tribunal (as in this case).

83.

Accordingly, if the constraint on the issue of a section 53 certificate after a determination of the tribunal is as provisionally concluded in para 68 above, the position in relation to the issue of a section 53 certificate after a determination of the Commissioner would not be entirely satisfactory irrespective of whether the constraint is the same or less than after a determination of the Upper Tribunal. As at present advised, I am inclined to the view that (i) Ms Rose is right in her suggestion that the constraint on the issue of a section 53 certificate after a decision of the Commissioner is less (and that it is similar to that envisaged by Sir John Chadwick in *Bradley*), but (ii) there would be some further restriction in that the executive should normally be expected to appeal an adverse determination of the Commissioner rather than issuing a section 53 certificate. However, as already explained, that is not something which needs to be conclusively determined in these proceedings.

84.

While it is unnecessary to decide that issue for present purposes, it highlights an important point for present purposes, namely that the co-existence of the two potentially parallel courses of certifying under section 53 and appealing under section 57 (and thereafter under sections 11 and 13 of the 2007 Act) gives rise to difficulties, however we resolve the issue raised by this appeal, namely the extent of the grounds upon which a section 53 certificate can override the decision of a judicial tribunal.

85.

I have not so far addressed the question of the issue of a section 53 certificate after a determination of the First-tier Tribunal, which is not a court of record. Although Ms Rose placed weight on the fact that the Upper Tribunal is a court of record, I consider that this is not really in point. The essential point is that, as explained in para 16 above, the Upper Tribunal has been specifically designated by Parliament as part of the judiciary by section 3(5) of the 2007 Act, and therefore the constitutional issue, which is so central to her argument, applies. There is no equivalent provision to section 3(5) in relation to the First-tier Tribunal. However, at least as at present advised, it appears to me that the effect of the 2007 Act is that such tribunals are part of the judiciary. Accordingly, I am currently of the view that the limitation on the grounds upon which a section 53 certificate can be issued following a decision of the First-tier Tribunal are the same as following a decision of the Upper Tribunal.

Validity under the FOIA 2000: conclusion

86.

In these circumstances, I agree with the Court of Appeal, rather than the Divisional Court, on this difficult first issue. I accept that this conclusion results in (i) section 53 having a very narrow range of potential application (paras 71-79 above) and (ii) the position of the exercise of the section 53 power being somewhat unsatisfactory following a determination of the Commissioner (see paras 80-83 above). As to point (i), it was always envisaged that section 53 would be rarely invoked (see paras 19 and 20 above), and the fact that it may well have an even narrower range of application than the executive seems to have assumed is not a particularly forceful point. As to point (ii), the same argument applies, and in addition there is the significant fact that the co-existence of the two rights available to the executive under section 53 and section 57 gives rise to problems on any view (see para 84 above).

87.

Accordingly, I am unpersuaded that these two points are sufficient to overcome the argument raised by Mr Evans, namely that, if it is necessary to give section 53 a significantly narrower application than it might otherwise have had, in order to respect the two fundamental constitutional principles identified in para 52 above, bolstered by the other factors summarised in para 69 above, then the section must be accorded that narrow effect. I would therefore accept that argument, provided that the section can fairly be given that narrower meaning as a matter of language.

88.

Turning then to the language of section 53, it is obviously true that the expression “reasonable grounds” could, as a matter of ordinary English, have the meaning and effect adopted by the Divisional Court (as described in para 47 above). However, like any other expression, its meaning is highly dependent on its context. As Lord Dyson said in the Court of Appeal at para 37, in the context of section 53 the appropriate question is whether it would be reasonable for the accountable person to make a decision contrary to an earlier decision on precisely the same point. In the present context, I agree with him that it is not reasonable for an accountable person to issue a section 53 certificate simply because, on the same facts and admittedly reasonably, he takes a different view from that adopted by a court of record after a full public oral hearing. I would add that the 2000 Act was passed after the Powergen and Danaei cases had been decided, and they both precluded executive decisions which conflicted with earlier decision of tribunals which were not even part of the judiciary. So it is not as if the grounds for this conclusion could have been unforeseen by Parliament.

89.

It is also fair to add that this conclusion could be said to cut across the two fundamental constitutional principles identified in para 52 above, in the sense that it would permit a member of the executive to override a judicial determination in some circumstances. However, section 53 has to be given some meaning in relation to a case where a court has issued or upheld a decision notice. It seems to me that the meaning I have adopted respects the two principles while giving effect to section 53, in that it limits the ambit of the section to cases which involve matters which were not before the tribunal or court which issued or upheld the notice, and will therefore not enable a member of the executive to overrule a judicial decision simply because he disagrees with it.

The different views expressed in other judgments

90.

Before leaving this first aspect of the appeal, I ought to address the different conclusions reached by Lord Wilson and Lord Hughes, and the different approach adopted by Lord Mance. I place

considerably greater reliance than they do on the implication of the constitutional principles discussed in paras 51-59 and 69 above. As I have sought to explain, there is no clear or specific suggestion anywhere in the FOIA 2000 that it is intended that a section 53 certificate should enable a member of the executive to override a judicial decision. Accordingly, it seems to me that this is a case where it has not been made “crystal clear” that fundamental constitutional principles are intended to be disapplied, and where Parliament has not “confront[ed] what it is [alleged to have been] doing”, but has used “general or ambiguous words”. The problems which can be said to arise from the interpretation I favour, and which are discussed in paras 71-84 above and in paras 124, 154-155 and 168-178 all ultimately concern the practical consequences of the interpretation, and, quite apart from the fact that some of those problems arise in any event, they are simply not commensurate with the fundamental constitutional issues which seem to me to be so centrally in point.

91.

In his trenchant judgment, Lord Wilson suggests that, because I accept that the Attorney General’s grounds, as expressed in his section 53 certificate, appear reasonable, there are difficulties in concluding that he did not have “reasonable grounds” within the meaning of section 53. As I have sought to explain in para 88 above, the meaning of “reasonable grounds” in section 53 is, inevitably, contextual, and, because of the factors summarised in para 69 above, it appears to me that grounds are not “reasonable” if they simply involve disagreeing with the conclusions of a court or judicial tribunal on the same material as was before it, however rational those grounds might otherwise appear to be if viewed on their own. In that, Lord Mance and I are in accord. Thus, as Lord Mance says, on any view, “reasonable grounds” in section 53(2) must require “a higher hurdle than mere rationality”.

92.

Lord Wilson identifies two further factors which I ought to mention. First, he refers to the fact that earlier versions of the Bill which became the FOIA 2000 conferred a power on the Commissioner to recommend, rather than to order, public authorities to disclose documents. Even if earlier versions of the Bill are admissible in relation to the present issue, the conclusions which can be drawn from the drafting history explained by Lord Wilson in his para 171 are, in my view, at best equivocal. As for Lord Hoffmann’s observation which Lord Wilson cites in his para 172, it is common ground that “what the general interest requires” in relation to freedom of information has been decided by a “democratically elected bod[y]”, namely by Parliament when enacting the FOIA 2000. The issue in this case is what the FOIA 2000 means, and it is for the courts to interpret an enactment, and, when doing so, they should bear in mind established constitutional principles. For the reasons which I have given, it appears to me that those principles lead to the conclusion that Mr Evans’s submission is correct.

93.

Lord Mance’s analysis has undoubted attractions, and I suspect that, as may be suggested by the fact that he and I reach the same conclusion in this case, his approach will normally yield the same outcome as mine. We have very similar views in practice as to the ability of the accountable person to differ from a tribunal decision on an issue of fact and law, and in reality it will, I think, normally be very hard for an accountable person to justify differing from a tribunal decision on the balancing exercise on Lord Mance’s analysis. However, quite apart from the fundamental point made in para 89 above, I have some difficulties with that analysis.

94.

Thus, as I think is apparent from the very full and detailed reasoning of the UT in this case, twenty days is an unrealistically short period to impose for a section 53 certificate if such high standards of

analysis and justification are to be imposed on an accountable person. It would be tantamount to requiring a judge to produce a decision in a complex case in three weeks – and, unlike senior Ministers or the Attorney General, judges are used to producing reasoned judgments, can ruthlessly prioritise judgment-writing over all other commitments if they have to do so, and do not have to, indeed should normally not, consult others when producing a judgment. (It is true that the grounds under section 53 can be given after the certificate, but, unless and until the accountable person has worked out the grounds, he or she will not be able to issue a certificate).

95.

I also do not quite see where, on Lord Mance’s analysis, the boundary lies between reasoning which satisfies, and reasoning which does not satisfy, the requirement for the “clearest possible justification” before the accountable person is to be entitled to disagree with the tribunal on an issue of fact. For instance, in this case, the UT and the Attorney General had different views on the extent of aspects of the tripartite convention, the likelihood of the correspondence continuing, and the public perception of the correspondence. If the Attorney General was permitted to disagree with the tribunal on such issues in the absence of any new material, then I would have thought that he should be entitled simply to say so in the way that he did, namely because he had clearly thought about the issues and simply took a different, and inherently rational, view of the evidence and arguments.

96.

Further, if the Attorney General was more or less bound by the findings of fact and law made by the tribunal because it heard full evidence and arguments, I find it a little difficult to understand why that should not also apply to the tribunal’s conclusion as to the weight to be attributed to the competing interests. For instance, both the extent of the constitutional conventions and the balancing exercise are matters of opinion, judgment and experience, on which any conclusion is inevitably influenced by evidence and argument.

97.

To say that the tribunal is the arbiter of the facts appears to me to involve implying a restriction into section 53 for which there is no principled justification. I accept that, if a tribunal’s decision were challenged on an appeal, its finding as to the conventions would probably be treated as one of fact, and its resolution of the balancing exercise would not. However, I do not consider it to be appropriate to treat the accountable person like an appellate court. Not only is he not performing a judicial or an appellate function, but, whatever else may be in dispute, it is common ground that he can certify if “fresh material” emerges, and that he is entitled, indeed could be expected, to obtain evidence and views from people who did not give evidence to the tribunal.

The effect of the 2003 Directive on the Certificate

98.

In the light of my conclusion on this first issue, it is not strictly necessary to consider the second issue, namely the effect of the 2003 Directive, but the point is of importance and has been fully argued, so I will deal with it.

The 2003 Directive: environmental information covered by the Certificate

99.

As explained above, the advocacy correspondence includes environmental information. In those circumstances, it is argued on behalf of Mr Evans that, quite apart from the effect of the FOIA 2000,



the Certificate is ineffective, either in relation to the environmental information or generally in relation to the advocacy correspondence, in the light of article 6.

100.

Article 6.1 requires that, following a refusal by a public authority of a request for environmental information, the applicant “has access to a procedure in which the [refusal] can be reconsidered by that or another public authority or reviewed administratively”. That requirement is plainly satisfied by the incorporation of section 50 into the EIR 2004: a reconsideration or an administrative review is carried out by the Information Commissioner. Article 6.2 requires that “[i]n addition”, the applicant must have “access to a review procedure before a court of law or [similar] body] in which the [refusal] can be reviewed and whose decisions may become final”. There is no doubt but that this requirement is satisfied to the extent that the tribunal is “a court of law or [similar] body” which can properly “review” the refusal. But, if and insofar as its decision can be effectively overridden by the executive under section 53, runs the argument, there would be a plain breach of the requirement that the outcome of that review “become[s] final”. And the importance of that requirement is, of course, underlined by the first sentence of article 6.3, “[f]inal decisions under paragraph 2 shall be binding on the public authority holding the information”.

