

# GLS Administrative Law Webinar

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## CASE REFERENCE

**R. (on the application of Evans) v Lord Chancellor**

**Divisional Court  
12 May 2011**

Westlaw Case Analysis ..... 4 pages

Official Transcript ..... 14 pages

## R. (on the application of Evans) v Lord Chancellor

Divisional Court

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### Case Analysis

#### Where Reported

[2011] EWHC 1146 (Admin); [\[2012\] 1 W.L.R. 838](#); [2011] 3 All E.R. 594; (2011) 108(21) L.S.G. 15; [Official Transcript](#)

#### Case Digest

**Subject:** Legal advice and funding **Other related subjects:** Administrative law

**Keywords:** Amendments; CLS funding; Funding code; Judicial review; Legal aid; Public interest

**Summary:** The court quashed amendments to the Legal Services Commission Funding Code, which restricted the availability of legal aid in public interest judicial review cases, because the Lord Chancellor and Secretary of State for Justice had taken into account irrelevant considerations when making their decision.

**Abstract:** The claimant civil liberties campaigner (E) brought a claim for judicial review of the decision of the first defendant Lord Chancellor and second defendant secretary of state to enact amendments to the Legal Services Commission Funding Code. Under the amendments, which came into force on April 1, 2010, public interest challenges by way of judicial review would be ineligible for public funding where the claimant stood to gain no direct benefit from the action. A consultation paper stated that the purpose of the amendments was to use limited funds in the best way possible. The prospective saving to the public purse amounted to £50,000 to £100,000. In correspondence prior to the consultation, the Secretary of State for Defence raised concerns about publicly funded judicial review applications relating to events in Iraq, stating that adverse judgments could affect the government's policy interests. Reference was also made to an earlier successful claim for judicial review brought by E, concerning the treatment of captured detainees in Afghanistan, which had been publicly funded. Emails revealed that internal meetings between the two departments had also taken place concerning the issue. E submitted that the consultation process had been flawed because it did not disclose the true reasons for the amendments. E also argued that the amendments were driven by the concerns expressed by the Secretary of State for Defence, which should not have been a material consideration.

Application granted. (1) The letter from the Secretary of State for Defence to the Ministry of Justice asserted that the consequences of an adverse result in a public interest judicial review case was a good reason for the denial of public funding to bring the case. Such a position was not open to the government. For the State to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be inimical to the rule of law. That did not mean that the State was bound to fund such litigation. The Lord Chancellor was perfectly entitled to promulgate criteria such as the amendments under challenge, but only for legally proper reasons. The reasonable prioritisation of scarce public funds would be

capable of amounting to such a reason (see paras 25-26 of judgment). (2) The Ministry of Defence was the only department to make representations to the Ministry of Justice addressing the proposed amendments, and the prospective saving to the public purse to be achieved by the amendments amounted to no more than £50,000 to £100,000. On the facts, the concerns expressed by the secretary of state as to the consequences of an adverse result in some cases, including E's earlier case, exerted some influence in the promulgation of the amendments. In those circumstances, a legally inadmissible consideration was taken into account and the amendments therefore had to be quashed (paras 28-29). (3) There was an overarching requirement of fairness for the standards of consultation. Those standards included a duty to give sufficient reasons for the proposal in hand to enable consultees to respond intelligently. The consultation process in the instant case fell short of those standards, *R. v Islington LBC Ex p. East* [1996] E.L.R. 74 and *R. v Brent LBC Ex p. Gunning* 84 L.G.R. 168 considered. The concerns of the Ministry of Defence were material to the proposed amendments. Accordingly, consultees should have been informed that they were a factor. Since that was not done, the consultation process was legally defective, and for that reason also the amendments should be quashed (paras 30-33).

**Judge:** Laws, L.J.; Stadlen, J.

**Counsel:** For the claimant: Tim Otty QC, Tom Hickman. For the defendant: Sam Grodzinski QC.

**Solicitor:** For the claimant: Public Interest Lawyers. For the defendant: Treasury Solicitor.

#### Significant Cases Cited

**R. v Islington LBC Ex p. East**

[1996] E.L.R. 74; QBD

**R. v Brent LBC Ex p. Gunning**

84 L.G.R. 168; *Times*, April 30, 1985; QBD

#### All Cases Cited

**R. (on the application of Evans) v Secretary of State for Defence**

[2010] EWHC 1445 (Admin); [2011] A.C.D. 11; *Official Transcript*; DC

**R. (on the application of Corner House Research) v Director of the Serious Fraud Office**

[2008] UKHL 60; [2009] 1 A.C. 756; [2008] 3 W.L.R. 568; [2008] 4 All E.R. 927; [2008] Lloyd's Rep. F.C. 537; [2009] Crim. L.R. 46; (2008) 158 N.L.J. 1149; (2008) 152(32) S.J.L.B. 29; *Times*, July 31, 2008; *Official Transcript*; HL

