Neutral Citation Number: [2020] EWHC 95 (Admin)

Case No: CO/449/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2020

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

The Queen on the application of
FF **Claimant**

- and -

DIRECTOR OF LEGAL AID CASEWORK **Defendant**

- -
- -

Mr Tom Hickman QC (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Mr Malcolm Birdling (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 6 June 2019

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Approved Judgment

Mr Justice Murray :

1. By this claim FF, whose identity is protected by an anonymity order, challenges the decision of the Director of Legal Aid Casework ("the Director") dated 2 November 2018 ("the Decision") to refuse his application for legal aid in relation to judicial review proceedings that FF wishes to bring against the Secretary of State for the Home Department ("the Secretary of State").

2. FF wishes to bring judicial review proceedings against the Secretary of State in order to ensure that she properly and lawfully considers FF's request that Prince Sheikh Nasser bin Hamad Al Khalifa ("the Prince"), the Commander of the Bahraini Royal Guard, be excluded from the United Kingdom. FF has been granted asylum in the United Kingdom on the grounds that he has a well-founded fear of persecution at the hands of the Bahraini authorities.

3. On 22 May 2019 I granted permission for judicial review of the Decision on a review of the papers. The principal issue in this case also arose in *R (Liberty) v Director of Legal Aid Casework* (Claim No. CO/4111/2018), which I heard on 20 March 2019 and in respect of which I reserved judgment. That case, however, concerned quite different facts. As of the date of the hearing of this claim, I had not handed down judgment in *Liberty*, but I expected to do so shortly. I have since done so. The neutral citation for my judgment in that case is [2019] EWHC 1532 (Admin).

The issue

4. The Director refused FF's application for legal aid in reliance on paragraph 19(3) ("Paragraph 19(3)") of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which excludes from the scope of civil legal aid in relation to any proposed judicial review proceedings that do "not have the potential to produce a benefit for the individual, a member of the individual's family or the environment".

5. The principal issue in this case, therefore, is whether the proposed judicial review proceedings that FF wishes to bring against the Secretary of State have the potential to produce a "benefit" for FF within the meaning of that term in Paragraph 19(3). It has not been suggested that the judicial review proceedings have the potential to produce a benefit to a member of FF's family in the absence of a potential for benefit to FF, so it is sufficient to consider whether there is a potential for benefit to FF. It is also not suggested that there is a potential for benefit to the environment.

The factual background

6. In order to assess whether the judicial review proceedings that FF wishes to bring would produce a benefit for him in the required sense, it is necessary to set out the factual background in some detail. This background is not in dispute. For the following summary I have drawn heavily on the skeleton argument prepared on behalf of FF by Mr Tom Hickman QC. The principal evidence supporting this account are the two witness statements of FF, each dated 1 February 2019, one included in the open bundle prepared for the hearing and one included in a confidential bundle, together with various documents that are in the public domain, to which reference is

made below. The need for confidentiality in relation to some of the evidence should be clear from the summary of the factual background below.

7. FF is a Bahraini citizen. At a certain point, he arrived in the United Kingdom and was thereafter granted asylum.

8. On 14 February 2011 FF joined thousands of others in a peaceful pro-democracy protest at the Pearl Roundabout in Manama in Bahrain. The protest complained about the failure to implement democratic change in Bahrain. The protest was apparently inspired by the Arab Spring movement, which had resulted in democratic reform in other Arab countries.

9. FF, along with many others, camped at Pearl Roundabout. He was assaulted when police attacked the protesters. He was arrested and held without charge. He was detained and was abused and tortured by those detaining him. He was released, but then subsequently detained again, held in overcrowded conditions and mistreated. He was convicted by a military court for being involved in the protests.

10. FF was detained together with protest leaders Sheikh Al-Meqdad and Sheikh Al-Mahroos. He witnessed guards abusing and threatening Sheikh Al-Meqdad. He was eventually released, but Sheikh Al-Meqdad and Sheikh Al-Mahroos remain in detention in Bahrain.

11. Following his release, FF remained involved with the pro-democracy movement. Following events which threatened his life, he fled Bahrain.

12. In April 2011 the Prince, who is also Chairman of the Supreme Council for Youth and Sports, stated on Bahraini television that athletes involved in the protests would be punished. It was also reported that the Prince was personally involved in launching an investigation that targeted athletes, through suspension from sports, arbitrary arrests, and detention.