101.

The argument advanced by the Attorney General to meet this point is that article 6 is satisfied because a certificate under section 53 can be the subject of judicial review (as these very proceedings demonstrate), and that therefore, although the issue of a section 53 certificate can result in a more etiolated process (particularly when, as here, it is issued after the matter has gone to the tribunal), the basic requirements of article 6 are satisfied. In effect, this argument suggests, the worst that can be said about the position in the present case is that it involves two procedures, the first involving a decision by the authority, followed by an article 6.1 review (by the Commissioner) and then an article 6.2 review (by the tribunal), which is in turn followed by a fresh article 6.1 review (by the Attorney General) and then a fresh article 6.2 review (by the Divisional Court).

102.

In my view, the Attorney General’s argument should be rejected, essentially for the reasons advanced by Mr Pitt-Payne QC for the Information Commissioner and by Ms Rose. The structure of article 6 is that, where the executive has refused a disclosure request and the applicant wishes to pursue the matter, (i) the executive must reconsider its refusal (article 6.1), (ii) if it maintains the refusal, the applicant must be accorded recourse to the judiciary (article 6.2), and, if he takes that up, (iii) the decision of the judiciary is to be “final” (article 6.2) and “binding” on the executive (article 6.3).

103.

Accordingly, in this case, once the right of appeal against the Commissioner’s determination had been exercised by Mr Evans’s appeal to the Upper Tribunal, and that tribunal had made its determination requiring disclosure, it seems to me very difficult to argue against the proposition that the closing words of article 6.2 and the opening sentence of article 6.3 applied. In the light of those provisions, there is in my judgment simply no room for the executive to have another attempt at preventing disclosure. In other words, it is inconsistent with the provisions of article 6 for there to be a right in the executive to override the judicial decision provided for in article 6.2. (It also appears to me to be inappropriate for there to be an additional procedural hurdle given that it would inevitably increase the delay and potentially increase the expense for any applicant seeking environmental information.)

104.

Having said that, it is appropriate to consider the contention that the inclusion of the section 53 power could nonetheless be justified under the 2003 Directive in the light of article 4. I would reject that contention. I consider that it is clear from the structure and wording of the Directive that article 6 is intended to provide a means of challenging a public authority which seeks to rely on article 4 to refuse information: article 4 cannot be invoked after the article 6 procedure has been gone through. I therefore consider that, in so far as it is sought to be invoked in relation to environmental information, the Certificate does fall foul of article 6.

105.

Even if this objection to the incorporation of section 53 into the EIR 2004 procedure were not good, and there was nothing objectionable in the executive having another attempt at preventing disclosure, I still would reject the Attorney General's argument. As Mr Eadie QC sensibly accepts, if the argument is to succeed, the section 53 procedure would have to comply with article 6. In my view, there are two problems in that connection. The first is that there would be a failure to comply with the requirement in article 6.1 that there be provision for a review, either by the Attorney General or by another arm of the executive, of the decision to issue the certificate. But there is no such provision in the EIR 2004 or the FOIA 2000. Secondly, there would have to be provision for a judicial review sufficient to satisfy articles 6.2 and 6.3. In that connection, Mr Eadie contends that the fact that a section 53 certificate can be challenged by a domestic judicial review satisfies the requirements of articles 6.2 and 6.3, as the court's decision on a judicial review is "final" and "binding on the public authority concerned". A domestic judicial review does not normally involve reconsideration of the competing arguments or "merits". However, it seems to me clear that article 6.2, with its stipulation that the court should be able to "review" the "acts and omissions of the public authority concerned", requires a full "merits" review. Even assuming in the Attorney General's favour that, on a domestic judicial review, the court could, unusually, consider the merits, it gets him nowhere at least in a case such as this, where a tribunal has ruled that the information should be disclosed and the certificate is merely based on the fact that he disagrees with the final decision of the Upper Tribunal. In such a case, a court would be bound to conclude that the certificate was not soundly based as a court of record had already decided that very point as between the applicant and "the public authority concerned".

106.

The Attorney General relies on article 288 of TFEU, which "leave[s] to the national authorities the choice of form and methods" to give effect to EU Directives, which is reflected in the Court of Justice's statement that it is for the law of each member state "to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law" – Case C-286/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483, para 44. It appears to me that, just as on the first point relating to the FOIA 2000, the issue raised by Mr Evans on the 2003 Directive is not one of "form and methods" or "detailed procedural rules"; it is a point of principle.

107.

In these circumstances, it is unnecessary to consider whether, as the Court of Appeal thought, the provisions of the European Charter provide another, or reinforcing, reason for the conclusion that the Certificate is unlawful in so far as it relates to environmental information, and I prefer to leave that issue open in this Court.

108.

Accordingly, for these reasons and for those given by Lord Mance in paras 147-149, I would hold that, by virtue of the requirements of article 6, the Certificate would in any event have been invalid in so

far as it related to environmental information contained in the advocacy correspondence. If I had decided that the Certificate was valid under the FOIA 2000, that conclusion would have led to a difficult further question, namely whether the effect of the 2003 Directive would have invalidated the Certificate only in so far as it related to the correspondence concerned with environmental information or whether it would have invalidated the Certificate generally.

The 2003 Directive: the effect of non-compliance

109.

At first sight, it might appear that the effect of the 2003 Directive should be limited to environmental information, and accordingly that it would have served to invalidate the certificate only in so far as it applied to environmental information in the advocacy correspondence. However, the argument advanced on behalf of Mr Evans is that, as a result of the fact that it fell foul of the 2003 Directive, the Certificate is, in effect, tainted by an error of law which would invalidate it generally and not merely in respect of environmental information.

110.

The Court of Appeal accepted that argument. At para 78, Lord Dyson first pointed out that the Attorney General had considered the non-environmental information and the environmental information separately (in paras 18 and 19 of the Certificate), and had come to the conclusion that each of the two classes of information was to be exempt from disclosure for the same reasons. However, Lord Dyson went on to say, the Attorney General “did not ... 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” (emphasis in the original). Lord Dyson pointed out that, if the environmental information had to be released, it is likely that the argument in favour of maintaining confidentiality in relation to at least some of the non-environmental information would have been weaker. Given that the Attorney General did not address the question whether he should certify in respect of the non-environmental information if the environmental information had to be released and that he could have done so, it could not be assumed that he would have certified in respect of the non-environmental information if the environmental information had to be disclosed.

111.

There is obviously great force in the Court of Appeal’s view. However, on this point, I have reached the same conclusion as the Divisional Court, namely that, reading the whole of the Attorney General’s reasoning in the Certificate, it is obvious that he would have granted a section 53 certificate in respect of the non-environmental information, even if the environmental information had to be disclosed.

112.

I agree with Lord Dyson that it is not possible to infer this view from any specific words, phrases, or conclusions in the Certificate. However, it is clear from the Certificate, in my view at any rate, that the Attorney General was firmly of the view that none of the letters from the Prince of Wales to Ministers should be disclosed. Apart from the overall tenor of the Attorney General’s reasoning, two specific points strike me as significant. First, he clearly took the view that disclosure against the will of the Prince of any letter was objectionable. Secondly, he was wholly unimpressed with the argument that disclosure of the advocacy letters should be ordered because the contents of some of the letters had been made public.

The 2003 Directive: conclusions as to its effect

113.

Accordingly, if (contrary to my conclusion expressed in paras 86-89 above), the Certificate had been valid so far as the FOIA 2000 was concerned, I would have concluded that the effect of the 2003 Directive was to invalidate the Certificate in relation to the environmental information, but not in relation to the non-environmental information, in the advocacy correspondence.

## Conclusions

114.

For these reasons, which, with the minor exception of paras 109-112 above, largely accord with those in the judgment of Lord Dyson in the Court of Appeal, I would dismiss this appeal.

115.

It is, I think, worth mentioning that the same fundamental composite principle lies behind the reason for dismissing this appeal on each of the two grounds which are raised. That principle is that a decision of a judicial body should be final and binding and should not be capable of being overturned by a member of the executive. On the second ground, which involves EU law, the position is relatively straightforward, at least as I see it: the relevant legislative instrument, the 2003 Directive, expressly gives effect to that fundamental principle through the closing words of article 6.2 and the opening sentence of article 6.3. On the first ground, which involves domestic law, the position is more nuanced: the relevant legislative instrument, the FOIA 2000, through section 53, expressly enables the executive to overrule a judicial decision, but only “on reasonable grounds”, and the common law ensures that those grounds are limited so as not to undermine the fundamental principle, or at least to minimise any encroachment onto it.

## **LORD MANCE: (with whom Lady Hale agrees)**

### Introduction

116.

This is an application for judicial review of a certificate issued by the Attorney General under section 53 of the Freedom of Information Act 2000 (“FOIA”) to prevent disclosure of written communications passing between the Prince of Wales and various Government Departments during the period 1 September 2004 to 1 April 2005. Disclosure of these communications has been requested by Mr Rob Evans, a journalist with The Guardian.

117.

The Departments’ refusal of disclosure was upheld by the Information Commissioner. Mr Evans’s appeal was transferred to the Upper Tribunal, where the Information Commissioner was the respondent and the various Departments were interested parties. The Information Commissioner now no longer resists disclosure, so I can in what follows simply refer to the Departments as the party resisting. The Upper Tribunal (Walker J, Upper Tribunal Judge John Angel and Ms Suzanne Cosgrave) heard extensive evidence and on 18 September 2012 allowed Mr Evans’s appeal by a decision with reasons extending to 251 paragraphs, with open annexes extending to a further 297 paragraphs.

118.

The Attorney General on 16 October 2012 issued his certificate stating that as an accountable person under section 53(8) of FOIA:

“I have on reasonable grounds formed the opinion that, in respect of the requests concerned, there was no failure to comply with section 1(1)(b) of the Act or regulation 5(1) of the Environmental Information Regulations 2004.”

Where such a certificate is issued, any decision notice ceases under section 53(2) to have any effect. Mr Evans challenges the legitimacy of that certificate.

119.

The Divisional Court (Lord Judge CJ, Davis LJ and Globe J) dismissed the challenge. The Court of Appeal (Lord Dyson MR and Richards and Pitchford LJ) allowed Mr Evans’ appeal. The Attorney General now appeals against that decision by permission of the Court of Appeal.

120.

The background circumstances and law have been set out in the judgment of Lord Neuberger, which I have had the benefit of being able to read before preparing this judgment, and I need not repeat them. I have also had the benefit of reading Lord Wilson’s and Lord Hughes’s judgments.

121.