**Security Industry Authority v Stewart**

[2007] EWHC 2338 (Admin); [2009] 1 W.L.R. 466; [2008] 2 All E.R. 1003; [2009] I.C.R. 233; *Official Transcript*; DC

**Tweed v Parades Commission for Northern Ireland**

[2006] UKHL 53; [2007] 1 A.C. 650; [2007] 2 W.L.R. 1; [2007] 2 All E.R. 273; [2007] N.I. 66; [2007] H.R.L.R. 11; [2007] U.K.H.R.R. 456; 22 B.H.R.C. 92; (2007) 151 S.J.L.B. 24; *Times*, December 15, 2006; *Official Transcript*; HL (NI)

**R. (on the application of Anderson) v Legal Services**

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### **R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions**

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### **R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)**

[\[2002\] EWCA Civ 1409](#); [Official Transcript](#); CA (Civ Div)

### **R. (on the application of L) v Barking and Dagenham LBC**

[\[2001\] EWCA Civ 533](#); [\[2001\] 2 F.L.R. 763](#); [\[2002\] 1 F.C.R. 136](#); [\[2001\] B.L.G.R. 421](#); [\(2001\) 4 C.C.L. Rep. 196](#); [\[2001\] Fam. Law 662](#); [Times, June 11, 2001](#); [Official Transcript](#); CA (Civ Div)

### **R. v North and East Devon HA Ex p. Coughlan**

[\[2001\] Q.B. 213](#); [\[2000\] 2 W.L.R. 622](#); [\[2000\] 3 All E.R. 850](#); [\(2000\) 2 L.G.L.R. 1](#); [\[1999\] B.L.G.R. 703](#); [\(1999\) 2 C.C.L. Rep. 285](#); [\[1999\] Lloyd's Rep. Med. 306](#); [\(2000\) 51 B.M.L.R. 1](#); [\[1999\] C.O.D. 340](#); [\(1999\) 96\(31\) L.S.G. 39](#); [\(1999\) 143 S.J.L.B. 213](#); [Times, July 20, 1999](#); [Independent, July 20, 1999](#); CA (Civ Div)

### **R. v Islington LBC Ex p. East**

[\[1996\] E.L.R. 74](#); QBD

### **R. v Barnet LBC Ex p. B**

[\[1994\] 1 F.L.R. 592](#); [\[1994\] 2 F.C.R. 781](#); [\[1994\] Fam. Law 185](#); [Independent, November 17, 1993](#); QBD

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### **R. v Secretary of State for Health Ex p. United States Tobacco International Inc**

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### **R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd**

[\[1982\] A.C. 617](#); [\[1981\] 2 W.L.R. 722](#); [\[1981\] 2 All E.R. 93](#); [\[1981\] S.T.C. 260](#); [55 T.C. 133](#); [\(1981\) 125 S.J. 325](#); HL

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[\[1981\] A.C. 75](#); [\[1980\] 3 W.L.R. 22](#); [\[1980\] 2 All E.R. 608](#); [78 L.G.R. 269](#); [\(1980\) 40 P. & C.R. 51](#); [\[1980\] J.P.L. 458](#); [\(1981\) 125 S.J. 168](#); HL

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[Access to Justice Act 1999 \(c.22\) s.6\(8\)](#)

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[Access to Justice Act 1999 \(c.22\) s.8\(1\)](#)

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Funding Code

Funding Code s..5

Funding Code s.7

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Legal Services Commission Funding Code para.7.3.4

[Private Security Industry Act 2001 \(c.12\)](#)

[Serious Organised Crime and Police Act 2005 \(c.15\) s.132\(1\)](#)

## Journal Articles

### Recent developments in public law (August)

Administrative law; Disciplinary procedures; Dismissal; Fairness; Judicial review; Legitimate expectation; Magistrates' courts; Mediation; Reasons; Upper Tribunal.

[Legal Action 2011, Aug, 15-19](#)

### Judicial review of cuts to publicly funded services

Consultation; Fairness; Funding; Irrationality; Legal Services Commission; Public sector equality duty; Public services; Tenders.