13. On 16 August 2011 the Bahrain Centre for Human Rights published a news report in which it described systemic torture and mistreatment of protesters. One passage in the report documented beatings administered by the Prince personally.

14. In 2011 the King of Bahrain commissioned an independent inquiry to report on events of February/March 2011. The Commission of Inquiry published a lengthy report on 23 November 2011. It confirmed the Bahraini Government's use of torture and other forms of physical and psychological abuse on detainees but did not identify any individual perpetrators.

15. In June 2012 both Sheikh Al-Mahroos and Sheikh Al-Meqdad, who had been convicted of crimes against the State of Bahrain linked to their political activities, gave accounts during their appeal hearings of the Prince having been personally involved in the beatings and torture to which they had been subjected.

16. On 5 July 2012 the European Centre for Constitutional and Human Rights ("the ECCHR"), which is based in Berlin, submitted a report to the Director of Public Prosecutions ("DPP") containing evidence implicating the Prince in the torture of detained prisoners in April 2011 and seeking to instigate a criminal investigation in

the United Kingdom of the Prince. The ECCHR report was passed by the DPP to the Counter Terrorism Command of the Metropolitan Police Service ("SO15").

17. At around the time that the ECCHR report was submitted to the DPP, FF learnt that the Prince was planning to come the United Kingdom for the July 2012 Olympic Games as the head of the delegation sent by the Kingdom of Bahrain.

18. Through his solicitors, Deighton Pierce Glynn solicitors ("DPG"), FF wrote to the DPP seeking consent, pursuant to section 1(4A) of the Magistrates' Courts Act 1980 (as amended by section 153 of the Police Reform and Social Responsibility Act 2011), to the issue of an arrest warrant in connection with a possible private prosecution of the Prince.

19. In response to the requests from both the ECCHR and FF, the DPP indicated that, in his view, the Prince would enjoy immunity under international and domestic law from prosecution in this country. Following further correspondence, on 2 October 2012 the DPP set out a statement of reasons for why he contended that the Prince had immunity from prosecution.

20. On 19 September 2012 the Director agreed to provide FF with legal services in order to pursue judicial review proceedings challenging the DPP's reasons for contending that the Prince had immunity from prosecution.

21. On 23 October 2012 FF issued judicial review proceedings against the DPP. The Statement of Facts and Grounds filed by FF in respect of those proceedings recorded that FF brought them on his own behalf and in a representative capacity for Sheikh Al Meqdad and Sheikh Al-Mahroos. The documents recorded that both Sheikh Al Meqdad and Sheikh Al-Mahroos had provided information to FF and indicated to him that they wished that claim to proceed.

22. On 29 January 2013 Foskett J granted permission for the judicial review. On 7 May 2013 Ouseley J directed that certain redacted papers be served on the Prince as an interested party and directed that the case was suitable for a Divisional Court. Both Foskett J and Ouseley J granted certain confidentiality orders to protect the Prince, FF and third parties.

23. On 19 June 2013 there was a directions hearing before Laws LJ and Wilkie J. As recorded in their judgment (neutral citation: [2013] EWHC 2047 (Admin)), the Court discharged Foskett J's order granting anonymity to the Prince and maintained the order granting anonymity to FF. Redacted papers were served on the Prince, but the Prince indicated that he would not be participating in the proceedings. Subsequent events are recorded in the judgment of Laws LJ ([2014] EWHC 3419 (Admin)), which was delivered at a hearing held on 7 October 2014, at [3]:

> "The case was at length fixed for hearing on 23 October 2013 but adjourned to enable service on the interested party which it was thought would take some time. Many interlocutory steps followed. Further directions were given, not least by Lord Justice Moses and Mr Justice King on 9 May 2014 in particular with a view to protecting the identity of FF and certain third parties. Their identity remains protected by order of the court.

> At length, after what seems to me a lamentable lapse of time, the case was re-listed for substantive hearing on today's date 7 October 2014. However on 15 September FF's solicitors wrote to the court indicating that a compromise was likely."

24. At the hearing on 7 October 2014, Laws LJ and Cranston J confirmed a consent order and statement of reasons which recorded that the DPP accepted that the Prince did not benefit from immunity. The court of its own motion thought it appropriate to quash the DPP's decision that the Prince had immunity and also made a declaration that the Prince is not entitled to immunity ([2014] EWHC 3419 (Admin) at [5]).

