

RESEARCH ARTICLE

# Judicial review and the future of UK development assistance: *On the Application of O v Secretary of State for International Development (2014)*

John Harrington<sup>1</sup> and Ambreena Manji<sup>2\*</sup>†

<sup>1</sup>Cardiff Law School, Cardiff University, Cardiff, Wales and <sup>2</sup>Cardiff Law School, Cardiff University, Cardiff, Wales

\*Corresponding author. Email: [manjia1@cardiff.ac.uk](mailto:manjia1@cardiff.ac.uk)

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## Abstract

In this paper we explore a case for judicial review brought against the Secretary of State for International Development by an Ethiopian national, Mr O. The claimant alleged that the Department for International Development (DfID) had failed adequately to assess evidence of human rights violations in Ethiopia to which funds provided by DfID had contributed. Warby J ruled that the claim merited a full hearing. DfID is unaccustomed to judicial review: the O case is the first time since the 1995 *Pergau Dam* case that UK development aid has been reviewed by the courts. We study Warby J's judgment and its implications for accountability for aid decisions. We argue that both the wider context for aid and the legal framework governing development assistance have changed significantly in the 20 or so years since *Pergau*. In particular, we show that despite the UK's new legal commitment, made in 2015, to spend 0.7% of gross national income (GNI) on official development assistance, the existing mechanisms for scrutinising aid decisions are inadequate. We argue that there is an accountability gap in relation to the UK's now considerable development spending and explore the role of judicial review in this context.

**Keywords:** international development; aid; judicial review; Pergau Dam

## Introduction

In July 2014, a case for judicial review brought against the Secretary of State for International Development by an Ethiopian national known as Mr O passed the permission stage.<sup>1</sup> The claimant alleged that the Department for International Development (DfID) had failed adequately to assess evidence of human rights violations in Ethiopia to which it was said funds provided by DfID under the Promotion of Basic Services (PBS) Programme had contributed. Warby J ruled that the claim merited a full hearing. On 26 February 2015, DfID announced that it was terminating its support for the PBS programme.<sup>2</sup> DfID's statement emphasised that its decision to withdraw from support was unconnected to permission being granted for a full hearing of Mr O's claim.

The permission stage of judicial review constitutes a considerable hurdle.<sup>3</sup> The O case is the first time since the leading case of *R v Secretary of State for Foreign Affairs, ex p World Development*

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<sup>1</sup>[2014] EWHC (QB) 14 July.

<sup>2</sup>Statement by the DfID February 2015 (on file with the authors).

<sup>3</sup>T Hickman and M Sunkin 'Success in judicial review: the current position' UK Const L Blog, 19 March 2014.

*Movement Ltd*<sup>4</sup> (the *Pergau Dam* case) that UK development aid has been subject to judicial review. For this reason, the *O* ruling has been described as ‘an important step towards greater accountability in development assistance’.<sup>5</sup> In this regard, it can be likened to the *Client Earth* case, which opened the door to judicial scrutiny of the UK’s air quality plans and indicated the willingness of the courts to review the substance of government policy.<sup>6</sup> In this paper, we study Warby J’s judgment with two aims. First, we draw out the implications of the case for aid accountability. We argue that both the wider context for UK aid and the legal framework governing development assistance have changed significantly in the 20 or so years since *Pergau Dam*. DfID – created in the wake of *Pergau Dam* to replace the Overseas Development Administration – has not been subjected to judicial scrutiny. It has been subjected to only weak non-judicial scrutiny of its spending. At the same time, a concerted campaign by DfID and others in the development community led to the UK making a new legal commitment in 2015 to spend 0.7% of gross national income (GNI) on official development assistance.<sup>7</sup> Despite this unprecedented legal commitment, the existing mechanisms for scrutinising aid decisions are inadequate.<sup>8</sup>

Our second aim is to use the example of aid as a unique sphere of public spending to explore wider questions of mechanisms for transnational accountability. We argue that whereas in other areas of public spending, accountability for decisions is directly to the UK electorate<sup>9</sup> what is unique about aid is that spending takes place extra-territorially. Seen in this light, willingness to open up development aid to judicial and other scrutiny can be said to be a matter of extra-territorial justice. Parliament and its relevant select committees should be in the frontline of scrutiny, but, failing this, the courts have a role to play. The *O* case is important because it allows us to explore the attitude of the courts to reviewing cases in which the alleged wrongdoing did not take place in the UK. The case raised important questions about the effective protection of citizens in aid recipient countries. It is a fundamental principle of international law that human rights and good governance are integral to development programmes, not optional add-ons. But projects funded by aid may be implemented in ways which violate the basic civil and social rights of individual citizens. Poor planning may lead to a skewing of priorities and damage to local economies. Of course it is for national authorities to address these problems in the first instance. But corruption, inertia and a lack of resources mean that local parliaments often fail to take account of the views of affected communities, and courts are unwilling to investigate violations after they happen. In practice accountability mechanisms in donor countries may offer the only realistic forum for monitoring the consequences of aid projects in partner countries. We argue that if parliament and the courts were unwilling to scrutinise such projects, a significant ‘accountability gap’ would be created.

The paper is organised as follows. In the next section, we provide the background to the *O* case. In [Section 2](#), we consider how the landscape of aid has changed since the *Pergau Dam* case. In particular, we argue that the DfID has become one of Whitehall’s most powerful and wealthiest departments and that the UK’s legal commitment to spend 0.7% GNI on official development assistance from 2015 raises a number of new and important questions relating to accountability and scrutiny. In the section that follows, we explore the issues that arose in the *O* case. We distinguish the approach taken in this case to that which characterised *Pergau Dam* and put both cases in their wider public law context. In

<sup>4</sup>[1995] 1 WLR 386.

<sup>5</sup>Human Rights Watch Ethiopia ‘UK aid should respect rights: ruling permits review of development agency’s compliance’, available at [www.hrw.org/news/2014/07/14/ethiopia-uk-aid-should-respect-rights](http://www.hrw.org/news/2014/07/14/ethiopia-uk-aid-should-respect-rights).

<sup>6</sup>*R (on the application of Client Earth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28.

<sup>7</sup>International Development (Official Development Assistance Target) Act 2015.

<sup>8</sup>A Manji ‘The International Development (Official Development Assistance Target) Act 2015: legislative spending targets, poverty alleviation and aid scrutiny’ (2016) 79 *Modern Law Review* 655 (arguing that it is unlikely that the new Commission for Aid Impact (CAI), which is entrusted with scrutinising aid spending and reporting to the Parliamentary Committee on International Development, will review aid decisions from a broad strategic or human rights perspective. Instead.

<sup>9</sup>JF McEldowney ‘The control of public expenditure’ in J Jowell and D Oliver (eds) *The Changing Constitution* (Oxford: Oxford University Press, 2011) pp 375–400.