[Legal Action 2011, Jul, 29-33](#)

Case No: CO/7188/2010

**Neutral Citation Number: [2011] EWHC 1146 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/05/2011

**Before :**

**LORD JUSTICE LAWS**  
**MR JUSTICE STADLEN**

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**Between :**

<b>The Queen (on the application of Evans)</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>The Lord Chancellor and Secretary of State for Justice</b>	<b><u>Defendant</u></b>

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
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Tel No: 020 7404 1400, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

**Mr Tim Otty QC and Mr Tom Hickman** (instructed by **Public Interest Lawyers**) for the  
Claimant  
**Mr Sam Grodzinski QC** (instructed by The **Treasury Solicitor**) for the The Secretary of State  
for Justice

Hearing date: 5 April 2011  
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**Judgment**  
**As Approved by the Court**

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## Lord Justice Laws:

### INTRODUCTION

1. This is a claim by way of judicial review, brought with limited permission granted by Ouseley J on 15 December 2010, directed to certain new provisions contained in paragraphs 7.2.4 and 7.3.4 of the Legal Services Commission Funding Code introduced on 1 April 2010 pursuant to ss.8 and 9 of the Access to Justice Act 1999 (“the 1999 Act”). I will refer to the new provisions as “the amendments”. The effect of the amendments (I summarise) is that a public interest challenge by way of judicial review, where the claimant stands to gain no direct benefit for himself or herself, is ineligible for public funding through the Legal Services Commission (“the LSC”) unless the claim promotes real benefit for the environment.
2. The claimant is a civil liberties campaigner and peace activist. She came to public prominence in October 2005 when she was arrested and convicted under s. 132(1) of the Serious Organised Crime and Police Act 2005 of an offence of holding an unauthorised demonstration. What she had done was seek to read out at the Cenotaph the names of British soldiers and Iraqi civilians who had died in the Iraq war. In 2008 she issued judicial review proceedings (“*Evans No 1*”) against the Secretary of State for Defence, claiming that it was unlawful for United Kingdom officials to hand over captured detainees in Afghanistan to the Afghanistan National Directorate of Security (“NDS”) because to do so would expose them to a real risk of torture. The claim was vigorously resisted. On 24 September 2008 the Treasury Solicitor wrote to the LSC asking them to “reconsider whether [the claimant] should be granted legal aid for the purposes of her threatened application for judicial review”. However, the LSC did not accede to the Treasury Solicitor’s request, and at length granted public funding for the challenge.
3. On 25 June 2009, just before the date fixed for an oral permission hearing, the Secretary of State dropped his objection (hitherto maintained) to the claimant’s standing to bring the claim and conceded that judicial review permission should be granted. The substantive hearing took place before Richards LJ and Cranston J in this court between 19 and 29 April 2010. The Secretary of State accepted that transferring detainees would be contrary to his own policy statement, issued in March 2010, if it exposed them to a real risk of torture. Delivering judgment on 25 June 2010 this court held that transfers might only continue to NDS facilities at Lashkar Gah and Kandahar, and then only if the protective monitoring regime was reinforced and strengthened. Transfers to NDS headquarters in Kabul would be unlawful. At paragraph 2 of the judgment the court observed:

“The claim itself is brought in the public interest, with the benefit of public funding. It raises issues of real substance concerning the risk to transferees and, although the claimant’s standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.”

It seems likely that but for *Evans No 1* the situation of the detainees liable to be handed over to the NDS would never have been subject to the scrutiny of the English courts.

4. In the present proceedings the first and principal ground of challenge – I will call it Ground 1 – consists in two separate but associated arguments, which I may express in my own words as follows. (1) The consultation process leading to the amendments was flawed for want of disclosure of documents showing the true reasons for the amendments being proposed; and (2) those reasons were bad in law because they consisted in, or at least were driven by, certain concerns expressed by the Secretary of State for Defence which were not legally material. These flaws are illustrated, Mr Otty QC for the claimant would say, by the terms of paragraph 3.2 of Consultation Paper CP 12/09 “Legal Aid: Refocusing on Priority Cases”, published on 16 July 2009, which I will set out below.
5. A complaint of want of disclosure was in fact canvassed before Ouseley J, who refused permission to advance it as a ground of judicial review. Since then certain documents (I will give the critical quotations) have very properly been produced by the Secretary of State as exhibits to a witness statement of Mr Jones, a senior official at the Ministry of Justice. Mr Otty has in consequence renewed and modified this ground of challenge so that it takes the form of Ground 1 which I have described. We grant permission to argue this compendious first ground. I will explain the circumstances in which it arises in due course.
6. There are two other grounds for which Ouseley J gave permission. Ground 2 asserts that the amendments are *ultra vires* the 1999 Act. Ground 3 assaults the rationality of criteria which, in the form of the amendments, allow LSC funding for public interest challenges in what may be called environmental cases, but in no other instance where international obligations of the United Kingdom might require litigation to be publicly funded; at least (as Mr Otty put it in his oral submissions) the Secretary of State should have considered whether other obligations might impose such a requirement.