25. On 20 March 2015, DPG on behalf of FF sent further evidence to SO15. On 27 May 2016, SO15 wrote to DPG communicating its decision that the investigation would not be pursued beyond the scoping stage. The primary obstacle to the continuation of the criminal investigation was said to be that the main witnesses were in detention in Bahrain and therefore the investigation would require the cooperation of the Bahraini authorities.

26. In July 2016 DPG wrote to SO15 asking whether it had referred the case to the Special Cases Department of the National Security Directorate of the Home Office ("the SCD-NSD") in accordance with para 29 of the Home Office *War Crimes/Crimes Against Humanity Referral Guidelines* (1 August 2015 version) for "potential future immigration action, taking into account victim and witness safety issues". On 10 August 2016 (FF's witness statement at para 44 records the date as 10 August 2018, but it is clear from context that this is an error), SO15 confirmed to DPG that a copy of their report and findings would be passed to the SCD-NSD for consideration.

27. On 28 October 2016 DPG wrote to the Home Secretary requesting that she exclude the Prince from the United Kingdom, having regard (among other reasons) to the obligations of the UK as a party to the United Nations Convention Against Torture. On 22 November 2016 the Home Office replied to DPG, without providing any information on the status of FF's request that the Prince be excluded from the United Kingdom.

28. On 20 December 2016 SO15 wrote to DPG confirming its position that the investigation could not make meaningful progress without the assistance of the Bahraini authorities.

29. On 13 January 2017 DPG sent a pre-action protocol letter to the Home Secretary requiring her to:

    i) make a decision whether to exclude the Prince from the UK;

    ii) set out the legal and factual basis for the decision reached; and/or

    iii) set out a clear response to the points raised by DPG in its pre-action protocol letter should the Home Secretary take the position that she was precluded by data protection legislation and/or other principles of law from disclosing part or all of the information sought from her.

30. On 22 February 2017 the Treasury Solicitor responded to the pre-action protocol letter on behalf of the Home Secretary. DPG continued the correspondence in a further pre-action letter dated 25 May 2017 to the Treasury Solicitor, to which the Treasury Solicitor responded on 22 June 2017. The Home Secretary's principal position was that FF did not have standing to bring a claim for judicial review against the Home Secretary concerning a request to exclude the Prince from the United Kingdom and therefore there was no obligation in that context to provide the disclosure sought by FF in relation to any such decision. The Treasury Solicitor noted that FF's related request made under the Freedom of Information Act was a separate matter and would be separately considered.

31. In the meantime, FF applied to the Director for funding for investigative representation. On 12 May 2017 this was refused by the Director on various grounds. On 7 November 2017 that refusal was upheld by the Special Cases Review Panel on the basis that funding for investigative representation was no longer appropriate.

32. On 8 January 2018 FF applied to the Director for funding for full representation. On 1 February 2018 the Director refused the application on the basis that FF had no standing and therefore the merits test was not satisfied.

33. Following further correspondence during the course of 2018, the Director ultimately accepted that the merits test was satisfied in this case and that the claim had a greater than 50 per cent chance of succeeding and also that the cost-benefit test was satisfied.

34. The Director, however, in a letter dated 20 August 2018:

    i) maintained his refusal of funding on the basis of alternative funding being available to FF and therefore FF did not qualify for legal representation by virtue of regulation 39(a) ("the alternative funding criterion") of the Civil Legal Aid (Merits Criteria) Regulations 2013 SI 2013/104 ("the Merits Criteria Regulations"); and

    ii) raised a new objection to granting funding, namely, that he did not accept that the exclusion of the Prince would constitute a "meaningful benefit" to FF or his family within the terms of Paragraph 19(3).

35. Following further submissions and a pre-action protocol letter dated 4 October 2018 sent by DPG to the Director, the Decision was made on 2 November 2018 refusing funding on the basis of Paragraph 19(3). The Decision stated that is replaced previous decisions in this matter. After setting out the terms of Paragraph 19(3), the Decision stated as follows:

> "You have stated that the benefit to your client is his sense of moral duty and obligation plus that he has invested a lot of time to date. To my mind that does not amount to a benefit to the individual as envisaged by the Act. If for example, by not obtaining an order excluding [the Prince] from the United Kingdom he is likely to suffer harm, that could amount to a benefit however that is not the case. Your argument that simply acquiring standing to bring a judicial review is sufficient is problematic. Had that been the case paragraph 19(3) would

> have been superfluous and it is clear the intention of Parliament was to impose a different and higher threshold than simply having standing.
>
> In the circumstances I have not been persuaded that the matter is within the scope of legal aid. It is not necessary for me to consider whether your client would therefore otherwise qualify."