**Section 4**, we build on these observations to make the case for parliamentary and judicial scrutiny of aid, arguing that thus far there have not been adequate mechanisms for scrutinising the disbursement of a large aid budget and that there are characteristics unique to the aid relationship that mean that judicial and other oversight is both necessary and desirable. In **Section 5**, we make some tentative suggestions as to the likely impact of the case.

## 1. Background to the case

In a statement of claim prepared by Leigh Day, Mr O – who at the time of the case was living in a refugee camp in Kenya – claimed that funding provided by DfID for the PBS programme had contributed to human rights abuses by the Ethiopian government. Under this programme, DfID contributed, together with the World Bank and the Africa Development Bank to a multi-donor scheme to promote access to five basic services: education; health; water and sanitation; agriculture; and roads. It was claimed that the Ethiopian government had implemented the PBS programme through forced villagisation and that this had led to evictions and forced removals, to arbitrary detention and rape, and to the alienation of the land of peasant farmers without compensation in the Gambella region in western Ethiopia.<sup>10</sup>

The Ethiopian government is something of a poster child for development experts and donors, and the UK has been a strong supporter of its ambitious development agenda and efforts in reaching the Millennium Development Goals. It is a major recipient of British aid (second only to Pakistan), receiving £370 million in official development assistance (ODA) in 2014/15.<sup>11</sup> But critics point to an authoritarian government, focused on economic growth through large infrastructure projects, which has imprisoned dissenters, including journalists, and stifled opposition parties. The government's villagisation programme was a central feature of its development ambitions. It aimed to cluster communities together in order to deliver public services such as water and sanitation and schooling. It was carried out with the assistance of police and the military which actively participated in moving the population against their will. These abuses had long been documented. For example, Human Rights Watch had been documenting serious human rights violations since the first year of villagisation in 2011 in Gambella and subsequently in other regions.<sup>12</sup> However, critics argue that donor countries have been silent on the abuses committed by Ethiopia's increasingly authoritarian government in order to maintain their relationship with an important strategic ally on matters of security, migration and peacekeeping.<sup>13</sup>

After Ethiopia's controversial disputed 2005 elections, which led to a crackdown on opposition parties and independent civil society (non-governmental organisations) donors including the UK responded by withdrawing direct budget support to the Ethiopian government.<sup>14</sup> Instead, from 2006 the first phase of the PBS programme began, with DfID contributing by funding block grants that aimed to provide adequate staffing and operations for the programme. The way the funding for the PBS was structured was intended to be more indirect because it was channelled through – rather than being directly received by – the Ethiopian Government and coordinated by the World Bank. The funding provided by DfID and other donors went towards the salaries of government officials. It was these officials who were said by the claimant to be carrying out villagisation under the auspices of the Commune Development Programme (CDP) of the government of Ethiopia.<sup>15</sup> Leigh Day Solicitors claimed that during the lifetime of the PBS, which was now in its third phase (2012–2018), DfID had failed

<sup>10</sup>[2014] EWHC 2371 (Admin).

<sup>11</sup>See DfID Development Tracker available at <https://devtracker.dfid.gov.uk/countries/ET>.

<sup>12</sup>Human Rights Watch, below n 13. It is interesting to note that although the *Pergau Dam* case was heard in 1994, 'questions were being asked in the House of Commons as early as 1989'. Considerable amounts of aid were disbursed in both cases after questions began to be raised and before the funding came to an end.

<sup>13</sup>See F Horne 'Ethiopia's bloody crackdown: the case for international justice' Human Rights Watch Report, available at <https://www.hrw.org/news/2016/08/18/ethiopia-bloody-crackdown-case-international-justice>.

<sup>14</sup>J Abbink 'Discomfiture of democracy: the 2005 election crisis in Ethiopia and its aftermath' (2006) 105 *African Affairs* 173.

<sup>15</sup>Human Rights Watch, above n 13; see also B Abegaz 'Aid, accountability and institution building in Ethiopia: the self-limiting nature of technocratic aid' (2015) 36(7) *Third World Quarterly* 1382.

adequately to monitor and evaluate it, and had made no attempt to speak with those who had fled as a result of abuses connected with it and who had sought refugee status in Kenya.

The proceedings against the Secretary of State for International Development, Justine Greening, claimed that despite being aware of allegations of abuse and being asked to investigate them, DfID had unlawfully failed properly to assess whether UK aid had been used to carry out forced villagisation. It was alleged that DfID had failed adequately to monitor how its funds were being used. Seeking permission for full judicial review, Mr O claimed that DfID ‘had failed adequately to assess Ethiopia’s compliance with its human rights obligations which was a pre-condition for receiving British aid money’.<sup>16</sup> Agreeing that the claim merited a full hearing, Warby J granted permission to apply for judicial review. Thereafter, Leigh Day sought specific disclosure of the documentation relating to assessments carried out by DfID. In the meantime, DfID’s partner in the Ethiopia programme, the World Bank, had agreed to consider allegations of human rights abuses associated with the PBS. In early 2015, the findings of the World Bank Inspection Panel charged with investigating the claims was leaked to the media.<sup>17</sup> The panel found ‘an operational link’ between the PBS programme and the CDP.<sup>18</sup> It also found that the World Bank had neither carried out sufficient investigation into this nor taken action to mitigate the risk of human rights abuses. A month later, DfID announced that it would be ending all funding to the PBS programme, in which it had by now invested £745 million.<sup>19</sup> Leigh Day responded by ending the judicial review action.

The *O* case is widely viewed as a significant development in the accountability of the UK for its aid.<sup>20</sup> It signaled the apparent willingness of the court to grant judicial review of an aid decision. Although *O* did not proceed to a full hearing, the judgment of Warby J granting permission for judicial review is thorough and detailed. As such, it presents an important opportunity to consider, for the first time since *Pergau Dam*, the approach of the courts to accountability for the Department’s aid decisions. This is an especially critical question in the new context of increased development funding to be disbursed by the Department.

## 2. UK aid since *Pergau Dam*

In this section, we explore the context for the *O* case and show that there have been four significant changes in the context for UK aid since the *Pergau Dam* case in 1995. In that case the decision of the foreign secretary, Douglas Hurd, to give £316 million in aid to Malaysia for a hydroelectric project was challenged in the High Court by the World Development Movement. It claimed that the aid was disbursed in order to secure the UK’s political and commercial relations with Malaysia and that the decision to do so was unlawful. In its landmark judgment, the court accepted that the decision was ultra vires the Overseas Development and Co-operation Act 1980, which at that time governed development aid and which set out in [section 1](#) that:

The Secretary of State shall have power, for the purposes of promoting the development or maintaining the economy of a country ... or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.

<sup>16</sup>Statement of claim (on file with the authors).

<sup>17</sup>International Consortium of Investigative Journalists ‘Leaked report says World Bank violated own rules in Ethiopia’ 20 January 2015, available at <http://www.icij.org/blog/2015/01/leaked-report-says-world-bank-violated-own-rules-ethiopia>.