Section 1(1)(b) of FOIA gives a person making a request to a public authority a general right to have communicated information held by that authority, subject to exemptions introduced by section 2. Regulation 5(1) of the Environmental Information Regulations 2004 contains a specific right in respect of environmental information, intended to implement the requirements of Parliament and Council Directive 2003/4/EC on public access to environmental information. The provisions of FOIA apply to this specific right with some modifications, by virtue of regulation 18. Both rights are expressly made subject to section 53, set out by Lord Neuberger in para 17. In the case of environmental information, this is by virtue of regulation 18(6). Under section 53(2) a certificate may be served (as this one was) not later than 20 working days following either a decision notice or enforcement notice given by the Information Commissioner or the determination or withdrawal of an appeal.

The issues

122.

The following issues arise: (i) whether the Attorney General’s statement that he had “on reasonable grounds” formed the opinion that there was no failure to comply with section 1(1)(b) or regulation 5(1) was one which he was entitled to make, having regard in particular to the decision and reasoning of the Upper Tribunal, and (ii) whether, in any event, regulation 18(6) complies with article 6 of Parliament and Council Directive 2003/4/EC; if it does not, then it is common ground that regulation 18(6) is invalid, and in that case a subsidiary issue arises: (iii) whether the certificate can stand even in relation to the non-environmental information which it covers.

The first issue – the test for issue of a certificate

123.

On the first issue, there is a significant difference of principle between Lord Neuberger and Lord Wilson. Lord Neuberger highlights the incongruity of a minister or officer of the executive, however distinguished, overriding a judicial decision. The incongruity is if anything more marked in the case of a court of record like the Upper Tribunal. This leads him to confine the operation of section 53 to marginal circumstances which could only rarely arise. But Lord Neuberger also notes that further incongruity could arise if a certificate were more readily capable of being issued at the earlier stage of

a non-judicial decision by the Information Commissioner. Unless the operation of section 53 were in this case also confined, the scope for issuing a certificate would vary according to whether the Information Commissioner's decision notice was for or against disclosure. Nonetheless, Lord Neuberger considers, provisionally, that the scope is not as confined in this case as after a tribunal decision, but that the existence of a right of appeal, on both law and fact, against an Information Commissioner's decision, would serve as some form of constraint.

124.

Lord Neuberger himself recognises, and Lord Wilson elaborates, some of the problems which this construction faces. I can myself subscribe generally to the views expressed by Lord Wilson in paras 171, 172 and 174 to 179 of his judgment. I consider that section 53 must have been intended by Parliament to have, and can and should be read as having, a wider potential effect than that which Lord Neuberger has attributed to it.

125.

Lord Wilson expresses this effect as being to enable the Attorney General to arrive at a different evaluation of the public interests. He takes the view that the fact that the statutory override is expressly conferred by FOIA distinguishes this scheme from those under consideration in the three authorities. I note, however, that, under the ombudsman scheme considered in *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114, the Court of Appeal held that the ombudsman's findings of maladministration were not as a matter of law binding on the minister. Nevertheless, the Court of Appeal was, in Sir John Chadwick's words at para 91:

"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. .... [I]t is not enough that the Secretary of State has reached his own view on rational grounds. .... [H]e 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."

126.

To that extent therefore, the decision indicates that there can be constraints on executive departure from the considered findings of even a non-judicial body established to investigate and make recommendations. But, as Lord Neuberger observes, the reasoning in *Bradley* appears to set a somewhat lower threshold for departing from the earlier decision than the Court of Appeal thought appropriate in the different circumstances under consideration in *R v Warwickshire County Council, Ex p Powergen plc* (1997) 96 LGR 617 and *R v Secretary of State for the Home Department, Ex p Danaei* [1998] INLR 124.

127.

In *Bradley*, the differences between acting rationally or irrationally, simply preferring one's own view and having a reason for rejecting a finding were not further examined in the judgments, and the Court of Appeal in its actual decision appears to have contented itself with examining whether the Secretary of State did or did not act rationally: see paras 95-96 and 125.

128.

Ultimately, the test applicable in relation to the first issue must be context-specific, in the sense that it must depend upon the particular legislation under consideration, here the FOIA and the Regulations, and upon the basis on which the Attorney General was departing from the decision notice or appeal decision. Mr James Eadie QC submits that the Attorney General could, instead of appealing, even take a different view from the Information Commissioner or Tribunal on a question of law, but accepts that,

in that event, the correctness of his view of the law could be tested by judicial review. As to findings or evaluations of fact, he accepted at one point that something more than mere rationality was required under section 53 if the Attorney General was to depart from a finding or evaluation of facts. He went on to explain that the Court must apply an objective standard, by asking whether the certificate expressed a view that was a reasonable view for the Attorney General to hold. A different view about or evaluation of the public interest was, in his submission, exactly what section 53 was intended to permit. Ultimately, therefore, it appears that Mr Eadie was contending for a test close, if not exactly equivalent, to rationality on the part of the Attorney General.

129.

On any view, the Attorney General must under the express language of section 53(2) be able to assert that he has reasonable grounds for considering that disclosure was not due under the provisions of FOIA. That is, I consider, a higher hurdle than mere rationality would be. Under section 53(6) he must also express his reasons for this opinion, unless, under section 53(7) this would involve disclosure of exempt information. On judicial review, the reasonable grounds on which the Attorney General relies must be capable of scrutiny. (The only doubt, discussed by Lord Wilson in para 181, is whether the court can consider in a closed material procedure any of the material of which disclosure is sought, in the same way that the Upper Tribunal was able to. That doubt does not require resolution on this appeal.)

130.

When the court scrutinises the grounds relied upon for a certificate, it must do so necessarily against the background of the relevant circumstances and in the light of the decision at which the certificate is aimed. Disagreement with findings about such circumstances or with rulings of law made by the tribunal in a fully reasoned decision is one thing. It would, in my view, require the clearest possible justification, which might I accept only be possible to show in the sort of unusual situation in which Lord Neuberger contemplates that a certificate may validly be given. This is particularly so, when the Upper Tribunal heard evidence, called and cross-examined in public, as well as submissions on both sides. In contrast, the Attorney General, with all due respect to his public role, did not. He consulted in private, took into account the views of Cabinet, former Ministers and the Information Commissioner and formed his own view without inter partes representations. But disagreement about the relative weight to be attributed to competing interests found by the tribunal is a different matter, and I would agree with Lord Wilson that the weighing of such interests is a matter which the statute contemplates and which a certificate could properly address, by properly explained and solid reasons.

131.

Lord Neuberger suggests (para 94) that the statute cannot contemplate such an exercise, because it would require more than the 20 days allowed by the statute for the issue of a certificate. I do not think that follows. The discussion below shows that the Attorney General did not undertake the weighing of interests which the statute contemplates, that is, normally at least, against the background and law established by the tribunal's decision. On the contrary, he was undertaking his own redetermination of the relevant background circumstances. Neither on my analysis nor on Lord Neuberger's was he entitled to do that. In short, the fact that it takes some elaboration to show that the Attorney General was proceeding on the wrong basis does not indicate the time the Attorney General would have required to address the matter on an appropriate basis.

The first issue – application of the test

132.

Applying the test identified in para 131 to the present case, it is necessary to look closely at the Attorney General's certificate in the light of the Upper Tribunal's findings and conclusions. In my view, his certificate was based essentially on differences in his account of the relevant circumstances, including the constitutional conventions, by reference to which the relevant issues of public interest fell to be evaluated. Central to the Attorney General's disagreement with the Upper Tribunal was his view that the "advocacy correspondence" in which the Prince of Wales engaged was "part of his preparation for kingship", or part of an "education" or "apprenticeship convention", as the Departments put it before the Upper Tribunal. The disagreement is apparent from the following paragraphs of the certificate:

"7. In the United Kingdom, that constitutional balance is preserved by the constitutional convention that the Monarch acts on, and uses prerogative powers consistently with, Ministerial advice ("the cardinal convention"). The corollary to the cardinal convention is the convention that the Monarch has the right, and indeed the duty, to be consulted, to encourage, and to warn the government (the "tripartite convention"). The tripartite convention ensures that a measure of influence is retained for the Monarch within the constitution. The tripartite convention is most obviously, though not solely, expressed through the Prime Minister's weekly audience with the Monarch.

8. In order to prepare for the exercise of the tripartite convention, the heir to the Throne has the right to be instructed in the business of government: a right described by the Tribunal in this case as the "education convention". The Tribunal in this case accepted the importance of the education convention; and accepted that it carried with it a duty of confidentiality. However, the Tribunal concluded both that "advocacy correspondence" was outside the education convention; and that such correspondence formed no part of The Prince of Wales' preparations for kingship, because it was not undertaken as part of preparation for kingship, and was not the type of activity in which the Monarch would engage.

9. In my view, it is of very considerable practical benefit to The Prince of Wales' preparations for kingship that he should engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments, because such correspondence and dialogue will assist him in fulfilling his duties under the tripartite convention as King. Discussing matters of policy with Ministers, and urging views upon them, falls within the ambit of "advising" or "warning" about the Government's actions. It thus entails actions which would (if done by the Monarch) fall squarely within the tripartite convention. I therefore respectfully disagree with the Tribunal's conclusion that "advocacy correspondence" forms no part of The Prince of Wales' preparations for kingship. I consider that such correspondence enables The Prince of Wales better to understand the business of government; strengthens his relations with ministers; and enables him to make points which he would have a right (and indeed arguably a duty) to make as Monarch. It is inherent in such exchanges that one person may express views and urge them upon another. I therefore consider that, whether or not it falls within the strict definition of the education convention, "advocacy correspondence" is an important means whereby The Prince of Wales prepares for kingship. It serves the very same underlying and important public interests which the education convention reflects.

10. If such correspondence is to take place at all, it must be under conditions of confidentiality. Without such confidentiality, both The Prince of Wales and Ministers will feel seriously inhibited from exchanging views candidly and frankly, and this would damage The Prince of Wales' preparation for kingship. Indeed, it is difficult to see how the exchange of views in correspondence could continue at all without confidentiality. Also, The Prince of Wales is party-political neutral. Moreover, it is highly important that he is not considered by the public to favour one political party or another. This risk will



arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy. Any such perception would be seriously damaging to his role as future Monarch, because if he forfeits his position of political neutrality as heir to the Throne, he cannot easily recover it when he is King. Thus in this context, confidentiality serves and promotes important public interests.

11. I also consider that the disclosure of “advocacy correspondence” engages the important freestanding interest in the preservation of confidences. Both The Prince of Wales, and Ministers, correspond on the basis that their exchanges are strictly confidential. Furthermore, I consider that the public interest in maintaining confidentiality will be buttressed where The Prince of Wales's letters reflect his and deeply held views and convictions, given under impress of confidentiality.

12. In my view, these are important public interests in non-disclosure, which will generally apply to “advocacy correspondence” between The Prince of Wales and Ministers. Of course, I recognise that each case must be decided on its own particular facts, so I have gone on to examine how those public interests apply in this case. I take the view that they apply with particular force, in circumstances where:

(1) The requests were made in April 2005. Thus, at the time when the requests fell to be responded to, the correspondence was very recent; and it is still relatively recent.

(2) Much of the correspondence does indeed reflect The Prince of Wales' most deeply held personal views and beliefs.