### ***THE ACCESS TO JUSTICE ACT 1999***

7. The material provisions of the 1999 Act are as follows.

“4(1) The Commission shall establish, maintain and develop a service known as the Community Legal Service for the purpose of promoting the availability to individuals of services of the descriptions specified in subsection (2) and, in particular, for securing (within the resources made available, and priorities set, in accordance with this Part) that individuals have access to services that effectively meet their needs.

2 The descriptions of services referred to in subsection (1) are—

...

(c) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties...

6(1) The Commission shall set priorities in its funding of services as part of the Community Legal Service and the priorities shall be set—



(a) in accordance with any directions given by the Lord Chancellor, and

(b) after taking into account the need for services of the descriptions specified in section 4(2).

(2) Subject to that (and to subsection (6)), the services which the Commission may fund as part of the Community Legal Service are those which the Commission considers appropriate.

...

(6) The Commission may not fund as part of the Community Legal Service any of the services specified in Schedule 2.

(7) Regulations may amend that Schedule by adding new services or omitting or varying any services.

(8) The Lord Chancellor—

(a) may by direction require the Commission to fund the provision of any of the services specified in Schedule 2 in circumstances specified in the direction, and

(b) may authorise the Commission to fund the provision of any of those services in specified circumstances or, if the Commission request him to do so, in an individual case.

...

8(1) The Commission shall prepare a code setting out the criteria according to which it is to decide whether to fund (or continue to fund) services as part of the Community Legal Service for an individual for whom they may be so funded and, if so, what services are to be funded for him.

(2) In settling the criteria to be set out in the code the Commission shall consider the extent to which they ought to reflect the following factors –

(a) the likely cost of funding the services and the benefit which may be obtained by their being provided,

...

(c) the importance of the matters in relation to which the services would be provided for the individual,

(d) the availability to the individual of services not funded by the Commission and the likelihood of his being able to avail himself of them,

...

(g) the public interest,

...

(8) Before preparing the code the Commission shall undertake such consultation as appears to it to be appropriate; and before revising the code the Commission shall undertake such consultation as appears to it to be appropriate unless it considers that it is desirable for the revised version to come into force without delay.

(9) The Lord Chancellor may by order require the Commission to discharge its functions relating to the code in accordance with the order.”

S.9 provides for approval of the code by the Lord Chancellor and for application of the affirmative resolution procedure in Parliament, subject to a fast-track process where the Lord Chancellor considers that a revision should come into force without delay (s.9(7) and (8)).

### ***THE AMENDMENTS***

8. After a consultation process to which I will refer, the Lord Chancellor approved the amendments which came into force (apparently pursuant to the fast-track procedure) as I have said on 1 April 2010. Paragraph 7.2.4 is in a section headed “Criteria for Investigative Help”; paragraph 7.3.4 under “Criteria for Full Representation”. 7.2.4 provides:

#### ***“7.2.4 Client Interest***

Investigative Help will be refused unless the proceedings have the potential to produce real benefits for the applicant, for the applicant’s family or for the environment. However funding will not automatically be withdrawn if the applicant ceases to have a direct personal interest during the course of the proceedings.”

Save that the opening words are “Full Representation” rather than “Investigative Help”, paragraph 7.3.4 is in identical terms.

### ***INVOLVEMENT OF THE MINISTRY OF DEFENCE***

9. As I have said, Consultation Paper CP 12/09 was published on 16 July 2009. It was laid before Parliament. The consultation period was to run to 8 October 2009. However before it was published there had been substantial communications between the Ministry of Defence and the Ministry of Justice; this material is central to the principal ground of challenge, Ground 1, which we have given permission to advance. The relevant documents are among those exhibited to Mr Jones’ witness statement. On 29 November 2008, two months after the Treasury Solicitor had written to the LSC asking them to reconsider the grant of legal aid for *Evans No 1*, the then

Secretary of State for Defence, Mr Ainsworth MP, wrote to Lord Bach, Parliamentary Under Secretary of State at the Ministry of Justice, in these terms:

“You will probably be aware that the Ministry of Defence has been faced with a series of judicial review applications arising out of the intervention in Iraq. In most of these cases the consequences of an adverse judgment could be extremely serious for our defence, security, and foreign policy interests and we are defending them vigorously, although at some cost in terms of time and effort in our legal and operational policy Departments.