<sup>18</sup>International Consortium of Investigative Journalists, *ibid*.

<sup>19</sup>The ‘terseness’ of a statement made by DfID has been commented on. ‘DfID’s announcement is striking in that it makes no reference to the controversy that has surrounded the PBS in recent years’. See J Lunn ‘Ethiopia: DFID end support to the Promotion of Basic Services Programme’ Standard Note SN07116, 2 March 2015 (House of Commons Library, International Affairs and Defense Section).

<sup>20</sup>See ‘Unwanted aid: DfID and forced resettlements’ (*The Economist*, 22 July 2014). For criticism of the case in the media, see ‘Refugee uses UK money to sue’ (*Daily Mail*, July 2014).

Rose LJ accepted the applicant's argument that although the word is not used in the legislation, aid must be given for sound development purposes because if Parliament's intention had been 'to confer a power to disburse money for unsound developmental purposes ... the statute would have said so expressly'. According to the judgment, if the money had been spent for sound development purposes, it would have been appropriate for the Foreign Secretary to have other considerations in mind, such as political and economic considerations. However, in the view of the court 'the project was so economically unsound that there was no economic argument in favour of it'.<sup>21</sup> According to McAuslan, the significance of the *Pergau Dam* case was the apparent willingness of the court 'to extend judicial control to development assistance'.<sup>22</sup> This led to important changes in the legal framework governing development assistance, as we show below.

### *The formation of DfID*

Before *Pergau Dam*, development aid was the responsibility of the Overseas Development Administration (ODA). The ODA formed part of the Foreign Office and the minister responsible for development was the Secretary of State for Foreign Affairs.<sup>23</sup> After the criticisms levelled at the ODA in the *Pergau* case, it was felt that the creation of a new ministry responsible for development would shelter aid from political interference and so end 'tied aid'.<sup>24</sup> It would also signal the importance of aid to the UK by giving the development community a distinct voice at the cabinet table. It was thought that this would provide development work with greater capacity to defend itself against political pressure in the way the ODA had not been able to do when it had come under pressure to use the aid budget to make possible an arms deal in the *Pergau Dam* affair.<sup>25</sup>

After the election of a Labour government in 1997, a new Department for International Development was created and Clare Short became the first Secretary of State for International Development. One of the first tasks of the new Ministry was to draft new legislation to govern its work.<sup>26</sup>

### *The International Development Act 2002*

Patrick McAuslan argued that the *Pergau Dam* case led directly to the introduction of the International Development Act 2002, which replaced the Overseas Development and Cooperation Act 1980.<sup>27</sup> The aim of the new legislation, he claimed, was to make judicial review of development aid more difficult. Section 1 of 2002 Act was drafted so as to broaden the grounds on which the Secretary of State for International Development could give aid. It provides that

The Secretary of State may provide any person or body with development assistance if he is satisfied that the provision of the assistance is likely to contribute to a reduction in poverty.<sup>28</sup>

McAuslan argued that UK aid decisions were very unlikely to fall outwith this broad provision: it was now highly unlikely that any decisions by the Secretary of State for International Development could be found to be ultra vires in the way that had occurred in the *Pergau Dam* case. The fact that over 20 years would elapse before development aid was once again the subject of a judicial review claim would

<sup>21</sup>R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd [1994] EWHC (Admin) 1 at 8.

<sup>22</sup>P McAuslan 'The International Development Act 2002: benign imperialism or missed opportunity?' (2003) 66 Modern Law Review 563 at 585.

<sup>23</sup>B Iretton *Britain's International Development Policies: A History of DfID and Overseas Aid* (Basingstoke: Palgrave MacMillan, 2013).

<sup>24</sup>World Development Movement 'Past campaigns, tied aid and development' (2005).

<sup>25</sup>T Lankester *The Politics and Economics of Britain's Foreign Aid: The Pergau Dam Affair*.

<sup>26</sup>See *Eliminating World Poverty: A Challenge for the 21<sup>st</sup> Century* Cm 3789, 1997.

<sup>27</sup>McAuslan, above n 22.

<sup>28</sup>International Development Act 2002.

seem to confirm McAuslan's thesis. It had indeed become more difficult to succeed in a claim against DfID as a result of the International Development Act 2002. As we show below, it is significant that when it did arise, the next judicial review of aid to come before the courts was framed in terms of the Department's procedure in assessing the PBS programme. It was not framed in terms of the lawfulness of the decision to lend. This is a significantly narrow approach. It focuses on the question of whether DfID had in place, and whether it followed, a procedure for assessing its programme in Ethiopia. This is in contrast to the *Pergau Dam* case's expansive approach. That case was organised around the larger question of the overall lawfulness of a lending decision. We return to this point below.

### *Funding environment*

When the *Pergau Dam* case was decided, the wider context for aid was very different to that which pertains today. The aid budget was not seen as a priority of the UK government. It was widely seen as vulnerable to cuts. In addition, some argued, the aid budget was viewed as a honey pot by those outside the development industry. This explained the way in which the ODA came under pressure to offer aid to Malaysia to sweeten an arms deal with that country's government.<sup>29</sup> By contrast the *O* case took place at a time of cross-party consensus in favour of ring-fencing, and increasing the amount spent on, aid. At the 2010 elections, the Labour, Liberal Democrat, Conservative and Scottish National Party manifestos had each promised to enshrine an aid pledge in law. The coalition agreement in 2010 then confirmed that it would bind itself to spend 0.7% of GNI on overseas aid from 2013.<sup>30</sup> This promise was reiterated in every party manifesto (except that of the UK Independence Party) in 2015.<sup>31</sup> There was wide consensus that the UK should be committed to development assistance as part of the exercise of soft power and influence in the international arena.<sup>32</sup> Although both Theresa May and the then Secretary of State for International Development, Priti Patel, have in the past expressed strong reservations about the UK's development budget, DfID's existence as a department seems set to continue and, in the wake of Brexit, to play a role in the promotion of the idea of 'Global Britain'.<sup>33</sup>

It is important to note that the *O* case therefore came before the courts at a critical time for UK development aid. As the case was being prepared, DfID was on the brink of bringing to completion a 15-year campaign to guarantee the amount to be spent on development assistance by the UK. Since the Jubilee campaigns for debt relief in the late 1990s, DfID had argued consistently that the UK must meet an OECD recommendation that the world's major aid donors spend 0.7% GNI on development assistance.<sup>34</sup> Over the years, thanks to the tenacity of the development community, there emerged widespread support for this change. In 2014, a private members Bill was introduced to enshrine in law a provision that the UK is bound to spend 0.7% of its GNI per annum on official development assistance and in March 2015, the International Development (Official Development Assistance Target) Act received assent. This legislation provides that the UK is legally obliged to spend 0.7% of GNI on aid and a report must be furnished to Parliament by the Secretary of State for International Development should it fail to reach this target.<sup>35</sup>

Across Whitehall, DfID is now seen as a large and powerful Ministry with significant resources at its disposal. In 20 years, aid has gone from being threatened with cuts to being ring-fenced. There is also keenness from other Whitehall departments to access the aid pot. There have been increasing attempts by the Foreign and Commonwealth Office (FCO) and the Ministry of Defence, as well as

<sup>29</sup>See Lankester, above n 25.