(3) The letters in this case are in many cases particularly frank. They also contain remarks about public affairs which would in my view, if revealed, have had a material effect upon the willingness of the government to engage in correspondence with The Prince of Wales, and would potentially have undermined his position of political neutrality.

(4) There is nothing improper in the nature or content of the letters.

The public interests in disclosure

13. I recognise, and take account of, the public interests in disclosure identified in the Upper Tribunal's judgment, namely governmental accountability and transparency; the increased understanding of the interaction between government and Monarchy; a public understanding of the influence, if any, of The Prince of Wales on matters of public policy; an interest in disclosure in light of media stories focusing on The Prince of Wales' alleged inappropriate interference, or lobbying; furthering the public debate regarding the constitutional role of the Monarchy, and in particular the heir to the Throne; and informing broader debate surrounding constitutional reform.

14. In my view, the factors in favour of disclosure identified by the Tribunal in this case are good generic arguments for disclosure of the information. However, if they were decisive in the present case it would have to be at the expense of the strong public interest arguments against disclosure, centred upon The Prince of Wales' preparation for kingship and the importance of not undermining his future role as Sovereign.

15. I also consider that the very high public interest that the Tribunal identified in the public knowing what The Prince of Wales said to Ministers was at least in part dependent upon the Tribunal's assumption that The Prince of Wales was in no different position from any other lobbyist, when making representations to Ministers, save that he did so from a position where his representations

would be accorded special weight. I do not consider that The Prince of Wales's correspondence is properly viewed in that light, in circumstances where it is part of his preparation for kingship. I take the view that the correspondence has a constitutional function, which makes any analogy between it and correspondence between a private individual and a Minister inapposite."

133.

The Attorney General's approach in paras 7 to 10 of the certificate is, as stated, in sharp disagreement with the Upper Tribunal's findings and conclusions. These findings and conclusions were based on extensive evidence and analysis of the role of the Monarch in this country, the skills and disciplines attaching to that role, the preparation regarded as necessary to understand, possess and exercise them and the relevant convention. The Upper Tribunal was at great pains to consider in this connection the significance and relevance of the advocacy correspondence, both that which has been published and that which the tribunal saw in closed session. It summarised three problems which had been identified by counsel for Mr Evans in relation to the Departments' evidence and case, as follows:

"(2) Professor Brazier [called by the Departments] accepted that under his thesis communications fell within the convention because they were a rehearsal for kingship, but was not able to point to anything evidencing a recognition by Prince Charles that there was a rehearsal mode or that he was acting within this rehearsal mode. There was powerful evidence that Prince Charles did not regard himself as acting in rehearsal mode. The biography made no suggestion of it. Indeed, the 1995 article characterised the correspondence in question as advocacy 'for real' under a radical parallel with the sovereign's tripartite convention. The Clarence House website described Prince Charles 'Promoting and Protecting' through publicly aired views and private correspondence, including with ministers. Sir Stephen Lamport [also called by the Departments] was emphatic that the descriptions "rehearsal" and "training" were inapt. On the contrary, Prince Charles believed that his contact with government could be used for the wider public benefit. The only thing which distinguished Prince Charles's role from the sovereign's, on Sir Stephen's evidence, was that the government did not feel they had to treat his advice as they would treat the Queen's. The memorandum by Sir Michael Peat showed that as regards Prince Charles's current actions (a) he understands the constitutional functions that the sovereign has (and he would have), and (b) that is decidedly not the character of his actions, indeed (c) he would change as sovereign and stop intervening in the way that he does. That explanation was inconsistent with Sir Stephen Lamport's and Sir Alex's [Sir Alex Allan, called for the Departments] metaphor of the "apprentice stonemason".

.....

(4) It is a fundamental condition of the exercise by the sovereign of the tripartite convention that the sovereign does not express views in public on matters of public policy. If Prince Charles is to be taken as being in 'rehearsal' mode, why would he so obviously act incompatibly with the necessary discipline accompanying the role he is supposedly rehearsing? Put another way, the absence of a perceived obligation of (rehearsed) silence in public on the public policy undermines the idea of a perceived right of (rehearsed) encouragement and warning in private.

...

(6) Professor Brazier's thesis was not able to identify any distinction between what Prince Charles is doing, nor what the government is doing, which is different because this is supposedly 'rehearsal' mode. On the contrary, it is precisely the same course of conduct of both parties which led to the Brazier 1995 suggestion of Prince Charles having the right to seek to urge and persuade. If the true analysis is that Prince Charles has no such right, but merely a right to rehearse, there would need to

be a difference between the two. But none has been identified, merely the fact that this is the heir and not the monarch.”

134.

The Upper Tribunal concluded that these problems had remained unanswered. It thought it “plain” that the advocacy correspondence was not prompted by a desire to become more familiar with the business of government and was not addressing what his role would be as king. Rather it was prompted by a strong belief that certain action on the part of government was needed. Further, in expressing that belief, Prince Charles was acting in a manner which was incompatible with his future role as king and in which he recognised that he would have to cease acting when he became king. That conclusion was expressed by the Upper Tribunal in the following passages:

“99. Problems (2), (4) and (6) are interlinked. It seems to us that they are much more substantial. First, the submissions for the Commissioner and the departments never distinctly grappled with the point that Prince Charles himself has recognised that as sovereign, "he must stop intervening in the way that he does." Mr Swift acknowledged that Prince Charles does not deal with government in "rehearsal mode". His suggested answer was that (1) instruction gives rise to debate, encouraged by ministers; (2) the convention takes the form of a debate or conversation, not a lecture; (3) Prince Charles can only learn how to debate and question issues of policy by actually debating and questioning issues of policy, not by pretending to do so; and (4) preparation for kingship over a period of four decades will involve forming a relationship with ministers in which matters of substance are discussed. However, in the public examples that we have seen, the plain facts are that what Prince Charles is doing is not prompted by a desire to become more familiar with the business of government, and simply is not addressing what his role would be as king. We cannot accept Mr Swift's contention that when Prince Charles discusses matters "for real" with ministers, both he and ministers appreciate that this is in the context of his preparation for kingship. The examples we have identified in our chronology of events at Open Annex 2 do not involve any assumption that Prince Charles has the rights of the monarch, but they all have as their context Prince Charles's strong belief that certain action on the part of government is needed. On analysis, as it seems to us, neither Sir Alex nor Sir Stephen was able to justify an assertion that either side saw these exchanges as part of preparation for kingship.”

135.

The Upper Tribunal also held that the Departments were advancing a novel case regarding the scope of the education convention. It was a “new approach” which Professor Brazier had first advanced in his witness statement, without recognising how far it departed from what Professor Brazier had written in an article in 1995. He had then simply advocated the recognition of a new constitutional convention enabling the Prince of Wales to obtain information from ministers, to comment on their policies and to urge other policies on them. The new approach asserted in the witness statement was to the effect that there already existed a convention attaching to every piece of correspondence, including Prince Charles and ministers. The new approach had in effect been created by Prince Charles’ own conduct, since it had no precedent. The new approach appears very close, if it is not identical, to that taken by the Attorney General in his certificate. The Upper Tribunal rejected it categorically in the following passages:

“103. In our view the new approach as advanced by Professor Brazier in his witness statement would involve a massive extension of the education convention. The new approach seemed to involve a proposition that whenever Prince Charles interacted with government this helped to prepare him to be king and was therefore part of the education convention. The logical consequence of this

proposition would be that the education convention extended both to advocacy correspondence and to correspondence on charitable or social matters without any advocacy element. As noted in section G of OA3, however, in cross-examination Professor Brazier resiled from his earlier stance in relation to charitable and social matters. What happened was that Mr Pitt-Payne put to him the difficulty that correspondence on charitable matters might be written by any other member of the royal family: it was not done as part of preparation to be king. In the course of cross-examination Professor Brazier gave consideration to this difficulty both in relation to charitable matters and in relation to social matters. In the light of that consideration, he very fairly acknowledged that - subject to there being no advocacy element - the Commissioner was right to say that the education convention did not cover correspondence on charitable and social matters. In that regard he accepted that he may have conflated two different things which should not have been conflated: the scope of the convention on the one hand and the obligation of confidence on the other.

104. Thus the analysis of the expert witness for the Departments changed during the course of oral evidence. He was confronted with difficulties facing any proposition that whenever Prince Charles interacted with government this helped to prepare him to be king and was therefore part of the education convention. His recognition of those difficulties led him to accept the Commissioner's narrower view that the scope of the education convention did not extend to charitable or social matters. Inevitably, as it seems to us, he was thereby accepting that merely incidental help in preparation for kingship - at least in charitable and social contexts - will not suffice. What we find illuminating is that the question which led Professor Brazier to change his mind did not merely point out that other members of the royal family might write on charitable matters. There was an additional element to the question which made the crucial point that such correspondence was not written "as part of preparation to be king". To our mind, for the reasons developed by Mr Fordham in cross-examination of Professor Brazier, that crucial point applies equally to advocacy correspondence.

105. The massive extension of the convention advanced by the Departments, and the less massive extension identified by the Commissioner, would both have to meet the second element of the Jennings test. In the context of the education convention this would require that both sides considered that as part of Prince Charles's preparation to be king they were bound to permit correspondence with government in the manner contemplated by the extension. Professor Brazier's witness statement relied on both sides exchanging correspondence on the explicit or implicit assumption that all of it would remain confidential. As noted above, however, in oral evidence he accepted that it was wrong to conflate confidentiality and the scope of the convention. The submissions for Mr Evans accepted that the traditional education convention involved informing Prince Charles about governmental matters and responding to queries from him about that information. The evidence before us, as examined in open session, demonstrates that interaction between Prince Charles and government went far beyond this, but not "as part of preparation to be king". Published advocacy correspondence shows Prince Charles using his access to government ministers, and no doubt considering himself entitled to use that access, in order to set up and drive forward charities and to promote views - but not as part of his preparation for kingship. Ministers responded, and no doubt felt themselves obliged to respond, but again not as part of Prince Charles's preparation for kingship. Indeed Prince Charles himself accepts, and government acknowledges, that his role as king would be very different. The inevitable conclusion is that while correspondence going beyond the traditional education convention may well be confidential, and is not (despite Professor Tomkins's concerns) said by Mr Evans in these proceedings to be unconstitutional, it does not have the special status of correspondence falling within a constitutional convention.

106. There is another element in the Jennings test which leads to the same conclusion. It is the third element: there must be good reason for the suggested extension. The good reason advanced by Professor Brazier for such a massive extension was difficult to pin down. At times it appeared to be simply that both sides regarded their discussions as confidential - something which he later accepted was not determinative of the scope of the convention. At other times it appeared to be that whenever Prince Charles interacted with government this helped to prepare him to be king - but he has accepted that, at least in the charitable and social context, merely incidental help does not suffice. In our view, however, there is an overwhelming difficulty in suggesting that there is good reason for regarding advocacy correspondence by Prince Charles as falling within a constitutional convention. It is a difficulty that was recognised in Professor Brazier's answer cited earlier: it is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government. Accordingly it is fundamental that advocacy by Prince Charles cannot have constitutional status. Professor Brazier sought to escape this difficulty by saying that under his extension to the education convention there was no obligation on government to consider what Prince Charles said. This in our view offers no escape: the communication of encouragement or warning to government has constitutional status only when done by the monarch. Even if ministers (despite every appearance of thinking the contrary) are under no obligation to consider what is said, they have received it and it is open to them to take account of it. It would be inconsistent with the tripartite convention to afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning which ministers might then take account of."