There was publicity recently when Patrick Mercer MP criticised the grant of community legal funding for one of these cases, brought on behalf of the alleged killers of two British soldiers who face transfer to the Iraqi authorities for trial. But I was if anything more concerned to hear from my officials that a more recent application for community legal funding for an action against the MOD arising out of the arrangements for transferring persons detained in Afghanistan to the custody of the Afghan government has been successful, despite the fact that no instance of wrongdoing has apparently been alleged and the applicant is an individual who appears to have no standing beyond a general interest in human rights. We made representations against the application for funding but these were rejected; no reasons were given...

This decision leads me to wonder whether the time is right for a look at the rules under which [the LSC] makes its decisions in judicial review cases, particularly in cases where the applicant is not personally affected by the decision complained of or where no example of wrongdoing is adduced. I do not necessarily argue that there should be a total bar on public funding in such cases. But it does seem to me that the rules under which the Commission operates might usefully reflect the point that they are likely to be accorded a lower priority for funding than applications made by or on behalf of named victims of alleged maladministration or wrongdoing...”

The case concerning “the arrangements for transferring persons detained in Afghanistan” was, of course, *Evans No 1*. On 17 June 2009 an intra-government e-mail recorded a meeting the day before between Lord Bach and officials

“... to discuss access to legal aid for Iraqis and Afghans to support JR actions against the Government for actions by the British armed services. Robert Wright’s submission of 19<sup>th</sup> May refers. Both Lord Bach and the Justice Secretary wished to see speedy progress made on this... Lord Bach was meeting Bill Rammell, the new MoD minister shortly and wished to be able to reassure him that action was being taken.

Key points from the discussion:

- Consideration of this point formed part of the wider consideration of access to legal aid to support judicial review cases, under the more general rubric of looking at what it was desirable to fund from finite resources...”

A further intra-government e-mail, of 22 June 2009, has this:

“1. The Minister for Armed Forces [sc. Mr Rammell] met with Lord Bach... to discuss legal aid funding in some categories of judicial review cases on 22<sup>nd</sup> June 2009...

2. Lord Bach opened by stating that both he and Jack Straw were supportive of the concerns raised by Bob Ainsworth in his letter dated 28<sup>th</sup> November 2008 and were looking to address them speedily. The focus, though, should be on the rules governing the award of legal aid rather than on individual cases, which Ministers could clearly not interfere in...”

There followed in July 2009 (when as I have said Consultation Paper CP 12/09, relating to the proposed amendments, was published) an exchange of correspondence between Lord Bach and the Minister Mr Rammell. Lord Bach said:

“I agreed to write to expand on our discussion on 22 June, following the letter from Bob Ainsworth...

During our meeting I explained that both the Justice Secretary and I were keen to look afresh at the rules for the granting of civil legal aid to ensure that limited legal aid resources were being targeted appropriately on priority cases...”

The Minister replied:

“I was very pleased with the way in which you addressed the issue of public funding for judicial reviews, which continues to be of serious concern to this Department...”

10. Mr Otty submitted that Mr Jones’ witness statement makes it plain that the then Secretary of State’s letter of 29 November 2008 was, at least, the trigger for the amendment proposals. After describing the letter itself Mr Jones says this:

“8. It was reported to officials in January 2009 by the Private Office of the then Justice Secretary, the Rt Hon Jack Straw MP, that this matter had been raised with the Justice Secretary by the then Defence Secretary, the Rt Hon John Hutton MP.

9. The MoJ had not appreciated that a judicial review case where the claimant had no connection to the decision under challenge could pass the Funding Code merits criteria. It was also considered that the requirement of the courts that claimants must have sufficient standing before they bring a claim would

mean that such a case would be unlikely to pass the prospects of success test for funding.

10. MoJ officials asked MoD officials for details of the case to help Ministers to understand how legal aid funding had been granted, and so that further enquiries could be made with the LSC about the basis for funding the case, and these were provided by MoD.”

11. We were told at the hearing that no Department other than the Ministry of Defence made representations to the Ministry of Justice advocating or otherwise addressing the proposed amendments. The prospective saving to the public purse which it is estimated (by government) that the amendments might achieve would amount to no more than £50,000 - £100,000.

***CONSULTATION PAPER CP12/09 “LEGAL AID: REFOCUSING ON PRIORITY CASES”***

12. It is only necessary to set out paragraph 3.2 of the Consultation Paper. It is headed “Personal Benefit from the Proceedings”. The general heading above paragraph 3 is “Legal Aid for Judicial Review”. 3.2 states:

“An underlying principle of [the 1999 Act] is that the claimant has a direct interest in and will personally benefit from the action. The Act is not intended to provide funding for purely representative litigation.