<sup>30</sup>The coalition: our programme for government (2010), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf).

<sup>31</sup>See Manifesto of the UK Independence Party 2015, available at <http://www.ukip.org/manifesto2015>.

<sup>32</sup>Manji, above n 8.

<sup>33</sup>See D Cullen and A Manji 'Making UK aid work: why scrutiny is key – and how to achieve it' LSE British Politics and Policy Blog, August 2016, available at <http://blogs.lse.ac.uk/politicsandpolicy/making-uk-aid-work/>.

<sup>34</sup>Manji, above n 8.

<sup>35</sup>Manji, above n 8.

the Department for Business and Skills (BIS), to work jointly with DfID and so to access the ODA budget. As Diane Abbott wrote, when she was Opposition Spokeswoman for International Development, ‘the refrain “Can we ODA that?” is now common in the corridors of the Foreign Office and the MoD’.<sup>36</sup> Examples include FCO partnerships with DfID on election monitoring funded from the aid budget; and Ministry of Defence navy ships sent to West Africa during the Ebola crisis funded by ODA.<sup>37</sup>

### *Scepticism of aid*

It is important to bear in mind that alongside DfID’s emerging position as one of the best-funded departments in Whitehall, there has also been a significant rise in aid scepticism in recent years. This has caused significant difficulties for DfID in some respects. The UK Independence Party has led the way in ridiculing wastage and ineffectiveness at DfID, but it has not been alone in expressing reservations about aid spending.<sup>38</sup> Its scepticism has been taken up by influential sections of the print media. On 13 June 2016, Parliament debated [an online petition](#) demanding a reduction in the amount the UK spends each year on ODA, following a *Mail on Sunday* campaign that had gathered over 220,000 signatures.<sup>39</sup> Critics of aid argue that the UK spending on development aid overseas is undesirable and unfair at a time of continued hardship and austerity at home.

### **3. Issues arising in *O v Secretary of State for International Development***

In this section, we explore the important issues raised in Warby J’s judgment in the *O* case, linking them to the preceding discussion by distinguishing the *Pergau Dam* case where relevant and locating the case in the wider political context for aid and for judicial review set out above.

### *Standing*

It is important to note that the *O* case arose in a wider context, in which the Lord Chancellor had raised the possibility of narrowing the grounds of standing in judicial review cases. Indeed, in its consultation paper on reforming judicial review, the Ministry of Justice explicitly cited the *Pergau Dam* case as one that demonstrated why judicial review needed to be reformed.<sup>40</sup> It argued that the World Development Movement as claimant should not have been allowed standing. The consultation paper describes such cases as ‘brought by groups who seek nothing but cheap headlines’.<sup>41</sup> It is therefore interesting that in *O*, the next case on development aid to come before the courts, the Government

<sup>36</sup>D Abbott ‘The stealth aid raid: militarising Britain’s development budget, 29 February 2016, available at <http://news.trust.org/item/20160229173810-dj9vp/?source=shtw>.

<sup>37</sup>On the governance of this non-DfID aid spending, see A Manji and P Mandler ‘Written evidence submitted to the International Development Committee *UK Aid: Other Government Departments* inquiry’, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-development-committee/uk-aid-other-government-departments/written/46950.html>.

<sup>38</sup>See UKIP Manifesto, above n 31. And by the media: O Harvey ‘Funding nemo: taxpayers’ aid cash splashed on tropical African fish’ (*The Sun*, 25 June 2015); and in relation specifically to the *O* case, see ‘Ethiopian Farmer given taxpayers money to sue Britain ... for sending international aid to his homeland’ (*Mail Online*, 10 February 2016).

<sup>39</sup>The petition is available at <https://petition.parliament.uk/petitions/125692>. See also D Cullen and A Manji ‘Why the UK needs a stronger legal framework for aid spending’, available at <https://www.theguardian.com/global-development-professionals-network/2016/jun/19/uk-needs-stronger-legal-framework-aid-spending>.

<sup>40</sup>See D Hart ‘Richard III on the move again – pitched into the current judicial review debate’ UK Human Rights Blog, available at <http://ukhumanrightsblog.com/2013/10/23/richard-iii-on-the-move-again-pitched-into-the-current-judicial-review-debate/>.

<sup>41</sup>Hart, above n 40. For an excellent critique, see S Sedley ‘Not in the public interest’ (2014) *London Review of Books* March 2014 36.

sought to ‘prob[e] the boundaries of the tests laid down by courts’.<sup>42</sup> Indeed, it has been argued that the decision by DfID to instruct the most senior barrister acting for the government clearly signals their determination to resist the granting of permission in this hearing and to do so in part by arguing for a narrow interpretation of the standing rules.<sup>43</sup> Equally, we will argue, the discussion of standing set out by Warby J can be interpreted as resisting the Government’s attempts to narrow the rules on standing.

Warby J’s judgment provides a detailed and nuanced response to the question of standing. Was Mr O, as the Government claimed, a ‘busybody’, a refugee who had left his homeland and who therefore did not have sufficient close connection with the abuses complained of to bring the action? For DfID, it had been argued that Mr O had neither legitimate concern nor sufficient interest in the case. Warby J resisted this attempt narrowly to interpret standing. He relied on *AXA General Insurance Ltd v Lord Advocate*<sup>44</sup> and cited Lord Reed’s judgment to the effect that:

A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law ... What is to be regarded as sufficient interest to justify a particular applicant’s bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

The discussion of standing in *Re O* is important not only because its predecessor, *Pergau Dam*, was considered a significant development in the willingness of the UK courts liberally to interpret standing and so to grant *locus standi* to the World Development Movement.<sup>45</sup> We would argue that, beyond this, Warby J showed himself to be especially sensitive to the significance of standing in cases relating to international development. In these cases, the courts will by definition have to consider claims made by those affected by UK aid decisions overseas. Warby J considered this issue in detail in granting permission for judicial review. It can be argued that he took an expansive view. He did this in two ways. Firstly, he found that sufficient evidence had been presented to support the contention of a likely connection between UK aid and the CDP which resulted in human rights abuses. In response to the requirement that ‘the Claimant must ... demonstrate a sufficient factual case of likely linkage between the provision of UK aid and the CDP’, Warby J accepted that Mr O had done so ‘not only in relation to the past but also in relation to the present and future’. This is a highly significant step for the court to have taken. It will be recalled from the discussion above that the World Bank Inspection Panel, in its leaked report, found evidence of ‘an operational link’ between the PBS and the Ethiopian government’s CDP. This information came to light in early 2015. In effect, this means that an ‘operational link’, to use the Inspection Panel’s language, was accepted by Warby J before the findings of the World Bank investigation were known. In assessing whether Mr O could pass the significant hurdle of a sufficient factual case, the judge accepted evidence presented to court at a time when there was little supporting

<sup>42</sup>D Hart ‘Government still on standing warpath’ UK Human Rights Blog, 20 July 2014, available at <https://ukhuman-rightsblog.com/2014/07/20/government-still-on-the-standing-warpath/>.