136.

The Upper Tribunal at a later point addressed a case made to the effect that the mere interchange with ministers might have value as preparation for kingship, because of the understanding it might bring about how government functions and the experience it might bring of dealing and developing relationships with ministers. It said this:

"174. ... The "to and fro" between Prince Charles and government involved in advocacy communications may carry an incidental benefit of increasing Prince Charles's knowledge of how government works, but unless there is some additional element they cannot properly be described as preparation for kingship."

137.

In contrast, the Attorney General issued his certificate on the basis that the advocacy correspondence in which the Prince of Wales engaged entailed "actions which would (if done by the Monarch) fall squarely within the tripartite convention", which were of "very considerable practical benefit" to, or "an important means" in connection with, his preparations for kingship and which therefore formed part of such preparation. The certificate does not engage with, or begin to answer, the problems about this apparently wholesale acceptance of Professor Brazier's thesis about the emergence of a new or highly expanded constitutional convention, which the Upper Tribunal had so forthrightly and on its face cogently rejected. It does not even address the problem that the Prince of Wales himself had accepted that advocacy communications of the sort under consideration would be incompatible with his role as king and are actions which he would have to cease undertaking. It does not address the fact that advocacy correspondence of the kind under discussion has no precedent, is not undertaken as part of and is not necessary as part of any preparation for kingship.

138.

The Attorney General's further reasoning in para 10 of his certificate is that confidentiality is needed, if such correspondence, and thereby the Prince's preparation for kingship, is to continue. As quoted above, para 10 states:

"Without such confidentiality, both The Prince of Wales and Ministers will feel seriously inhibited from exchanging views candidly and frankly, and this would damage The Prince of Wales' preparation for kingship. Indeed, it is difficult to see how the exchange of views in correspondence could continue at all without confidentiality."

139.

That reasoning depends in part on the view, already considered, that the correspondence is an aspect of preparation for kingship. But it also contains the assertion that "it is difficult to see how [such correspondence] could continue at all". This is then repeated in para 12(3) of the certificate. But no basis for such an assertion is stated, and it is contrary to the clear and reasoned findings of the Upper Tribunal on the point. In para 196 the Upper Tribunal found that:

"there is good reason to think that Prince Charles will not, as a result of liability to disclosure, cease to make points to government that in his view need to be made. The chronology forcefully suggests that these are things that he feels strongly cannot be left unsaid: see for example OA2 at paras 35, 37, 43(4), 61, 62 and 97. Moreover, he has not been dissuaded by publicity in the past: we consider that the high degree of publicity afforded to Prince Charles's dealings with government in the past has not prevented his being educated in the ways and workings of government, nor has it deterred him from corresponding frankly with ministers."

140.

The certificate continues:

"Also, The Prince of Wales is party-political neutral. Moreover, it is highly important that he is not considered by the public to favour one political party or another. This risk will arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy."

This reasoning also fails to address or meet the Upper Tribunal's conclusions, based on the evidence before it. The Upper Tribunal pointed out that it was and is well known that Prince Charles advocates causes which may in a broad sense be described as political, but that, at the same time, he avoids party-political arguments, code words or personalities in a manner which The Times had as long ago as 25 October 1985 commended in an editorial. The Attorney General's certificate does not suggest the contrary. It appears, by inference, to be concerned about public misperception, or possibly misrepresentation. But both The Times then and the Upper Tribunal in its decision robustly dismissed the risk of public "misperception" as not being real or persuasive.

141.

More specifically, the Upper Tribunal found, in relation to the suggestion that the Prince might, as a result of disclosure, be viewed as politically partisan, that:

"176. ... [T]he concern was a concern about perception, and "political" was used in a narrow sense of "party-political". The concern that was advanced by the Commissioner and the Departments was that disclosure of the disputed information might lead the public to think that Prince Charles favoured one political party over another. The Departments were at pains to stress that Prince Charles was not politically partisan, and the Commissioner made it clear that he did not suggest this. The concern is thus about misperception."

...

182. ... The word "political" can be used in a broad sense, connoting an activity relating to policy. It is apparent from Prince Charles's public advocacy, from the revelations in the biography about his private advocacy, from purported revelations elsewhere about his private advocacy, and from public criticism of his advocacy activities ... that in this broad sense of "political" Prince Charles's activities are not neutral and in a number of respects have been controversial. It was common ground in the present case that despite all this, and despite views he has advocated often being later adopted to a greater or lesser extent by politicians or government, Prince Charles had succeeded in not being perceived as party-political. There is a risk that a view publicly advocated by him at a time when it did not divide political parties may do so in the future, but that is a risk that he has been prepared to run.

183. ... As we explain below, it does not follow that failure by members of the public to distinguish between views on party-political issues and views on wider matters of policy involves "unfair criticism" - or even if it were "unfair", that Prince Charles or the royal family generally needs to be protected from it.

184. It follows from this reasoning that we do not accept the broad general proposition advanced by the Commissioner on this aspect. It is true that a decision to abstain from making certain kinds of statement in public may be rendered ineffective if private correspondence were disclosed. This has to be seen, however, in the context of advocacy correspondence. In that context the Commissioner's submission effectively becomes that while Prince Charles desires to be known publicly as an advocate on some issues, nevertheless there is a public interest in not revealing his advocacy on issues where he does not wish his stance to be known publicly. There may be special cases - for example, particular circumstances where, in order to achieve some public good, there is an initial period where secrecy is necessary to avoid tipping off wrongdoers. In the absence of this, or some other special circumstance, we do not accept that a desire that the public should not know of his advocacy on a particular issue of itself gives rise to a public interest in non-disclosure.

187. ... For reasons explained in our conditionally suspended annex, we can say that in the disputed information - consistently with what in 1985 he described as his own practice - Prince Charles avoids "party arguments", "party code-words" and "personalities". If it were possible to identify in the disputed information anything on a topic which attracted party-political controversy either at the time it was written or now, just as The Times in 1985 thought the public interest permitted public statements on such a topic, we consider that in the 21st century "our language is not so deformed and our politics are not so penetrating" as to make it in the public interest not to disclose advocacy communications on such topics.

188. There is, as it seems to us, a short answer to all the various ways in which the Departments have sought to rely on dangers of "misperception" on the part of the public. It is this: the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be."

142.

The Attorney General's certificate does not engage with or give any real answer to this closely reasoned analysis and its clear rebuttal of any suggestion that a risk of misperception could justify withholding of disclosure. Sufficient is already known publicly about the Prince of Wales' actions and communications - some of it as a result of authorised disclosure - to make the suggested risk of misperception remote, and the Upper Tribunal evidently saw nothing to suggest any greater risk in any closed material. It also took the robust view, which again the certificate does not address, that

public discourse is not so deformed that public figures cannot express important and potentially influential views without sounding politically partisan - or that secrecy should, in effect, outweigh transparency for fear of "misperception".

143.

Another factor highlighted in connection with the Attorney General's evaluation of the public interest is that "much of the correspondence does indeed reflect The Prince of Wales' most deeply held personal views and beliefs" (paras 11 and 12(2) of the certificate). But it is unclear why this is an argument against disclosure of communications by a public figure intended to influence public action. Further, as the Upper Tribunal found

"Prince Charles's self-perceived role has been described on his behalf as representational, "drawing attention to issues on behalf of us all" and "representing views in danger of not being heard". We find this assertion to be established by the evidence."

Where a public figure makes representations on behalf of the public or on behalf of those whose voice might not otherwise be heard, it is not unlikely that he or she will do this out of personal conviction. It would seem strange if that were a reason for withholding knowledge about the representations from those in whose interests they were made.

144.

The Attorney General also identified as a reason why the public interest pointed towards disclosure that

"12(4) There is nothing improper in the nature or content of the letters".

That reinforces the point that misperception is an unreal fear. But it does not address the reason why disclosure is sought. The Upper Tribunal in paras 4 and 144-160 identified a very strong interest in disclosure in the interests of transparency, so that the influence which such communications has or may have on public decisions may be appreciated, and potentially also of course countered. I would myself also regard this as clear.

145.

It follows from all the above that the Attorney General's certificate proceeded on the basis of findings which differed, radically, from those made by the Upper Tribunal, and in my view it did so without any real or adequate explanation. The Upper Tribunal's findings and conclusions were very clearly and fully explained. I do not consider that it was open to the Attorney General to issue a certificate under section 53 on the basis of opposite or radically differing conclusions about the factual position and the constitutional conventions without, at the lowest, explaining why the tribunal was wrong to make the findings and proceed on the basis it did. As it is, the certificate asserted the existence of a tripartite convention wide enough to cover the Prince of Wales's advocacy communications; it asserted in particular that they fell within the preparation for kingship convention, would be of very considerable practical benefit and were an important means of preparation; it further asserted that publication would cause them to cease or would cause misperception, and that the fact that the communications, made in a representational capacity, involved deeply held personal views and belief was a reason for non-disclosure. These assertions were in very direct contradiction with the Upper Tribunal's findings, without any substantial or sustainable basis being given for the disagreement. In my view and in the light of all that I have set out, the certificate cannot be regarded as satisfying the test identified in para 129 above. The disagreement with the Upper Tribunal's detailed findings and conclusions reflected in the certificate has not therefore been justified on reasonable grounds. I therefore consider



that the Court of Appeal was right to set aside the certificate, and that the appeal should be dismissed on this ground.

146.

The Attorney General sought in their written case to allege that the Upper Tribunal made a number of errors of law in the course of its decision. But no such errors featured as any part of the Attorney General's reasoning in his certificate - or indeed in the application made and granted for permission to appeal to this court - and I did not understand that any or at any rate great reliance was placed on them in oral submissions before the Supreme Court. In any event, I do not consider that it was or should now be open to the Attorney General to rely on them, in the absence of any exceptional circumstances, bearing in mind that the scheme of section 53 is to require a certificate within 20 working days, accompanied either then or as soon as reasonably practicable thereafter by information about the maker's actual reasons for the decision, with the certificate then being laid before each House of Parliament.

The second and third issues – environmental information

147.

I can deal with the second and third issues identified in para 123 above very briefly. I agree with Lord Neuberger's remarks and conclusions on both of them. I have no doubt that, if it had been correct to reach an opposite conclusion to that which I have reached under the general provisions of FOIA, then such of the communications as constitute environmental information would still fall to be disclosed under the 2004 Regulations. The power to override a decision of the Upper Tribunal provided by regulation 18(6), read with section 53 of FOIA, is in my opinion clearly irreconcilable with the provisions of article 6 of Parliament and Council Directive 2003/4/EC, set out by Lord Neuberger in para 25; and it is common ground that, in that event, regulation 18(6) must be treated as invalid.

148.