Section 4.5 of the Funding Code’s Standard Criteria sets out that ‘an application will be refused unless it is for the benefit of a client who is an individual...’. This should make clear that proceedings cannot be brought about matters to which the applicant has no connection or direct interest. However, there have been cases where applicants have sought funding about matters of principle, on behalf of other people whom they do not know, or with regard to decisions to which they have no direct connection or involvement. It is our view that it is not appropriate for purely representative actions to receive limited legal aid funds.

Our proposal is to amend section 7 of the Funding Code to tighten the tests for both investigative help and legal representation in judicial review so that funding can only be granted to an individual who will gain a personal benefit from the outcome of the proceedings, either for themselves or their family.”

***GROUND 2***

13. I turn then to the grounds of challenge, and will deal with Ground 1 last. Mr Otty deploys an overall proposition in support of Ground 2, to the effect that s.8 of the 1999 Act does not authorise the formulation of a “brightline” rule or criterion by

which funding will be refused in every case where the applicant cannot demonstrate a “real benefit” for himself or his family (or the environment) arising from the litigation. He referred to *Security Industry Authority v Stewart* [2009] 1 WLR 466, [2007] EWHC Admin 2338, where this court (myself and Mitting J) upheld brightline criteria which were, however, promulgated (as Ouseley J in effect observed) under a very different statute, namely the Private Security Industry Act 2001.

14. Mr Otty’s argument begins with the terms of s.4 of the 1999 Act, which he says shows that the statute’s overall scheme is broad enough to permit LSC funding for public interest claims. So it is; but it does not follow that the Act does not authorise criteria which exclude such claims. It is next submitted that s.6 prohibits the funding of certain services specified in Schedule 2, but even then there is a residual power in the Lord Chancellor (s.6(8)) to direct funding of the provision of any of the services specified in Schedule 2 in particular circumstances. This, it is said, militates against a power to introduce hard-edged criteria. These provisions, however, deal with exclusions which the Act makes compulsory (subject to s.6(8)). They do not in my judgment cast light on the scope of the LSC’s discretion to elaborate criteria under s.8.
15. Mr Otty then turns to s.8 itself. The section contains no reference to “real benefit”. It refers to other factors, not least “the importance of the matters in relation to which the services would be provided for the individual”, an expression well capable of embracing public interest cases. Indeed s.8(2)(g) refers in terms to “the public interest”. It is to be noted, however, that the sub-paragraphs of s.8(2) are introduced by the words “[i]n settling the criteria to be set out in the code the Commission shall consider the extent to which they ought to reflect the following factors...” Thus in my judgment the Act does not require that the criteria conform rigidly to the considerations set out in the subsection. Or (as Mr Grodzinski QC for the Secretary of State puts it: paragraph 53 of his skeleton argument) the Secretary of State is entitled to adopt a narrow approach to the s.8(2)(c) factor, treating it as referring to the importance of the case to the applicant himself (and his family).
16. In my judgment s.8 confers a broad discretion as to the content of the criteria to be included in the code. The s.8(2) factors provide a steer not a straitjacket. The discretion is wide enough to allow for provision of the kind made in the amendments. I would accordingly reject Ground 2.

### **GROUND 3**

17. Ground 3 as I have indicated takes the form of a rationality challenge. It arises from the fact that the amendments allow for the funding of one type of public interest case – where the claim may produce real benefits for the environment – but no other. This exception was incorporated into the amendments because of the United Kingdom’s obligations under the Aarhus Convention (largely given effect in European Union law by the Public Participation Directive 2003/35/EC). The claimant says that consideration should have been given to the possibility of providing for another exception or exceptions on similar grounds. It is in particular suggested that compliance by the United Kingdom with its obligation under public international law – *ius cogens erga omnes* – to forestall torture, by allowing for the public funding of appropriate litigation, should at least have been contemplated. Mr Otty submits that

it is particularly striking that nothing of the kind was done given that this was the territory of *Evans No 1*.

18. It is not I think necessary to set out the relevant terms of the Aarhus Convention which (I summarise very broadly) requires that members of the public have access to appropriate procedures for review in relation to certain environmental matters. The procedures have to be “fair, equitable, timely and not prohibitively expensive”. I should, however, cite this passage from Friends of the Earth’s response to the consultation process which preceded the amendments:

“This is an issue of particular concern for environmental cases and for the UK’s compliance with its Aarhus obligations. FOE’s view is that it is unclear how this proposal would actually alter the current position under the Funding Code, which already refers to the benefits to an individual client, but that there is a significant risk in adopting a more restrictive personal benefit test in terms of compliance with the Aarhus Convention... Our concern is that such an approach would fail to recognise that in environmental judicial reviews the interests sought to be protected are diverse such that they affect a wider number of people in the community and not just the person bringing the claim... any changes in this direction should specifically address (perhaps by way of a ‘carve out’) the Aarhus issues.”