<sup>43</sup>As Hart (ibid) puts it: ‘It is a tad ironic that this unsuccessful attempt to batten down the hatches on standing should come in an overseas aid case’ given that it was a case concerning overseas aid, Pergau, which is now seen as ‘a turning point in the courts’ current relaxed approach to standing’.

<sup>44</sup>[2011] UKSC 46.

<sup>45</sup>I Hare ‘Judicial review and the Pergau Dam’ (1995) 54 Cambridge Law Journal 227.



evidence in the public domain. The reports of human rights groups who had long gathered evidence of abuses will have been presented and these were clearly given due weight by Warby J. As he put it:

The contention that the CDP has been at least indirectly funded via UK contributions to the PBS certainly cannot be rejected at this stage. It is therefore reasonable for the Claimant to contend that the Defendant's approach to the assessment of Ethiopia's human rights record, and hence to the disbursement of aid, may have had a causal impact on the implementation of the CDP in the past, and that the same is likely to be true as regards current and future disbursements.<sup>46</sup>

The later findings of the World Bank Inspection Panel appear to vindicate this aspect of his decision.

We would also argue that Warby J took an expansive view in understanding Mr O's 'legitimate interest' in the case. Elaborating on how Mr O was affected, Warby J rejected the argument that Mr O had no legitimate interest in the case. Indeed, he argued forcefully that spatially and temporally Mr O 'remained affected'. To address the spatial point first, Warby J effectively turned on its head the Government's claim that Mr O was too physically remote from the case because he now lived in Kenya. He resisted what was in effect DfID's attempt to narrow jurisdiction and to avoid accountability because of the messiness and uncertainty of Mr O having fled his country.<sup>47</sup> On the contrary, he said, Mr O remained affected precisely because he was someone 'ousted from his ancestral land' and because – not despite the fact that – he was separated from relatives still at home. He explicitly rejected the Government's arguments that as a refugee from Ethiopia, Mr O had no legitimate interest in the case. Secondly, to address the temporal point, Warby J rejected the defendant's attempt to argue that Mr O was too far removed in time from the events complained of to have sufficient interest in the case. It was contended by DfID that Mr O's claim related to abuse that occurred in 2011 and 2012 and that these events predated the decisions now under challenge. In response, Warby J developed a plausible 'temporal stretch' to recognise that Mr O was indeed affected.<sup>48</sup> The claimant was, the judgment argues, legitimately concerned with 'the Defendant's present and future policy and practice with regard to the assessment of Ethiopia's human rights record'. The following passage sums up the judge's expansive approach to the spatial and temporal arguments launched by the Government:

It is true that the experiences of abuse which he relates occurred in 2011 and 2012, before the decisions challenged in this action. He is entitled however to say that he remains affected, as someone who remains ousted from his ancestral land and a refugee from his home country. Further, he can say that he is a family member with relatives from whom he has been and remains separated as a result of the way the CDP has been implemented, with those relatives remaining somewhere in Ethiopia.

### ***Grounds of claim***

The relief sought by the claimant was firstly, a declaration that the defendant had acted unlawfully in failing to have or to apply a proper assessment process so far as Ethiopia's compliance with human rights is concerned, and secondly an order requiring the publication of the most recent assessment of Ethiopia's compliance. It is important to note that:

'No challenge is made, and no relief is sought, in respect of any decisions by the Defendant to grant aid to Ethiopia'.

<sup>46</sup>See *O v Secretary of State for International Development* at 30.

<sup>47</sup>For an insightful and suggestive critique of this messiness, see FS Saunders 'Where on earth are you?' (2016) *London Review of Books* February 2016.

<sup>48</sup>For a discussion of 'chronopolitics' in the context of medical law, see J Harrington *Towards a Rhetoric of Medical Law* (London: Routledge, 2017).

Here we can return to *Pergau Dam* and distinguish the way in which the grounds of claim were drafted. In *Pergau*, a declaration that the decision of the Secretary of State for International Development was unlawful was sought by the World Development Movement. In *O* the case did not rest on whether the decision of the Secretary of State was ultra vires her powers in granting aid to Ethiopia. Rather, Mr O claimed that DfID failed to evaluate the human rights impact of its lending and so contributed inadvertently to abuses by supporting the villagisation scheme implemented by the Ethiopian government. This is a narrower framing, as we have shown above.

As we noted, McAuslan argued that the most important outcome of the judicial review in *Pergau Dam* was the introduction of the International Development Act 2002. This legislation provides in s 1 that development assistance can only be provided if it is likely in the opinion of the Secretary of State to lead to ‘poverty reduction’:

The Secretary of State may provide any person or body with development assistance if he is satisfied that the provision of the assistance is likely to contribute to a reduction in poverty.

In McAuslan’s assessment, ‘the willingness of the court in the *Pergau Dam* case to extend judicial control to development assistance’ led to a scramble to find ways to avoid future judicial review of any decision by a development minister.<sup>49</sup> In McAuslan’s view ‘proper scrutiny of ... public expenditure [is now] virtually impossible’ because the purpose for which development aid could be given was, as a result of the International Development Act 2002, now so widely drawn as to be meaningless. He described the 2002 law as giving:

the Secretary of State very wide and hopefully unchallengeable powers to disburse aid as she thinks fit, so avoiding addressing the problem that she will be likely to be disbursing monies that she and her officials have a pretty shrewd suspicion will often be wasted or misused. She doesn’t wish to be tied down by a legal framework which imposes specific duties on her which will have all sorts of internal British legal and accountability implications. Far better to legislate for a more judgeproof version of the present system.<sup>50</sup>

Since 2002, therefore, the prospect of the Secretary of State being found to have acted unlawfully has been very remote. In *O*, the case was cast in terms of DfID’s obligations to assess Ethiopia’s compliance with human rights. The claim was not that the actions of the Secretary of State were ultra vires her powers. Nonetheless, despite this narrower framing, DfID launched a vigorous defence to the suggestion that it might be compelled by a judicial review to explain and defend its specific practice in discharging its duty. In response to the claimant’s assertion that in respect of evaluating human rights, DfID had failed in its policy and practice, DfID argued that the claimant was presenting ‘a series of assertions as to how the Defendant should discharge her duty, by which the Claimant seeks to impose a “straightjacket” on the rational exercise of judgment by her’.<sup>51</sup> DfID argued that so long as the Secretary of State’s decision making was rational – and the claimant in *O* did not seek to call this into question – then the courts should not be allowed to set out how she exercised this judgement. We elaborate on this point below.