Lord Wilson argues that the words of article 6(2) of the Directive are wide enough to cover not simply a situation where there is a right of appeal, but also a situation in which the Upper Tribunal's decision may be set aside by executive decision, with the executive decision being then capable itself of being judicially reviewed. If the judicial review succeeds, the tribunal decision will become final. If it fails, it will never become final. But Lord Wilson has already accepted, and I agree, that the executive decision permitted by section 53(2) can legitimately involve a different evaluation of the weight of competing interests from that which the court of law or independent and impartial body established by law, contemplated by article 6(2), has taken. On that basis the scope for judicial review is narrowed. It cannot involve a full merits review. It must be a limited review, as indicated in para 131 above. Accordingly, what becomes final in the event of judicial review failing, is not a decision on the merits that the Upper Tribunal's decision is wrong. It is the conclusion that there is nothing wrong with the minister's or Attorney General's decision to override the Upper Tribunal's decision. That cannot be consistent with the evident intention of article 6(2) - to provide means of recourse to a court or similarly independent and impartial system, which will decide, one way or the other, on the merits.

149.

That regulation 18(6) read with section 53(2) can be incompatible with the Directive is shown by supposing a case where a section 53 certificate was issued after a decision notice issued by the Information Commissioner, without any appeal. There would then be no decision under article 6(2) of any court of law or independent and impartial body established by law. Even if the section 53 certificate were then judicially reviewed, the outcome of the judicial review would once again not be a

decision on the merits of the disclosure or non-disclosure, as contemplated by article 6(2), but a decision on the issue whether there was anything wrong with the override reached by applying the different test identified in para 131 above. It does not of course follow axiomatically that regulation 18(6) is incompatible in the present context of a certificate issued following an Upper Tribunal decision, but in my view it is also in this context for the reasons given in paras 147 and 148 as well as those given by Lord Neuberger.

#### Conclusion

150.

For these reasons, I conclude that (i) the communications requested are not excepted from any duty of disclosure to Mr Evans under section 53 of FOIA; (ii) even if they had not been, such of them as constitute environmental information would have been and are disclosable under regulation 18(6) of the Environmental Information Regulations 2004, although in that case (iii) the remainder would not then have been disclosable.

151.

It follows that the Attorney General's appeal should be dismissed.

#### **LORD HUGHES: (dissenting in part)**

152.

It is neither necessary nor helpful for this judgment to traverse the background or facts of this appeal, which are clearly set out in the judgment of Lord Neuberger.

153.

My conclusions can be summarised as follows:

(i)

Section 53(2) of the Freedom of Information Act 2000 can mean nothing other than that the accountable person (here the Attorney General) is given the statutory power to override the decision of the Information Commissioner, and/or of a court after appeal from the Commissioner, if he disagrees with it on reasonable grounds; this must include the power to disagree with the evaluation of where the balance of public interest lies.

(ii)

The exercise of such power is subject to judicial review if the Attorney General has acted unlawfully; if he has materially misdirected himself that would justify the court setting aside his certificate; on the facts of this case he has not done so.

(iii)

Insofar as the certificate relates to environmental information the power is inconsistent with the provisions of the 2004 Regulations and article 6 of Parliament and Council Directive 2003/4/EC.

(iv)

For the reasons explained by Lord Neuberger, the certificate in this case would clearly have been issued whether or not the environmental information was within it.

(v)

Accordingly for my part I would allow the Attorney General's appeal except insofar as it relates to environmental information.

Differing on the balance of public interest: the meaning of section 53(2)

154.

The rule of law is of the first importance. But it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says. I agree of course that in general the acts of the executive are, with limited exceptions, reviewable by courts, rather than vice versa. I agree that Parliament will not be taken to have empowered a member of the executive to override a decision of a court unless it has made such an intention explicit. I agree that courts are entitled to act on the basis that only the clearest language will do this. In my view, however, Parliament has plainly shown such an intention in the present instance.

155.

In the end this issue does not admit of much elaboration; it seems to me to be a matter of the plain words of the statute. The alternative postulated is simply too highly strained a construction of the section. Section 53(2) could, no doubt, have said that a certificate could be issued only if fresh material came to light after the decision of the Commissioner or the First -tier Tribunal, but it did not. Likewise, it could have said that a certificate could be issued if the decision of the Commissioner or court could be shown to be demonstrably flawed in law or fact, but it did not. If Parliament had wished to limit the power to issue a certificate to these two situations that is undoubtedly what the subsection would have said. If anyone had suggested at the time of the passage of the bill which became the Act that either of these things was what was meant, it seems to me that that suggestion would have received a decisive and negative response. The second possibility is, moreover, one which would afford clear grounds for appeal, so that a certificate would not be necessary. Even if it were a second appeal, a demonstrably flawed decision upon a topic of public significance would be one for which there would nearly always be a compelling reason for leave to appeal to be given.

156.

In the end, the very fact that it is necessary to postulate so vestigial an extent for a generally expressed power if it is to be given any content at all is a potent demonstration that it does indeed mean what it says. The reality is that the section 53(2) provision for exceptional executive override was the Parliamentary price of moving from an advisory power for the Commissioner (and thus for the court on appeal) to an enforceable decision.

157.

The three decisions of *R v Warwickshire County Council, Ex p Powergen* (1997) 96 LGR 617, *R v Secretary of State for the Home Department, Ex p Danaei* [1998] INLR 124 and *R (Bradley) v Secretary of State for Work and Pensions (Attorney General intervening)* [2009] QB 114 are altogether too slender a foundation to support the contrary argument. The first two do not support the proposition that Parliament, knowing of them, legislated with the intention of not providing the accountable person with a power to differ from the court except in the two very restricted circumstances suggested and considered above. And in none of these cases was there an explicit statutory power to disagree with a previous decision.

158.

*Powergen* and *Ex p Danaei* were decided on the basis that the second decisions were, given the earlier findings of the planning inspector and the immigration adjudicator, *Wednesbury* unreasonable, ie irrational. In the former, Simon Brown LJ pointed out that if the Authority's argument were correct, it would be exercising "what effectively amounts to a veto" of the planning inspector's decision; that,

he held, “cannot be right” (at 625f). The present, however, is a case of a veto explicitly conferred by statute in limited circumstances. If such a provision had been present in these two cases, the outcome would, as it seems to me, inevitably have been different.

159.

Bradley is a somewhat stronger case for Mr Evans because at para 91 Sir John Chadwick articulated the proposition that it was not enough for the Secretary of State to reach his own view on rational grounds, but rather that his decision to reject the contrary view of the Parliamentary Commissioner had itself not to be irrational. There the statute gave the Commissioner the power to report and the court held that her report was not binding on the Secretary of State, but the statute was entirely silent about his position when responding publicly to such report. So this was again a case in which there was no explicit statutory power to disagree, as there is here. Moreover, as Lord Mance says, the (to my mind elusive) distinction articulated by Sir John Chadwick did not fall to be explored. On the facts of the case the Secretary of State’s conclusions, where they differed from the Commissioner’s, were held to fail the straightforward Wednesbury test: see paras 95 and 108, and contrast those conclusions which were upheld as rational in paras 105-106 and 125. It is a long step from this case to the proposition here relied upon, namely that Parliament must have meant section 53(2) to be construed, despite its apparently clear wording, in the restricted sense contended for.

160.

It follows that the Attorney General was entitled to differ from the Upper Tribunal on where the balance of public interest lay. This was the principal purpose of section 53(2). His decision must be rational, but in this case it is not seriously suggested that it was not, and it is to be noted that it was shared by the Commissioner. Indeed, the law has now been changed so as to provide unqualified exemption from disclosure for communications with the monarch, the heir or the second in line to the throne, but not for those with other members of the Royal Family.

#### Judicial Review

161.

Assuming this, I agree that the Attorney General’s certificate remains subject to judicial review. If it errs in law, that error can be corrected by the court and if necessary the certificate struck down. As to conclusions of fact, it seems to me that the position is not complex. Section 53(2) allows the issuer of a certificate to take a different view of the facts from the Commissioner or court so long as the conclusion reached is a rational one. It might not be rational if (inter alia) the certifier materially misdirected himself.

162.

I agree also that the certifier must state his reasons for his differing conclusion. That does not, as it seems to me, require him to address the judgment of the court with the same particularity as the court afforded the case. In the present case, it was not necessary for the Attorney General to match the remarkable detail of the Upper Tribunal’s judgment. Providing he has explained in general terms where he differs and why, so that his reasoning can be understood, the requirements of the section are, I think, met. Has he done so without self-misdirection or error of law?

163.

Lord Mance’s concern is that he has in effect misdirected himself as to the facts in relation to the constitutional conventions because, in summary, he has ignored the finding that the Prince was not, in the correspondence under consideration, “acting in rehearsal mode”, but rather accepted that his future role as monarch would require a different approach.

164.

I agree that a conclusion that correspondence of the kind described would, if undertaken by the monarch, fall squarely within the tripartite convention might arguably be wrong. But I do not think that this is what the Attorney was saying: what he said falls squarely within the convention is “Discussing matters of policy with Ministers, and urging views upon them within the ambit of advising or warning”, and on a basis of mutual confidence. As I read the Attorney’s reasons, he did not misunderstand or ignore the accepted fact that this correspondence was not conducted in “rehearsal mode”. At para 8 he expressly addressed the Upper Tribunal’s conclusions that (a) “the correspondence was not undertaken as part of preparation for kingship” and (b) that it “was not the type of activity in which the monarch would engage”. Having done so, he stated at para 9 his conclusion that “whether or not it falls within the strict definition of the education convention” (emphasis supplied) it served the purpose of familiarising the heir with the practical workings of government, enabled him better to understand it, and strengthened his relationships with ministers. In this way, so the Attorney concluded, it helped prepare the heir for the (differently managed) function of King. He added that the correspondence had been undertaken on an explicitly confidential basis on both sides. It does not seem to me that that involves any flawed self-misdirection; the conclusion was one which was properly open to the Attorney General.

165.

Similarly, it does not seem to me that the Attorney was irrational in taking a different view from the tribunal of the potential damage to a constitutional monarchy of misunderstanding, misperception, or for that matter misrepresentation, as to the heir’s political neutrality; that seems to me to be a matter of judgment of the possible reaction of sections of the public on which an experienced politician is at least as entitled to a view as a court.

166.

Accordingly it seems to me that the Attorney General gave sufficient rational reasons for his conclusion that the public interest lay in non-disclosure.

Environmental information

167.

To the extent that the correspondence concerned environmental information, I agree, for the reasons given by Lord Neuberger, that a certificate under section 53(2) is ineffective. I also agree, for the reasons which he gives, that this does not render the certificate as a whole unlawful.

**LORD WILSON: (dissenting)**

168.

I would have allowed the appeal. How tempting it must have been for the Court of Appeal (indeed how tempting it has proved even for the majority in this court) to seek to maintain the supremacy of the astonishingly detailed, and inevitably unappealed, decision of the Upper Tribunal in favour of disclosure of the Prince’s correspondence! But the Court of Appeal ought (as, with respect, ought this court) to have resisted the temptation. For, in reaching its decision, the Court of Appeal did not in my view interpret section 53 of FOIA. It re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy.

169.

