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CASE AND COMMENT

THE PRINCE AND THE PAPER: DISCLOSING PRINCE CHARLES'S ADVOCACY CORRESPONDENCE

IT is well known that Prince Charles takes an active interest in the governance of the United Kingdom. Often, this involves petitioning government ministers on issues he considers important, usually by private letter. In *Evans v Information Commissioner* [2012] UKUT 313 (AAC), the Upper Tribunal had to consider whether some of this "advocacy correspondence" ought to be disclosed by various government departments.

Mr Evans was a journalist at *The Guardian*, and sought disclosure of advocacy correspondence dating from 2004–05 under the Freedom of Information Act 2000 ("FIA") and the Environmental Information Regulations 2004 ("EIR"). The main focus of the Upper Tribunal's judgment was on the FIA regime. Section 1(1) FIA imposes a broad duty on public authorities to publish, on request, information held by them. The potentially wide scope of section 1(1) is, however, significantly reduced by a number of exemptions in sections 21–44. In *Evans*, three of these exemptions were relied on by the departments: the exemption under section 37 on publication of information concerning, inter alia, communications with the royal family; the exemption under section 40 relating to personal data as defined by the Data Protection Act 1998; and the exemption under section 41 relating to publication which would constitute a breach of confidence or privacy. At the time of Mr Evans's requests for publication, sections 37 and 40 were qualified exemptions, such that publication would not be required unless it was in the public interest (FIA, s. 2 (2)(b)). (Section 37 has since been made an absolute exemption by the Constitutional Reform and Governance Act 2010). The section 41 exemption, on the other hand, was absolute: it applied irrespective of any countervailing

public interest. However, the question whether publication would constitute a breach of confidence for the purpose of section 41 itself involved a consideration of the public interest: breach of confidence not being actionable where the breach is shown to be in the public interest. For each exemption, therefore, the Upper Tribunal had to consider whether disclosure of the advocacy correspondence was in the public interest. The Information Commissioner had previously held it was not.

In approaching the question of public interest, the Upper Tribunal recognised three factors in favour of the disclosure of the advocacy correspondence. First, it was held that disclosure would promote good governance, increasing governmental accountability and transparency. Secondly, the tribunal recognised that disclosure of the information would lead to a more informed debate about the role of the monarchy and its interaction with government. Thirdly, the tribunal recognised that disclosure would facilitate a more informed debate about Prince Charles's specific influence on the government.

Having acknowledged these reasons in favour of the disclosure of the advocacy correspondence, the Upper Tribunal then considered the arguments advanced by the departments against disclosure. The first argument was that disclosure would undermine the constitutional convention that the heir to the throne be educated in and about the business of government ("the education convention"). The departments argued that this convention necessitated the confidentiality of *all* correspondence with the heir to the throne. The tribunal rejected this argument for reasons that will be considered below.

The departments also argued that a negative public perception of Prince Charles might result if the advocacy correspondence was disclosed. In particular, it was said that disclosure could create a perception that Prince Charles was party-political, thus impairing his constitutional position and his ability to carry out his public duties. The Upper Tribunal noted that Prince Charles's advocacy on many issues was widely known. Thus, the departments' argument effectively boiled down to the following, "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" (at [184]). The tribunal rejected this argument, holding that in the absence of special circumstances, Prince Charles's mere desire that the public should not know of his advocacy on a particular issue was insufficient to give rise to a public interest in non-disclosure.

A third argument advanced by the departments was that disclosure of the advocacy correspondence would have a chilling effect on the

frankness of future correspondence between Prince Charles and the government. This was said to be undesirable, given that it could impede the development of a relationship of mutual trust between the government and Prince Charles, adversely affecting the latter's preparation for his future role as King. The tribunal rejected this argument, too. The tribunal noted that any disclosure it ordered would only be of advocacy correspondence: correspondence properly falling under the education convention, correspondence on social matters, and other correspondence not involving advocacy would still be protected from disclosure. Advocacy correspondence, the tribunal noted, had no special constitutional status, such that it needed special protection against an inhibition on frankness. Additionally, the tribunal doubted whether Prince Charles's frankness would truly be inhibited as a result of a liability to disclose advocacy correspondence. As the tribunal put it, "[t]he chronology [of evidence] forcefully suggests that [issues important to Prince Charles] are things that he feels strongly cannot be left unsaid" (at [196]).

Finally, the tribunal considered the departments' argument that it was in the public interest to protect confidential and private information. The tribunal, while recognising the force of this argument in principle, doubted its applicability to advocacy correspondence. It found there to be a "strong air of unreality" surrounding the departments' contention that Prince Charles's birth gave him no choice as to whether to engage in advocacy correspondence. Such correspondence was not, therefore, to be characterised as truly personal, such as to give it a special status which detracted from the arguments in favour of its disclosure.

An interesting feature of the Upper Tribunal's judgment is its lengthy discussion on the nature and role of constitutional conventions. This discussion related to the departments' argument that the education convention extended to the protection from publication of *all* correspondence between the heir to the throne and the government, and not just correspondence relating to the workings of government, such that its disclosure would not be in the public interest. In discussing constitutional conventions, the tribunal endorsed the test put forward by Sir Ivor Jennings as to the existence of constitutional conventions. A convention would be held to exist where: (i) there was at least one precedent underpinning the alleged convention; (ii) both parties to the convention considered themselves to be bound by it; and (iii) there was a reason for the convention, in the sense that it accorded with the prevailing political philosophy. Perhaps of even greater interest, the tribunal offered a robustly orthodox account of the nature of constitutional conventions. In Diceyan spirit, the tribunal held that "[t]he first thing to stress is that they [conventions] are not law", though

acknowledging that action contrary to conventions could be said to be "unconstitutional" (at [66]). Nonetheless, *Evans* itself raises once again the questionable nature of Dicey's bright-line distinction between law and conventions. If the government departments had succeeded in proving that the education convention extended to Prince Charles's advocacy correspondence, then the tribunal would probably have concluded that the public interest was against disclosure. The education convention would then have had a substantive impact on the legal outcome of Mr Evans's application. Just as where a constitutional convention is relied on to show the confidential nature of published information in an action for breach of confidence (*Attorney General v Jonathan Cape Ltd*. [1976] Q.B.752), or as the basis of a legitimate expectation in judicial review proceedings (*Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374), the non-legal education convention would have been given distinctly legal effects.

As it happened, the Upper Tribunal concluded that the education convention did not extend to advocacy correspondence. It held that, on the evidence, the second limb of the Jennings test was not satisfied: it did not seem that both the government and Prince Charles considered that, as part of the Prince's preparation to be king, they were bound to permit correspondence that went beyond simply informing the Prince of how government operated. Additionally, the third limb of Jennings's test was equally unsatisfied: there was no reason to recognise the extension of the education convention to advocacy correspondence, and to do so would be to undermine the constitutional convention that recognised that it was the *monarch's* role to encourage and warn government, and her sole entitlement to be consulted on the nation's governance.

Having accepted a number of arguments in favour of disclosure, and having rejected all the arguments against disclosure, the Upper Tribunal concluded that the advocacy correspondence should be published. Nonetheless, Mr Evans's victory was short-lived: the tribunal's judgment did not result in the disclosure of Prince Charles's letters. Following the judgment, the Attorney General exercised his power of ministerial veto under FIA, s. 53, blocking disclosure. Disagreeing with the scholarly judgment of the Upper Tribunal on the issue, he held that the advocacy correspondence did constitute preparation for kingship such that it fell under the education convention. In light of the impressively detailed analysis of the Upper Tribunal on this issue, this outcome might be considered unsatisfactory.

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