### ***Rationality and the exercise of judgement***

In relation to the defendant’s duties, the claimant made two complaints. Their first, primary complaint was that the defendant has acted in breach of the duty owed by any public body to take reasonable steps to obtain the information relevant to the discharge of its functions. Citing *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*,<sup>52</sup> it was claimed by Mr O

<sup>49</sup>McAuslan, above n 22.

<sup>50</sup>McAuslan, above n 22, at 600.

<sup>51</sup>*O v Secretary of State for International Development* at 37.

<sup>52</sup>[1977] QC 1014.

that in contexts involving fundamental rights, there is a need for ‘anxious scrutiny’ and that in certain circumstances this duty is enhanced. When this happens, scrutiny encompasses a duty, ‘where evidence calls for an explanation, to seek such an explanation’<sup>53</sup>. It was the claimant’s allegation that the defendant had ‘no established mechanisms for collecting or assessing evidence as to Ethiopia’s compliance with the conditions for the grant of aid’.<sup>54</sup> According to Mr O the defendant had ‘neither a system for assembling information itself, nor any mechanism for a third party to undertake inquiries on her behalf, nor any means of enabling third parties to draw relevant information to her attention’.

In response to this argument, the defendant did not dispute the existence of the duties of inquiry relied on by the claimant. She did, however, resist the broadening of her *Tameside* duty, arguing that this duty requires only that she take reasonable steps in carrying out her duties. According to the Secretary of State for International Development, the standard which the law required her to meet ‘in discharging her functions in this regard is that of rationality and no more’. DfID claimed that so long as the manner in which the duty was exercised was rational, it was empowered as a public body to determine ‘the manner and intensity of inquiry appropriate to the function in question’.<sup>55</sup> DfID resisted what it saw as the claimant’s attempt to persuade the court to accept ‘a series of assertions’ as to how the defendant should discharge her duty. By attempting to do this, DfID claimed, Mr O was seeking ‘to impose a “straightjacket” on the rational exercise of judgement’<sup>56</sup> relating to aid decisions. Although Warby J saw some merit in DfID’s argument, he was reluctant to reject Mr O’s argument as to the Secretary of State’s exercise of her functions at this stage. Arguing that it deserved a full hearing, Warby J said that the claim that the defendant ‘has in effect ignored, or chosen not to enquire further into, factual allegations which are plainly relevant to the assessment’ merited fuller consideration.<sup>57</sup>

The court, however, rejected the claimant’s second complaint that by using the word transparency in relation to aid, DfID had committed itself to making its assessments public. The court accepted that the defendant had made commitments to transparency in decision-making about aid, but it did not accept the argument that by

using the term ‘transparency’ in the ways that she had, the Secretary of State for International Development committed herself to making the PPA as a document public either in whole or in part, or that she had made any commitment to ‘publishing a class of document of which the PPA is an example.

The court qualified its approach to revelation of the document by saying that it was prepared to accept that the publication might be necessary for different reasons. It could see for example that ‘the publication of aspects of the Defendant’s assessments of Ethiopia’s record is a necessary component of a lawful process of assembling and assessing relevant evidence’.<sup>58</sup> The court accepted that DfID might have to make the documentation public but stated that it would do so if necessary to the lawful assembling of evidence in the instant case rather than because the court had compelled it to do so in order ‘to comply with her stated policy on conditionality by refusing to make the assessment public’.<sup>59</sup>

#### 4. The case for greater scrutiny of aid

Those critical of judicial involvement in reviewing aid have argued that *Pergau Dam* constituted a judicial overstepping of powers. In his 2011 Mann lecture, Lord Sumption argued that in *Pergau Dam* the court ‘might have been expected to say that the policy justification of this particular decision was a

<sup>53</sup>R v Secretary of State for the Home Department, ex p Gashi [1999] Imm AR 415, CA.

<sup>54</sup>O v Secretary of State for International Development at 34.

<sup>55</sup>Ibid, at 34.

<sup>56</sup>Ibid, at 37.

<sup>57</sup>Ibid, at 39.

<sup>58</sup>Ibid, at 41.

<sup>59</sup>Ibid, at 41.

matter for the minister, for which he was answerable to Parliament'.<sup>60</sup> But, Sumption says disapprovingly, rather than take that stance it quashed the decision of the Foreign Secretary.<sup>61</sup> In so doing, the court reserved for itself the power to assess development policy, a responsibility that is rightly within the power of the Secretary of State:

They ... interpreted the statute as limiting the power to grant development aid to projects that were a good idea. Who was to decide what was a good idea? Naturally, the Court itself. The practical effect was to transfer to the court the discretionary powers of the Secretary of State on a matter of policy and the task of assessing the project's merits.<sup>62</sup>

In addition to this substantive criticism of *Pergau Dam*, the granting of standing to the World Development Movement was criticised for allowing interest groups and campaigners to bring their claims before the UK courts.<sup>63</sup>

In the discussion that follows we argue, against this position, that in light of recent developments in development assistance, it is both necessary and desirable for courts to have oversight of aid lending decisions.<sup>64</sup> We explore four interrelated reasons why judicial review of aid is important. We argue that at present there exist few mechanisms to allow for meaningful scrutiny of aid; we show that the nature of official development assistance is changing rapidly and that the broadening out of those involved in its disbursement necessitates judicial oversight; we argue that DfID is now a large and powerful government Department under a legal obligation to spend a substantial budget and that the increased pressure to 'push money out of the door'<sup>65</sup> has increased the risks associated with aid decisions. We make the case that the aid relationship is unique and that the extra-territorial nature of aid spending demands both parliamentary and judicial involvement in scrutinising decisions.

### *Lack of robust mechanisms of scrutiny*

The International Development (Official Development Assistance Target) Act 2015 (the ODAT Act) constitutes a new and unprecedented commitment by the UK to an increased level of development assistance. However, there is no obvious model for scrutiny of the large amount of aid that DfID will now have not just a responsibility but also a legal obligation to disburse. In this regard, the new aid commitment is uncharted water.<sup>66</sup> The current provisions for scrutinising aid, which give responsibility to the Commission for Aid Impact, are not adequate to the task. But, at the same time DfID is under a new legal obligation because of the ODAT Act 2015 to spend its large, newly-guaranteed budget. The Act provides for an Independent Commission on Aid Impact to assess the work of the DfID and report to the parliamentary select committee on international development on its efficiency and value for money. We have argued that scrutiny of aid decisions under this arrangement are unlikely to be robust. In *Pergau Dam*, a judicial review enabled the courts to ask probing and difficult questions about the propriety of the aid given. Under the CAI mechanism, it is only the impact rather than the lawfulness of DfID's lending that will be assessed and, we would argue, this is not adequate fully to hold a wealthy and increasingly powerful Department to account.