With the fairness and courage characteristic of him, Lord Neuberger, at para 88 above, defines the basis of the Court of Appeal’s decision, with which he agrees, as follows:

“... it is not reasonable for an accountable person to issue a section 53 certificate simply because, on the same facts and admittedly reasonably, he takes a different view from that adopted by a court of record after a full public oral hearing.”

By his terminology, Lord Neuberger squarely confronts the paradox within his definition.

170.

It is helpful to notice the circumstances in which section 53 came to be included in FOIA. The version of the Bill printed on 10 February 2000 included nothing analogous to it. But under that version the applicant had no right to disclosure of such information as was subject to qualified exemptions. Clause 13(4) of it merely conferred a discretion on the public authority to disclose such information and clause 13(5) required that, in exercising the discretion, it should have regard to the desirability of disclosing it wherever the public interest in doing so outweighed the public interest in not doing so. In the event that disclosure was refused, clause 48 empowered the Commissioner only to recommend that it be given. He could not overrule the authority by ordering disclosure. At the Commons Report stage, however, the text of the Bill came, instead, to impose enforceable obligations on public authorities to disclose such information as was subject to qualified exemptions unless (reversing the weighting originally canvassed) the public interest in maintaining the exemption outweighed the public interest in disclosing the information. But, if the discretion of public authorities in this respect was to be eliminated, there needed, so Parliament decided, to be a closely circumscribed power of public authorities at the highest level to override the evaluation of public interests by the Commissioner or by tribunals or courts in ensuing appeals. This was clause 52 of the text of the Bill printed on 6 April 2000 and it became section 53 of FOIA. It is a central feature of the Act. Section 25 of the Irish Freedom of Information Act 1997 had provided for an executive override in somewhat analogous circumstances.

171.

A power of executive override of determinations of the Commissioner, or of tribunals or courts in ensuing appeals, on issues of law would have been an unlawful encroachment upon the principle of separation of powers: see the classic judgment of Sir Edward Coke, Chief Justice, in *Prohibitions del Roy* [1607] EWHC KB J23, 77 ER 1342, upon the claim of King James 1 to determine issues of law. But issues relating to the evaluation of public interests are entirely different. In the words of Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, at para 69, the principle is that “in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them”. This was the principle reflected in the first version of the Bill. In the later version Parliament sanctioned departure from it but, in enacting section 53, it no doubt continued to have in mind that the evaluation of public interests was not an exercise in relation to which the Commissioner, the tribunals and the courts, could claim any monopoly of expertise. With respect to Lord Neuberger, I cannot agree with his observation at para 96 above that in this context it is hard to differentiate between the findings of fact and conclusions of law traditionally reached by tribunals and courts, on the one hand, and their occasional excursions into evaluating the potency of rival public interests on the other.

172.

At the same time, however, Parliament recognised the potential inherent in the proposed override for executive encroachment upon the rule of law. Insofar as this was a unique power, it had therefore to be circumscribed by a unique array of safeguards. Of these, there are eight, which follow.

(a)

The power applies only to a decision notice served on a government department (now extended to the Welsh Assembly Government): subsection (1)(a).

(b)

The notice must relate to a failure to comply with section 1(1)(b) (in other words to make disclosure) in respect of exempt information: subsection (1)(b)(ii). This safeguard is of particular significance: whether the information is exempt is a question of law, to be determined in the usual way, namely by the Commissioner or in an ensuing appeal. It is not enough that the executive considers the information to be exempt. If the information is exempt and the notice relates to a failure to comply with subsection (1)(b), the notice can mean only one thing, namely that the exemption is qualified and that the evaluation of the Commissioner, tribunal or court is that the public interest in maintaining it does not outweigh the public interest in disclosure. This, then, crucially identifies the scope of the override: it is the evaluation of public interests.

(c)

The certificate is required to state that the certifier, namely the accountable person, has on reasonable grounds formed the opinion that there was no failure falling within subsection (1)(b), ie the opinion that the public interest in maintaining the exemption does outweigh the public interest in disclosure: subsection (2).

(d)

By subsection (8), the accountable person is required, in relation to a government department in England to be not just a government minister but a Cabinet minister or to be the Attorney General; in relation to Northern Ireland to be the First and deputy First Ministers acting jointly; and in relation to Wales to be the First Minister. Thus the power is exercisable only at the highest level. In relation to England, the convention, announced in Parliament during the passage of the Bill and honoured in the present case, is for the Cabinet minister or Attorney General to consult the Cabinet collectively before signing the certificate.

(e)

The accountable person must give the certificate to the Commissioner not later than 20 days following service on the department of the decision notice or following the determination of any appeal against it or of any further appeal arising out of it: subsections (2) and (4).

(f)

As soon as practicable after giving the certificate the accountable person must lay a copy of it before each House of Parliament or, in Northern Ireland and Wales, before the respective Assemblies: subsection (3). Thus there is the facility for almost immediate democratic scrutiny of the use of the override.

(g)

Also as soon as practicable the accountable person must inform the applicant of the reasons for his opinion save to the extent that to do so would involve disclosure of the information: subsections (6) and (7).

(h)

It is inherent in the procedure that the applicant can challenge the lawfulness of the certificate in proceedings for judicial review. It is crucial to the compatibility of section 53 with the rule of law that

the courts should thereby retain the right to utter the last word on the issue of disclosure: see the Alconbury Developments case, cited at para 171 above, para 73 (Lord Hoffmann).

173.

The Court of Appeal decided – and today, three members of this court agree – that, at any rate where the decision notice is the product of an appeal to the Upper Tribunal (or beyond – but in what follows I will, for convenience, put that alternative aside), Parliament must have intended its phrase “reasonable grounds” to carry a restricted meaning. Although the Court of Appeal left the point open, Lord Neuberger accepts – in my view inevitably, as I will explain in para 181 below, that the Attorney General did have, at any rate, reasonable grounds for forming his opinion that the correct evaluation of public interests lay in favour of maintaining the exemption. But, so the argument for Mr Evans runs, while a certificate on such grounds might qualify as a lawful override under section 53 of a decision notice served by the Commissioner (para 83 above), it cannot qualify as a lawful override of a decision notice upheld or substituted by the Upper Tribunal or even, probably, by the First-tier Tribunal (para 85 above).

174.

Then, however, the argument has to address the question: so what might constitute reasonable grounds for the accountable person to form the opinion that, contrary to the effect of such a decision notice, there was no failure of disclosure? The Court of Appeal offered two examples.

175.

The first example was where there had been a material change of circumstances since the determination of the Upper Tribunal. In light of the obligation of the accountable person to give his certificate within 20 days, the first point seemed unpromising. Now, however, it is expanded and said to be strengthened. It is accepted that in the present case the Upper Tribunal was, as a result of reference from the First-tier Tribunal, hearing an appeal against the Commissioner’s decision notice and that therefore there was scope for the government departments to put evidence before the tribunal that was not before the Commissioner, as indeed they did. But, according to the argument at paras 74 and 75 above, contrast the case in which the Upper Tribunal hears an appeal from the First-tier Tribunal: such an appeal is limited to a point of law and so the departments would be unlikely to achieve admission of further evidence. In such a case, therefore, a material change of circumstances founding the reasonable opinion might have arisen at any time following the determination of the First-tier Tribunal.

176.

The second example was where the decision of the Upper Tribunal was demonstrably flawed in fact or law. In the light of the ability of the public authority to appeal to the Court of Appeal on a point of law (which would include challenge to an irrational finding of fact), the second point also seemed unpromising. Now, however, it too is expanded and said to be strengthened. The argument at para 77 above is that the Court of Appeal might hold that the public authority failed to satisfy the criteria for permission for a second appeal in that its proposed appeal did not raise an important point of principle and that, notwithstanding the demonstrable flaw, there was no other compelling reason for it to be heard.

177.

Such are indeed valiant attempts to confer some substance upon the two examples given by the Court of Appeal. Do they succeed? They strike me, at least, as far-fetched and as thus serving only to illumine the deficiency of the Court of Appeal’s analysis of section 53. Its effect is that, for all practical



purposes, no certificate can be given under section 53 by way of override of a decision notice upheld or substituted by the Upper Tribunal or, probably, by the First-tier Tribunal. In other words, namely in those of Ms Rose, it will “almost never” be reasonable for an accountable person to disagree with the decision of a court in favour of disclosure. The trouble is that, as is agreed, Parliament made clear, by subsection (4)(b), that such a certificate could be given in such circumstances.

178.

It is worthwhile to note that, on the first day of the hearing in this court, Mr Eadie stated that he would probably concede that, for so long as it remained open to a government department to challenge an evaluation of public interests by way of appeal, it would be wrong for a certificate to be given instead under section 53. On the second day, however, no doubt on instructions, Mr Eadie made clear that the foreshadowed concession would not be forthcoming. In proceedings for judicial review of the lawfulness of any future certificate, it may prove important to consider the impact of a facility to appeal upon the existence or otherwise of reasonable grounds. In this regard I agree with Lord Neuberger’s remarks at para 80 above. But no such consideration arises in the present case. What is clear, and in my view significant, is that the disagreement of the government with the evaluation of public interests by the Upper Tribunal under section 2(2)(b) could not have amounted to a point of law upon which it might have appealed to the Court of Appeal. There was only one course open to it and then only if it had reasonable grounds for disagreement: it was to give a certificate under section 53. In my view, therefore, the circumstances of the case constituted a paradigm example of the area of the section’s lawful use.

179.

Ms Rose cites three decisions of the Court of Appeal in support of the proposition that it is not open to the accountable person to give a certificate under section 53, or (to put it another way) that he could have no reasonable grounds for forming the requisite opinion, in circumstances in which a court has made an evaluation of public interests with which he disagrees. I am grateful for Lord Neuberger’s full analysis of the three decisions at paras 60 to 65 above. With respect, however, I do not share his view of the light which they cast on the present issue. They were to the effect that a highway authority could not continue to maintain that the developer’s plans for access would be unsafe in the face of a contrary conclusion by a planning inspector (the Powergen case, cited at para 61 above); that in the absence of special reasons the Secretary of State for the Home Department could not continue to reject the applicant’s claim that he had committed adultery in Iran in the face of an adjudicator’s finding that he had done so (the Danaei case, cited at para 62 above); and that a minister’s rejection of the Parliamentary Ombudsman’s conclusion that his department had been guilty of maladministration was unlawful if it was irrational (the Bradley case, cited at para 63 above). All three decisions are uncontroversial. In none of them, however, did statute expressly confer a power of override on the public authority. I, for my part, cannot subscribe to the suggestion in para 88 above that, with its deemed knowledge of the decisions in the Powergen and Danaei cases, Parliament might have concluded in 2000 that, even were it to enact what became section 53, the law established by those decisions would apply so as to deprive the section of effect in relation to the evaluation of public interests made by courts and tribunals.

180.