36. On 28 November 2018 DPG sent a letter to the Director giving formal notice that FF proposed to issue these judicial review proceedings to challenge the Decision. In his response to that letter, the Director stated:

> "In our view, the decision-maker was entitled to conclude on the information available to him and in accordance with the discretion afforded to him that [FF]'s intended claim does not have the potential to produce a benefit for him or a member of his family. This is not the same as the test for whether an individual has 'standing' to bring a judicial review claim.
>
> There is no further right of appeal under Regulation 45 of the Civil Legal Aid (Procedure) Regulations 2012."

37. In that letter, the Director also agreed to reach a fresh decision on the issue of alternative funding so that, if it was adverse to FF, that could be challenged at the same time as the challenge based on Paragraph 19(3). On 28 January 2019 the Director informed DPG that the alternative funding criterion was no longer relied upon.

38. Accordingly, the only basis on which FF's funding application is now resisted by the Director is that the proposed judicial review is outside the scope of legal aid by virtue of Paragraph 19(3).

Bahrain: the current position

39. FF says that the current position in relation to Bahrain and the Prince is relevant to his application. The following matters are set out in FF's Statement of Facts and Grounds at paragraphs 62 to 64:

> "62. According to Amnesty International's 2017-18 report on Bahrain, the regime has "clamped down on all forms of dissent" through travel bans, arbitrary detention, dissolution of an opposition group and closure of a newspaper, stripping 150 Bahraini nationals of their citizenship, and continued imprisonment of opposition leaders. In addition, Amnesty International reported that:
>
> > 'A climate of impunity persisted. The authorities continued to fail to hold senior officials

> accountable for torture and other human rights violations committed during the 2011 protests.'

63. Prince Nasser is known still to be a frequent visitor to the United Kingdom. For example, he has attended and competed at the Royal Windsor Horse Show every year since 2013, an event closely associated with the United Kingdom Royal Family as it takes place in the private grounds of Windsor Castle. These visits are publicised by the Bahraini press and international news media, and by the Prince himself on social media.

64. On 26th April 2018, Andrew Slaughter MP introduced an Early Day Motion condemning the Bahraini authorities' detention and interrogation of family members of UK-based Bahraini human rights activists who peacefully protested the 2017 Royal Windsor Horse Show. Twenty-six MPs signed the motion, which states that the House of Commons:

> 'is appalled by the invitation to the Prince to attend this year's Royal Windsor Horse Show, when his alleged involvement in the torture of detainees in Bahrain which led to his immunity being revoked by the High Court of Justice in 2014, has yet to be addressed and thoroughly investigated'."

(footnotes omitted)

40. FF maintains that his involvement in this matter goes well beyond a simple public-spirited interest in politics and social justice in Bahrain. Since arriving in the UK, he has made various efforts to take action against the Prince, including compiling evidence of abusive actions by the Prince. In his evidence, FF says that his work in this regard has led others to take risks and to repose their trust in him to take legal steps against the Prince and to try to hold him accountable for his actions. FF feels under a moral obligation to those individuals to bring his proposed judicial review proceedings against the Home Secretary, for which he is seeking public funding.

41. Mr Hickman submitted that the following redacted passage from FF's confidential witness statement encapsulates his case as to the real personal benefit FF is seeking by bringing this case:

> "So the Bahraini regime has had a direct, devastating, effect on my life. … I am separated from close family in Bahrain and it is no longer safe … to return. I continue to be at real risk from the regime and my family in Bahrain even more so. Each successful step that I take to bring accountability to the regime for the abuses inflicted against those opposed to it, and their families, is a personal victory for me as well as my family and many others. It is not only of psychological benefit to me and to them but is a concrete step forward in challenging the regime

> which has had and continues to have such a terrible impact on our lives. I believe that accountability has a role in achieving democracy in Bahrain so that one day I can safely return there … ."