<sup>60</sup>J Sumption 'Judicial and political decision making: the uncertain boundary' FA Mann Lecture 2011. See also Lord Hoffmann 'Separation of powers' (2002) 7 *Judicial Review* 137.

<sup>61</sup>Sumption, above n 60.

<sup>62</sup>Sumption, above n 60, at 3.

<sup>63</sup>Sumption, above n 60.

<sup>64</sup>See M Elliott *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2000); and M Elliott and D Feldman *The Cambridge Companion to Public Law* (Cambridge: Cambridge University Press, 2015).

<sup>65</sup>Below n 69.

<sup>66</sup>Manji, above n 8.

Further layers of scrutiny exist through the relevant select committee. For lending by DfID this would fall to the International Development Committee, and through the National Audit Office (NAO). Despite the purpose of the International Development Committee to provide parliamentary oversight of development and aid expenditure and the responsibility of the NAO to review public spending, neither of these bodies inquired into the decision of DfID to participate in the Ethiopian PSB programme.

### *The UK's changing aid landscape*

In recent years, commentators have drawn attention to the changing nature of UK aid. There are two changes that merit our attention. First, the fact that more and more the aid budget is disbursed to multilateral organisations, such as the World Bank<sup>67</sup> and, secondly, the implications of greater disbursement by non-traditional aid departments.<sup>68</sup> There was a significant increase in multilateral aid in 2013–2014. In this period, DfID gave multilateral organisations 44% more in core funding than it did in the previous financial year. This significant change in the spending pattern of the Department raises important questions about whether working through multilateral organisations represents value for money, the desirable balance between bilateral aid (which rose by 33%) and multilateral aid, and once again the question of whether this is the most effective way to pursue poverty alleviation. Indeed, the Committee of Public Accounts had warned in 2011 that DfID might seek to increase multilateral aid as it did not have the capacity to manage a large increase in bilateral aid. In its recommendation, the NAO noted that the International Development Committee might wish to consider ‘whether the Department’s discretionary multilateral programme grew in 2013–2014 because it did not have the capacity to manage its larger budget’.<sup>69</sup>

The increased channelling of aid spending to multilateral organisations, as happened in the 2013–2014 financial year, has caused concern.<sup>70</sup> In 2013, 41% (£4.7 billion) of ODA was spent via multilateral organisations, increasing to 42.5% (£5 billion) in 2014. In contrast to bilateral ODA, over which the UK as donor would have control because it is earmarked to go to specific countries or certain programmes, multilateral ODA is perceived to be more difficult to control. This is because, in multilateral aid arrangements, funds from a range of national governments are pooled together. The funds are then used as core funding to multilateral organisations. At that point, control over the funds is with the multilateral body and will be used as it wishes within the terms of its mandate. The concern is that the original donor no longer has control over the purposes for which spending takes place. The money having been satisfactorily disbursed to a multilateral institution such as the World Bank, the EU and the United Nations Development Programme, the UK may well find itself on course to reach the legal target for ODA spending, but questions of effectiveness remain. Indeed, commentators have pointed out that when ODA is channelled through multilateral organisations, the risks of waste, even corruption, are largely ignored.<sup>71</sup> Questionable human rights records such as those of Rwanda and Uganda are overlooked, for example, when budgetary support is given.<sup>72</sup>

Aid is now spent through a range of channels over which there is not always clear oversight. Increasingly, aid is available to departments not traditionally associated with the disbursement of development assistance, such as the Ministry of Defence and the Department for Business, Energy

<sup>67</sup>S Brown and J Gravingholt ‘Security, development and the securitization of foreign aid’ in S Brown and J Gravingholt (eds) *The Securitization of Foreign Aid*.

<sup>68</sup>Manji and Mandler, above n 37.

<sup>69</sup>National Audit Office ‘Managing the official development assistance target’ HC 950 (2015).

<sup>70</sup>See Independent Commission for Aid Impact ‘How DFID works with multilateral agencies to achieve impact’ (ICAI Report No 44, June 2015), available at <http://icai.independent.gov.uk/reports/how-dfid-works-with-multilateral-agencies-to-achieve-impact/>.

<sup>71</sup>See J Harrington and A Manji ‘Satire and the politics of corruption in Kenya’ (2013) 22 *Social and Legal Studies* 2.

<sup>72</sup>OECD and World Bank ‘Integrating human rights into development: donor approaches, experiences and challenges’ (World Bank, 2013).

and Industrial Strategy.<sup>73</sup> Some have argued that this is a ‘stealth aid raid’ in which other departments in Whitehall have attempted to access the aid budget.<sup>74</sup> Commentators have been especially critical of the militarisation of aid which has involved the Ministry of Defence in particular in accessing funds characterised as ODA. Britain has actively lobbied the Development Assistance Committee of the OECD to change the rules on definitions of aid spending. In February 2016, the OECD **widened the definition** of overseas development assistance (ODA) to allow for aid to be used for military purposes.<sup>75</sup> If DfID’s accountability mechanisms through the International Development Committee and the Commission for Aid Impact are thin, as we have argued above, it is concerning that currently mechanisms for monitoring non-traditional aid spending are non-existent.<sup>76</sup> Scrutiny of this changing spending is critical.

### *Institutional power and the pressure to spend*

The willingness judicially to review aid decisions will be critical as the implications of a large aid budget become apparent. Even when the rise of non-traditional aid departments is taken into account, it is clear that DfID will be a powerful Whitehall spender in coming years. This requires us to consider the implications of the pressure to keep spending under which DfID might find itself. In the 2013–2014 financial year, when the UK hit the OECD’s 0.7 target but before the commitment to spend this percentage of GNI was enshrined in law, the Department found itself faced with a sudden and considerable rise in its budget. A great deal can be learned by scrutinising DfID’s response. The Department effectively pushed money out of the door in the 2013–2014 financial year and questions were raised by the NAO about the lack of strategic planning and the likely effectiveness of these funds.<sup>77</sup> The NAO reiterated this point in its 2017 report, stressing the ongoing need for greater coherence and scrutiny of aid spending.<sup>78</sup> This situation is in all likelihood aggravated by the new legal target. DfID is under a legal obligation to spend its increased budget, and although it now shares the aid budget with 14 other departments, it is responsible for much of the aid budget (around 80%). Politically, it will want to avoid any underspend that might suggest it cannot make use of the increased funding it has been promised. The pressure to spend is likely to increase in coming years. How this pressure can be reconciled with strategic and effective aid remains to be seen. It was suggested in relation to the O case that the Department knew there were human rights problems associated with a programme to which it was the main contributor, but that it nonetheless pursued the programme under pressure to disburse aid. As Rawlence put it:

the claim put together by Leigh Day alleged that DfID had failed to follow its own human rights policy. In effect, they claimed, DfID had knowingly ignored human rights problems in order to keep spending.