If, as I consider, section 53 did in principle entitle the Attorney General to override the evaluation of public interests which underlay the Upper Tribunal’s substituted decision notice, the question for the Divisional Court on judicial review was whether the grounds which formed his opinion were reasonable. The 27 pieces of “advocacy correspondence” are not before the court. In the proceedings

for judicial review no application was made for the court to consider them in the way in which the Upper Tribunal had considered them, namely pursuant to a closed material procedure. It is clear that, had the Attorney General made any such application, Mr Evans would have responded that, in the absence of statutory authority, the High Court has no jurisdiction to adopt such a procedure; and that the Attorney General would have countered that, where the very purpose of the proceedings is to obtain disclosure of information, the High Court has an inherent power to consider the information pursuant to such a procedure if justice so demands. It is an important issue, requiring attention to be given in particular to the breadth of this court's decision in *Al Rawi v Security Service* (JUSTICE intervening) [2011] UKSC 34, [2012] 1 AC 531. But, in that no such application was made, the issue must await resolution in other proceedings.

181.

Sight of the correspondence would have made it easier for the Divisional Court to determine whether the Attorney General's grounds were reasonable. But its task was by no means impossible and I consider that it reached the correct conclusion. Having studied the disputed correspondence, the Upper Tribunal had conceded, at the outset of its determination, that there were "cogent arguments for non-disclosure" and indeed the Commissioner, for his part, had persuaded himself that they outweighed those in favour of disclosure. So it would have been surprising for the Divisional Court to have concluded that the Attorney General had no reasonable grounds for his opinion. It is true that, once the Upper Tribunal's determination was disseminated, the Attorney General's opinion would be reasonable only if, in his statement of reasons, he demonstrated engagement with its reasoning. But he did so. He began his analysis with a summary of the conclusions of the Upper Tribunal and later, at para 13 (set out in para 132 of Lord Mance's judgment) summarised the six main aspects of the public interest in disclosure which it had identified. In para 14 he described them as good generic arguments for disclosure but explained that in his view they were substantially outweighed by public interest considerations militating against disclosure which were "centred upon The Prince of Wales' preparation for Kingship and the importance of not undermining his future role as Sovereign". Earlier in his statement the Attorney General had explained each of these two aspects in some detail. The Upper Tribunal had recognised the existence of a tripartite convention under which, on a confidential basis, the Sovereign has a right to be consulted by government, to encourage it and to warn it; so preparation of the Prince for Kingship was, among other things, preparation for his exercise of rights under the tripartite convention. Confidential dialogue with Ministers was therefore, so the Attorney General asserted at para 9, an important aspect of the preparation of the Prince for Kingship in that it enabled him better to understand the business of government, by which no doubt the Attorney General intended to include the value for the public, as well as for the Prince, in his coming to understand such political difficulties as may have surrounded some of his enthusiasms. The second aspect of public interest to which, at para 10, the Attorney General referred was cast on the undeniable importance that the Sovereign should be neutral as between political parties. There was no doubt that the Prince was neutral in that sense but, so the Attorney General asserted, there was a risk that disclosure might engender a contrary perception which would be difficult to dispel and which therefore might seriously compromise his future role as monarch.

182.

In paras 130 and 131 of his judgment Lord Mance accepts that section 53 of FOIA entitled the Attorney General to disagree with the Upper Tribunal's evaluation of public interests provided that his reasons were solid and properly explained and provided, in particular, that he did so against the background of fact and law established by the tribunal. Lord Mance considers, however, that instead the Attorney General undertook a re-determination of the relevant factual background. Lord Mance

contends that the ensuing paragraphs of his judgment so demonstrate. But (I ask, with respect) do they so demonstrate? I suggest that most readers of the extensive quotations from the tribunal's judgment and the Attorney General's certificate set out in paras 132-144 of Lord Mance's judgment will conclude as follows:

(a) There was a surprising concentration in the evidence before the tribunal and in its judgment on the theoretical ambit of constitutional conventions, in particular of the so-called education convention.

(b) To determine whether a particular piece of correspondence fell within the ambit of the education convention or some other convention was not to determine the central question, which was whether the public interest in not disclosing it outweighed the public interest in disclosing it.

(c) Preparation for Kingship was, as I have explained, the first of the two central grounds for the Attorney General's conclusion that the balance of public interests lay against disclosure. In that respect it was reasonable for him to state, in para 9 of the certificate:

"I therefore consider that, whether or not it falls within the strict definition of the education convention, "advocacy correspondence" is an important means whereby the Prince of Wales prepares for Kingship. It serves the very same underlying and important public interests which the education convention reflects."

(d) In stating that the correspondence formed part of the Prince's preparation for Kingship and that it did not matter whether it fell outside the education convention and thus lacked what, at para 106, the tribunal described as "constitutional status", the Attorney General disagreed with the tribunal not on a question of fact but in its approach to the evaluation of the rival public interests.

(e) The Attorney General's certificate discloses no disagreement with the tribunal upon any issue of "fact" in any ordinary sense of that word.

183.

Without in any way agreeing with the Attorney General that the public interest in maintaining the exemption did outweigh the public interest in disclosure, the Divisional Court was in my view right to conclude that there were reasonable grounds for him to hold that opinion.

184.

Insofar as the correspondence includes environmental information, the Attorney General's certificate under section 53 was unlawful if it fell foul of the requirements for access to justice in article 6 of the European Directive 2003/4/EC ("the Directive"). As Lord Neuberger explains in para 100 above, paragraph 1 of the article entitled Mr Evans to demand reconsideration of the departments' refusal of disclosure by an independent body established by law ("the paragraph 1 requirement") and, in the event of his continued dissatisfaction, paragraph 2 entitled him to access to a review procedure before a court of law "whose decisions may become final" ("the paragraph 2 requirement"). In the interests of maximum clarity paragraph 3 added that, once the decisions were final, they should be binding.

185.

The fifth recital to the Directive explains that its purpose was to make EU law consistent with the Aarhus Convention dated 25 June 1998 ("the Convention"), the subjects of which, in the words of its title, were "access to information, public participation in decision-making and access to justice in environmental matters". So access to justice was the third pillar of the Convention and was the subject of detailed provision in its article 9, paragraph 1 of which was the subject of efficient transposition into article 6 of the Directive. But article 6 should not be subject to the intricate analysis

apt to a domestic statute. It required the provision to Mr Evans of a right to invoke two robust, independent inquiries into whether the refusal to give him the environmental information was in accordance with the Directive. But, while they are obliged to achieve the result envisaged by a directive, and in particular to provide effective judicial protection for an individual's exercise of such rights as it confers, member states have "the freedom to choose the ways and means of ensuring that a directive is implemented": paras 40 to 47 of the judgment of the Grand Chamber of the ECJ in the Impact case, cited at para 106 above.

186.

It is agreed that the facility to apply to the Commissioner satisfies the paragraph 1 requirement and that the facility to appeal onwards to the First-tier Tribunal (or, by reference, to the Upper Tribunal) satisfies the para 2 requirement. The issue is whether and if so how, the facility for the giving of a section 53 certificate and for attendant judicial review can be accommodated within the structure of the two requirements or either of them.

187.

The Attorney General seeks a ruling that the facility for judicial review of a section 53 certificate satisfies the paragraph 2 requirement for a review procedure before a court of law. He may in part be motivated to do so by his wish to preserve the facility for a certificate to be given following a decision notice served by the Commissioner and prior to any appeal. If in such circumstances the paragraph 2 requirement is to be satisfied, it can be satisfied only by the facility for the applicant to seek judicial review of the section 53 certificate. At all events the Attorney General cites the decision of the Court of Appeal in *T-Mobile (UK) Ltd v Office of Communications* [\[2008\] EWCA Civ 1373](#), [\[2009\] 1 WLR 1565](#), in which an article of an EU directive required provision of an "effective appeal mechanism" in which "the merits of the case are duly taken into account". Although ultimately there was no argument to the contrary, Jacob LJ concluded, at para 19, that the jurisdiction to conduct a judicial review was flexible enough to accommodate whatever standard the article required; and in paras 20 to 29 he convincingly set out the grounds of his conclusion. Nevertheless it remains difficult to shoe-horn the facility for judicial review into the requisite review procedure. However intense the judicial scrutiny, the focus of the judicial review can only be upon whether the accountable person had formed his opinion on reasonable grounds; but I agree with the Court of Appeal that paragraph 2 requires that the focus of the review procedure should be upon whether refusal of the information was in accordance with the Directive. Grave doubts about whether, in the case of environmental information, judicial review can satisfy the paragraph 2 requirement should lead an accountable person to be even more cautious before deciding to give a certificate under section 53 in relation to a decision notice served by the Commissioner rather than to appeal against it to the First-tier Tribunal.

188.

In the present case, by contrast, satisfaction with the paragraph 2 requirement has been achieved by the appeal to the Upper Tribunal and the question is whether the giving of the certificate and the attendant judicial review somehow operate so as to set it at naught. I consider that the answer is to be located in words in paragraph 2 which Davis LJ highlighted in para 135 of his judgment in the Divisional Court, namely that the outcome of the review "may become final". I am doubtful about the legitimacy of Lord Neuberger's interpretation, expressed in para 100 above, that these words give rise to a requirement that the outcome "become[s] final". Article 9.1 of the Convention also refers to final decisions but sheds no light on this issue. In my view the drafters of article 6 of the Directive rightly recognised that the decision made upon the paragraph 2 review might or might not become final and that this might depend on the outcome of some further procedure. I believe that they had in

mind, in particular, that a public authority might win an appeal against the decision made upon the paragraph 2 review. In England and Wales a successful appeal by a public authority to the Court of Appeal on a point of law against a decision notice upheld or substituted by the Upper Tribunal would mean that the latter's decision had proved not to be final. But no one could deny that, in that event, the applicant had nevertheless been afforded his right of access to review under paragraph 2. The present case exemplifies the adoption of a different procedure before it could be seen whether the decision made upon the paragraph 2 review would become final: for the procedure took the form not of an appeal but of the giving of a certificate under section 53 attended by a judicial review. Had the result of the judicial review been to quash the certificate, the decision made upon the paragraph 2 review would indeed have become final. But since, correctly in my view, the Divisional Court declined to quash the certificate, the decision made upon the paragraph 2 review did not become final. As in the case of an appeal against the decision made upon the paragraph 2 review, the ultimate arbiter of whether the Upper Tribunal's decision should become final has been a court of law. On any sensible reading of paragraph 2, that feature must be crucial but, granted its existence in the present case and notwithstanding the specific focus of the judicial review, I conclude that there has been no breach of the paragraph 2 requirement.

189.

Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") provides that everyone whose rights guaranteed by the law of the Union are violated has the right to an effective remedy, including to a fair and public hearing by an independent tribunal established by law. By the Directive, the law of the Union guarantees to Mr Evans qualified rights to the disclosure of environmental information. He contends that, insofar as it addressed such information, the Attorney General's certificate violated his rights under article 47; and, in reliance on article 52.3 of the Charter which ascribes to his rights under article 47 the meaning and scope of corresponding rights under article 6 of the European Convention on Human Rights, he contends that the giving of the certificate under section 53 infringed his rights to legal certainty and to equality of arms. If, for the reasons which I have explained, the giving of the certificate, when taken together with its attendant judicial review, does not violate the detailed requirements for access to justice in article 6 of the Directive, I do not accept that it might nevertheless infringe the right of Mr Evans to an effective remedy under article 47 of the Charter. No one would welcome the further protraction of a dissenting judgment by enlargement upon this straightforward conclusion.