The legislative background

42. In my judgment in *Liberty v Director of Legal Aid Casework* [2019] EWHC 1532 (Admin) at [16] to [31], I set out in some detail the development of the legal framework for civil legal aid over the past twenty years, with particular reference to the changes introduced by LASPO.

43. Mr Malcolm Birdling, who was junior counsel for the Director in that case and is counsel for the Director in this case, has relied on that same legislative history in submitting that Paragraph 19(3) must be construed bearing in mind the legislative purpose behind Part 1 of LASPO, which was to reform civil legal aid, prioritising specific types of case.

44. In a nutshell, the current legislative scheme is as follows. Part 1 of LASPO deals with legal aid. Sections 8 to 12 deal with civil legal aid. Section 8 defined "civil legal services". Section 9 provides for the circumstances in which civil legal services are to be provided. Section 10 provides a further basis on which civil legal aid may be made available, although it is common ground that it does not apply in this case. Sections 11 and 12 deal with other requirements that raise no issue for determination in this case.

45. The key provision for present purposes is section 9(1) of LASPO, which provides as follows:

> "**9 General cases**
>
> (1) Civil legal services are to be available to an individual under this Part if –
>
> (a) they are civil legal services described in Part 1 of Schedule 1, and
>
> (b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)."

46. The relevant provision of Part 1 of Schedule 1 to LASPO is paragraph 19, which, of course, includes Paragraph 19(3), and which reads, in relevant part, as follows:

> "**Judicial review**
>
> **19**
>
> (1) Civil legal services provided in relation to judicial review of an enactment, decision, act or omission.

> *General exclusions*
>
> (2) Sub-paragraph (1) is subject to—
>
> (a) the exclusions in Part 2 of this Schedule, with the exception of paragraphs 1, 2, 3, 4, 5, 6, 8, 12, 15, 16 and 18 of that Part, and
>
> (b) the exclusion in Part 3 of this Schedule.
>
> *Specific exclusion: benefit to individual*
>
> (3) The services described in sub-paragraph (1) do not include services provided to an individual in relation to judicial review that does not have the potential to produce a benefit for the individual, a member of the individual's family or the environment.
>
> (4) Sub-paragraph (3) does not exclude services provided in relation to a judicial review where the judicial review ceases to have the potential to produce such a benefit after civil legal services have been provided in relation to the judicial review under arrangements made for the purposes of this Part of this Act."

47. It is common ground that none of the general exclusions referred to in paragraph 19(2) apply and also that paragraph 19(4) does not apply in this case. Paragraphs 19(5) to 19(8) deal with specific exclusions relating to immigration cases and paragraphs 19(9) and 19(10) set out various definitions. No issue arises from any of these provisions.

48. The policy reflected in Paragraph 19(3) was foreshadowed by an amendment to the funding code that had been issued by the Legal Services Commission under the Access to Justice Act 1999, which governed civil legal aid prior to LASPO. That amendment was quashed by the Divisional Court *R (Evans) v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1146 (Admin), [2012] 1 WLR 838 (DC) at [25], [33] and [34] on the basis that a legally inadmissible consideration had been taken into account in formulating the amendment. The Divisional Court in *Evans* made clear, however, at [26] that the proposed amendment could be made, "but only for legally proper reasons". The purpose of the proposed amendment to the funding code was explained in a consultation paper, produced jointly by the Ministry of Justice and the Legal Services Commission, entitled "Legal Aid: Refocusing on Priority Cases" (Consultation Paper CP 12/09, Ministry of Justice, July 2009) in part 3 under the heading "Legal Aid for judicial review" at para 3.2 under the heading "Personal benefit from the proceedings", where it is stated (relying on the reproduction of this passage in *Evans* at [12]):

> "An underlying principle of [the Access to Justice Act 1999] 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 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."

49. Against that background, the issue in this case is whether the judicial review proceedings that FF seeks to bring against the Home Secretary, to require her properly and lawfully to consider his request that the Prince be excluded from the United Kingdom, has the potential to produce a benefit for FF.

Meaning of the term "benefit" in Paragraph 19(3)

50. In relation to the proper interpretation of the term "benefit" in Paragraph 19(3), Mr Hickman submitted that the term should be construed broadly and not limited to financial or material benefit. In this regard, he relied on a number of cases where the courts of have considered what constitutes a "benefit" in various contexts. He submitted that a review of the cases shows that the concept of "benefit" is a broad one, not limited to financial or material benefit, but embracing any form of advantage or whatever would be beneficial to a person in any respect.