This view carried weight with the Secretary of State, and the amendments were made in their current form.

19. The United Kingdom’s obligation to prohibit and/or forestall torture does not require the establishment of “access to justice” measures analogous to those insisted on by Aarhus. There is in my judgment no inconsistency, or irrationality, in the Secretary of State’s choosing to accommodate the one but not the other in the amendments. As was said by Lord Bingham *Corner House Research v SFO* [2009] 1 AC 756 at paragraph 40:

“A discretionary decision is not in any event vitiated by a failure to take into account a consideration which the decision-maker is not obliged by the law or the facts to take into account, even if he may properly do so: *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183.”

20. Mr Otty’s less ambitious formulation of Ground 3 as a duty to consider other international obligations, rather than necessarily giving effect to them, adds nothing. I would reject Ground 3.

### **GROUND 1**

21. There are some documents which Mr Otty has not so far seen and which he says ought to be disclosed. Thus there is, no doubt, some documentary record concerning the communication between the Secretary of State for Justice and the Secretary of State for Defence in or about January 2009, and any consequent involvement of

officials (referred to in paragraph 8 of Mr Jones' witness statement); and there is the submission of Mr Robert Wright of 19 May 2009 referred to in the intra-government e-mail of 17 June 2009 which I have set out. However the documents (and extracts from Mr Jones' witness statement to which they are exhibited) which I have cited provide the essential history. The claim constituted by Ground 1, as it presently stands, is thus viable without further interlocutory disclosure.

22. There is one further document I should cite before confronting the argument's substance. The claimant's solicitors had on 27 May 2010 submitted very full representations to the Treasury Solicitor, by way of a pre-action protocol letter, indicating their client's intention to challenge the then prospective amendments. The Treasury Solicitor replied on 15 June 2010 and said this:

"The heart of the difficulty in your client's proposed challenge is its failure to recognise that legal aid is intended to assist individuals with their own legal problems. The [1999 Act] does not envisage legal aid being used by those who wish to bring public interest litigation which will produce no benefit for them personally. On the contrary, it is clear from the 1999 Act as a whole that funding is intended to be for the benefit of *individuals* to meet their needs: see in particular section 4(1)..." (original emphasis)

Argument in *Evans No 1* had taken place about six weeks before that, and judgment would be delivered ten days later.

23. As I have made clear Ground 1 has two aspects. The first is that the true reasons for the proposed amendments were not properly revealed in the consultation process. The second is that those reasons were bad in law because they consisted in, or were driven by, concerns expressed by the Secretary of State for Defence which were legally irrelevant to the decision.
24. The core material on which Mr Otty founds as being the real basis for the amendments is to be found in the Secretary of State's letter of 29 November 2008. I repeat this extract:

"... [T]he Ministry of Defence has been faced with a series of judicial review applications arising out of the intervention in Iraq. In most of these cases the consequences of an adverse judgment could be extremely serious for our defence, security, and foreign policy interests..."

... I was if anything more concerned to hear from my officials that a more recent application for community legal funding for an action against the MOD arising out of the arrangements for transferring persons detained in Afghanistan to the custody of the Afghan government has been successful, despite the fact that no instance of wrongdoing has apparently been alleged and the applicant is an individual who appears to have no standing beyond a general interest in human rights...



This decision leads me to wonder whether the time is right for a look at the rules under which [the LSC] makes its decisions in judicial review cases...”