### *The exceptionalism of the aid relationship*

In *Pergau Dam*, Rose LJ observed that in the absence of a challenge by the pressure group, it was hard to see who else would question the decision, and cited ‘the importance of vindicating the rule of law’ as

<sup>73</sup>See for example the ‘Global Challenges Research Fund’ of the Department for Business Innovation and Skills (BIS), announced as part of the 2015 Spending Review, which is composed of ODA funds as part of the commitment to spend 0.7% GNI on ODA: ‘The allocation of science and research funding 2016/7–2019/20’, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/505308/bis-16-160-allocation-science-research-funding-2016-17-2019-20.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505308/bis-16-160-allocation-science-research-funding-2016-17-2019-20.pdf). See also A Manji and P Mandler ‘Parliamentary scrutiny of aid spending: the case of the Global Challenges Research Fund’, *Parliamentary Affairs* <https://doi.org/10.1093/pa/gy014>.

<sup>74</sup>Abbott, above n 36.

<sup>75</sup>OECD ‘DAC High Level Meeting Communiqué’ 19 February 2016, available at <http://www.oecd.org/dac/DAC-HLM-Communiqué-2016.pdf>.

<sup>76</sup>Abbott, above n 36.

<sup>77</sup>Above n 69.

<sup>78</sup>National Audit Office ‘Managing the official development assistance target: a report on progress’ HC 243 (2017).

a key argument in favour of granting standing to the World Development Movement.<sup>79</sup> Given the shifts in aid spending explored above, Rose LJ's observation is more pertinent than ever. Moreover, as we have argued above, parliamentary scrutiny of aid is evidently not robust enough to ensure accountability for aid spending. The NAO reports of 2015 and 2017 both echo our concerns. In the specific case of lending to Ethiopia, parliamentary scrutiny (by the International Development Committee or the NAO) does not appear to have taken place. No questions were raised through parliamentary fora about the UK's involvement in the country, despite the concerns of human rights groups: 'DfID is perhaps the least accountable ministry: its operations are far away and its beneficiaries do not vote in the UK'.<sup>80</sup> For Elliott, '[j]udicial review constitutes such a form of participation ... it allows those with the necessary means and expertise to advocate on behalf of those whose marginalization deprives them of the opportunity adequately to speak up for themselves'.<sup>81</sup> Parallels can be drawn here with the Bribery Act 2010, which seeks to create a legal framework for intervention in cases where 'the alleged infractions did not take place on UK soil'.<sup>82</sup> The willingness legislatively to intervene in these cases – which do not concern UK government spending – surely strengthens the case for judicial oversight of UK aid spending.

## 5. The impact of O

The question of how to assess the impact of judicial review on the behaviour of individuals and institutions is complex.<sup>83</sup> This is especially true when the case does not go to full judicial review, but does experience some preliminary judicial scrutiny. Had the case gone to a full hearing, the courts might have set out a framework of obligations to which the Secretary of State must adhere.<sup>84</sup> This would have been a significant development for the development ministry which, in contrast to other government departments, is unaccustomed to judicial review cases. An intervention by the court at full judicial review would clearly have constituted an undesirable straitjacket on the Secretary of State's judgement. The risk for DfID was that 'the court would force it to design and implement a transparent policy for assessing human rights'.<sup>85</sup>

The longer-term impact of the case is more difficult to gauge. To what extent and how will DfID 'internalize ... judicial review norms and values'?<sup>86</sup> It seems plausible to argue that the case will have a significant impact on the way in which this government department operates. The determination of DfID to resist the case on all grounds demonstrates the power of scrutiny by the judiciary not just in this case but more widely for the DfID bureaucracy.<sup>87</sup> As Jennings has written:

The legal review ... may force greater transparency on the decisions being made ... it will put pressure on DfID to clarify just how seriously it takes its 'good governance' mantra when deciding on aid spending.<sup>88</sup>

<sup>79</sup>Above n 4, Rose LJ at 395.

<sup>80</sup>B Rawlence 'The refugee who took on the British government' (*The Guardian*, 12 January 2016).

<sup>81</sup>M Elliott 'Standing and judicial review: why we all have a "direct interest" in government according to law', available at <https://ukhumanrightsblog.com/2013/07/30/standing-and-judicial-review-why-we-all-have-a-direct-interest-in-government-according-to-law-dr-mark-elliott/>.

<sup>82</sup>See N Branson 'Debt and corruption in Tanzania', discussing the landmark Deferred Prosecution Agreement between the UK Serious Fraud Office and Standard Chartered Bank in November 2015, available at <http://www.africaresearchinstitute.org/blog/debt-and-corruption-in-tanzania/>.

<sup>83</sup>P Cane 'Understanding judicial review and its impact' in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) p 15.

<sup>84</sup>Rawlence, above n 80.

<sup>85</sup>Rawlence, above n 80.

<sup>86</sup>M Sunkin 'Conceptual issues in researching the impact of judicial review on government bureaucracies' in Hertogh and Halliday, above n 83.

<sup>87</sup>Sunkin, above n 86.

<sup>88</sup>M Jennings 'It takes a village, revisited' Africa Development and Politics Blog, available at <http://www.mikejennings101.wordpress.com>.

In the absence of full judicial review, the opportunity was missed to elaborate on what the Department's monitoring of human rights should amount to. In the absence of this clarification, it is difficult to know how DfID's monitoring of its programmes works in practice. This gives rise to the impression that the Department is prioritising spending over human rights compliance, and that in so doing may be overlooking difficult human rights issues across the world. Patrick McAuslan argued that the then Overseas Development Administration (later the Department for International Development), reeling after the Malaysian dam affair, worked to make sure that its aid decisions were thereafter 'Pergau proof'. For the next 20 years, the chances of an adverse judicial decision concerning DfID were remote. In *Re O*, the Department came close once again to being held to account by the courts for the way in which the Secretary of State for International Development exercises her power. DfID has avoided the straightjacket of accountability on this occasion but will be on notice that judicial scrutiny of its large budget may now be more likely. Internally, the Department will no doubt be reviewing its readiness to respond to judicial review.

### Conclusion

By attempting to open aid spending up to judicial scrutiny for the first time in over 20 years, the *O* case constitutes something of a landmark. The UK is now one of the OECD's largest disbursers of aid. DfID will become an increasingly powerful Whitehall Department in years to come, but most of those affected by its decisions are overseas. They have few means to hold the Department to account for its lending decisions. We have argued that litigation has a role to play in steering policy and decision-making on development spending. In this regard, the *O* case constitutes an important milestone in developing accountability for aid decisions.