51. Mr Hickman referred to the consideration of the concept of "benefit" in the following cases:

    i) *Re Clore's Settlement* [1966] 1 WLR 955 (ChD), considering whether a distribution of trust funds to a charity chosen by the beneficiary was a "benefit" to the beneficiary under the terms of a trust;

    ii) *Cronin v Grierson* [1968] AC 895 (HL), considering what constituted a "benefit" under section 2 of the Betting, Gaming and Lotteries Act 1964;

    iii) *Re W (EEM)* [1971] 1 Ch 123 (Court of Protection), considering whether the institution of divorce proceedings was for the patient's "benefit" for the purpose of section 102 of the Mental Health Act 1959; and

    iv) *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, considering whether a length of service criterion was capable of constituting a "benefit"

> within regulation 32 of the Employment Equality (Age) Regulations 2006 SI 2006/1031.

52. Mr Hickman also referred to the court's analysis of the concept of "private interest" under the law of protective costs orders in the context of a judicial review, as considered by the Court of Appeal in *R (Goodson) v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172 at [28], and the Divisional Court in *R (Litvinenko) v Secretary of State for the Home Department* [2013] EWHC 3135 (Admin). All of these cases, Mr Hickman submitted, show the court taking a broad approach to what constitutes a "benefit" (and to the analogous concept of "private interest"). This approach is supported in relation to Paragraph 19(3) by the fact that in section 10(5) of LASPO the term "significant benefits" is used in relation to formulating a condition for exceptional funding. Mr Hickman also contrasted the unqualified use of the term "benefit" with the drafting of delegated legislation under LASPO, where in the Merits Criteria Regulations at regulation 6 there is a reference to "real benefits" and at regulation 32 to "sufficient benefits". He submitted that this supports the view that "benefit" in Paragraph 19(3) should be given the broadest possible interpretation.

53. Mr Hickman also submitted that Paragraph 19(3) needs to be interpreted in a manner that minimises the restriction on access to justice that it imposes. He relied on the following dictum of Lord Reed in *R (Unison) v The Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 (SC):

> "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question."

54. Bearing this in mind, Mr Hickman submitted, it was necessary to give the term "benefit" a broad interpretation so as not to restrict access to the courts more than necessary.

55. Mr Hickman referred to the background to the policy underlying Paragraph 19(3) as discussed in the *Evans* case, to which I made reference at [48] above, and noted that the Explanatory Notes to LASPO at para 881 confirm that the purpose of Paragraph 19(3) is to exclude from civil legal aid only "representative actions by way of judicial review" or, in other words, actions where an individual is acting as a representative of the public interest and does not have a private interest in the decision.

56. Finally, Mr Hickman contrasted the question of whether an applicant has a private interest in a decision he or she seeks to challenge by way of judicial review and therefore would obtain a benefit from a successful challenge with the question of whether an applicant has standing to bring an action in the public interest. He referred to the observation of Sedley J in *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 (QBD) at p 117, that:

> "… there will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court."

57. As this proposition is not controversial, I do not need to rehearse the other cases cited by Mr Hickman as demonstrating the recognition of standing for a claimant seeking to act simply as a representative of the public interest. His point was that Parliament sought in Paragraph 19(3) to exclude only cases brought in the public interest, with no element of private interest, from the scope of civil legal aid. There is no need, he submitted, to construe Paragraph 19(3) as going further and excluding other types of cases.

58. Mr Birdling submitted in response to these arguments that little help can be drawn from the authorities cited by Mr Hickman that construe the term "benefit" in entirely unrelated contexts. Those authorities simply demonstrate that the scope of the term "benefit" is context-dependent. The term "benefit" in Paragraph 19(3) needs to be construed in light of the legislative history and, in particular, the changes introduced by LASPO, that altered the position from one where civil legal aid was available unless expressly excluded under the Access to Justice Act 1999 to a position under LASPO where civil legal aid is presumed excluded unless there is an explicit funding entitlement in respect of specific civil legal services.