25. In plain language this seems to me to assert that the consequences of an adverse result in such a public interest judicial review is a good reason for the denial of public funding to bring the case. It needs no authority to conclude that by law such a position is not open to government. For the State to inhibit litigation by the denial of legal aid because the court’s judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law. The point is one of principle; it is not weakened by the fact that such litigation might be funded by other means.
26. This is not, of course, to say that the State is bound to fund such litigation. If my Lord agrees with my conclusions on Grounds 2 and 3, the LSC and the Secretary of State are perfectly entitled to promulgate criteria such as the amendments under challenge, but only for legally proper reasons. The reasonable prioritisation of scarce public funds would in my judgment be capable of amounting to such a reason.
27. Mr Grodzinski submitted that for his part the Lord Chancellor did not approve the amendments in order “to ameliorate the burden on public authorities of defending judicial review claims, whether in the security or any other context”. He stated that the concerns of the Secretary of State for Defence acted as a “trigger”, prompting the Ministry of Justice to consider whether public funding should be granted for purely representative cases; the Lord Chancellor in fact approved the amendments because he took the view that limited funds should not be allocated to judicial review claims where there was no potential for the claimant to obtain real benefits for himself and his family.
28. I do not doubt the good faith of Mr Grodzinski’s instructions. But an aspiration to husband limited resources does not necessarily exclude the influence of Mr Ainsworth’s more pointed anxieties. As was stated in the e-mail of 17 June 2009: “[c]onsideration of this point [sc. the MoD’s concerns] formed part of the wider consideration of access to legal aid to support judicial review cases, under the more general rubric of looking at what it was desirable to fund from finite resources”. And indeed the contemporary record, found in the e-mails, strongly suggests that these concerns were not excluded as the policy was being formulated. Thus on 16 June 2009 there had been a meeting between Lord Bach and officials “... to discuss access to legal aid for Iraqis and Afghans to support JR actions against the Government for actions by the British armed services... Both Lord Bach and the Justice Secretary wished to see speedy progress made on this...” Then on 22 June 2009 “Lord Bach opened by stating that both he and Jack Straw were supportive of the concerns raised by Bob Ainsworth in his letter dated 28<sup>th</sup> [sic] November 2008 and were looking to address them speedily”. Moreover, as I have indicated, the Ministry of Defence was the only Department to make representations to the Ministry of Justice addressing the proposed amendments; and the prospective saving to the public purse which it is estimated (by government) that the amendments might achieve would amount to no more than £50,000 - £100,000.

29. On the facts I conclude that the concerns expressed in the Secretary of State's letter of 29 November 2008 as to the consequences of an adverse result in the kinds of case to which the letter refers (including *Evans No 1*) exerted some influence in the promulgation of the amendments. In those circumstances a legally inadmissible consideration was taken into account, and in my judgment the amendments must be quashed for that reason.
30. That result will give effect to the second arm of Ground 1. But the first arm – that the true reasons for the proposed amendments were not properly revealed in the consultation process – is also important. Had the MoD's concerns been disclosed as a factor in the decision-makers' minds, muscular representations would have been advanced by interested parties, no doubt including the claimant. The Lord Chancellor would most likely have been expressly confronted with the assertion that he was contemplating a legally irrelevant factor. He could have made it plain, before the amendments were made, that he disavowed it.
31. Instead, consultees had paragraph 3.2 of Consultation Paper CP12/09 to consider. As I have said it was published on 16 July 2009. At that time it was known in the Ministry of Justice that public funding had been granted for *Evans No 1*. And only three weeks before, on 25 June, the Secretary of State had dropped his objection to the claimant's standing to bring the claim in that case and conceded that judicial review permission should be granted. In those circumstances I consider that the contents of paragraph 3.2 are, to say the least, surprising. The statement that "[t]he Act is not intended to provide funding for purely representative litigation" is disingenuous. The further statement that "there have been cases where applicants have sought funding about matters of principle, on behalf of other people whom they do not know..." significantly understates the position. And of course there is nothing to suggest the nature (or the existence) of the concerns expressed by the Secretary of State for Defence in November 2008. All this is I think compounded by the terms of the Treasury Solicitor's letter of 15 June 2010, although it was of course written after the amendments were made.
32. Mr Grodzinski rightly submits that a government minister owes no general obligation to disclose to interested parties unpublished advice (*Bushell* [1981] AC 75) or representations from other consultees (*Ex p. US Tobacco* [1992] QB 353, 370F-G) received by him in the course of arriving at a decision. What unifies the standards which the courts have set for meaningful consultation is the overarching requirement of fairness: *per* Keene J as he then was in *Ex p. East* [1996] ELR 74, 88 (relying on *Ex p. Baker* [1995] 1 AER 73 *per* Simon Brown LJ at 88). However Mr Grodzinski acknowledges, as he must, that the standards include a duty to give sufficient reasons for the proposal in hand to enable consultees to respond intelligently: *Ex p. Gunning* (1985) 84 LGR 168, approved in *Ex p. B* [1994] ELR 357 and *Ex p. Coughlan* [2001] 1 QB 213. It is here, in my judgment, that the consultation exercise in the present case fell short.
33. If the concerns of the MoD expressed in the November 2008 letter had formed no part of the reasons for which the amendments were proposed, the terms of the letter might well have been neither here nor there. But for the reasons I have given that is not in my view the case. Those concerns were material to the proposal, and to the decision to make the amendments. Accordingly consultees should have been informed that they were, so to speak, part of the mix. Because that was not done the consultation

process was in my judgment legally defective. For this reason also I would quash the amendments.

34. For all the reasons I have given I would uphold Ground 1 and grant this application for judicial review.

**Mr Justice Stadlen:**

35. I agree.