59. Mr Birdling submitted that, on its proper construction, Paragraph 19(3) requires that a prospective litigant obtain a real, personal benefit from the proposed litigation. It is not enough that the litigant cares deeply about the cause. The litigant must have a personal stake in the outcome. Mr Birdling submitted that this is supported by para 881 of the Explanatory Notes, to which Mr Hickman had also referred, as I have noted at [55] above.

60. In *Liberty v Director of Legal Aid Casework* at [43] to [46], I considered the proper interpretation of the term "benefit" in Paragraph 19(3) in the context of that case. I summarise below the principles that apply when considering whether proposed judicial review proceedings have the potential to produce a benefit to the applicant or a member of the applicant's family. (I do not consider in this case the principles that would apply when considering whether proposed judicial review proceedings have the potential to produce a benefit to the environment.) The relevant principles are, in my view, as follows:

    i) Whether proposed judicial review proceedings would have the potential to produce a benefit for an individual or a member of his family is a mixed question of law and fact.

    ii) As such, it is a matter for determination as a question of law after the relevant decision-maker has found and then evaluated the relevant facts that are said to give rise to the potential to produce a benefit.

    iii) The starting point is that "benefit" should be given its ordinary, broad meaning. It is not necessary to consider the degree or quality of the benefit provided that there is some benefit, but the benefit must have some reality, some substance, that goes beyond the "sufficient interest" that Sedley J in the *Somerset County Council* case found any citizen to have to bring a matter before the court in certain cases that involve an apparent abuse of power. That is a matter of evaluation.

iv) The benefit must be real. It is not necessary, therefore, for Paragraph 19(3) to have used the words "real benefit". That the benefit must be real goes without saying. Similarly, the standard would be no different, in my view, had the words "material benefit" been used, using "material" simply to mean having some substance. The benefit does not, in my view, have to be financial or otherwise result in an improvement in the material conditions of the life of the applicant or of a member of their family.

v) Whether there is a benefit to an applicant for civil legal aid for purposes of Paragraph 19(3) is a hard-edged test. As a matter of law, there is a right answer. It is not a matter of discretion for the Director, and it is not simply a case of considering whether the Director's judgment on the question is reasonable.

vi) A benefit to an applicant that is "merely" psychological and/or involves the fulfilment of a moral obligation may, in an exceptional case, be a sufficient benefit for purposes of Paragraph 19(3), either alone (in a truly exceptional case) or, more likely, in combination with other factors. Clearly, however, any such psychological benefit or benefit involving the fulfilment of a moral obligation that proposed judicial review proceedings have the potential to produce for the applicant or a member of the applicant's family must go beyond what would otherwise be involved in purely representative litigation. Otherwise the legislative purpose of Paragraph 19(3) would be defeated. The decision to be made is fact-sensitive, a question of degree and a matter for evaluative judgment by the decision-maker.

61. Accordingly, in considering the question of whether proposed judicial review proceedings have the potential to produce a benefit for an individual or a member of their family, the Director needs to make an evaluation of the evidence provided in support of the application, make findings in relation to any disputed facts and then decide whether, as a matter of law, there is a potential for the proposed judicial review proceedings to produce a benefit. The usual principles will, of course, apply as to the Director's findings of fact, to which appropriate deference will be given by the court on a judicial review of the Director's decision. But where, by reference to those findings of fact and/or to undisputed facts, the Director's decision is wrong, that will be an error of law.

Would the proposed judicial review proceedings against the Home Secretary be of benefit to FF for purposes of Paragraph 19(3)?

62. Mr Hickman submitted that the proposed judicial review proceedings against the Home Secretary would be of benefit to FF given that:

i) he is recognised as having a well-founded fear of persecution at the hands of the Bahraini authorities;

ii) he and those connected to him remain at risk from the Bahraini regime;

iii) the exclusion from the UK of the Prince, who is clearly implicated in the brutal suppression of pro-democracy protests in Bahrain, would be a concrete step towards obtaining justice and accountability for that brutal suppression, which

would materially benefit FF, who has suffered serious emotional distress on each occasion that the Prince has visited the UK with apparent impunity and with significant attendant publicity;

iv) FF owes a moral duty to persons who claim to have been personally tortured and abused by the Prince, including Sheikhs Al-Meqdad and Al-Mahroos, who have taken risks and reposed trust in FF to pursue his campaign to hold the Prince accountable for his abusive actions; and

v) the decision FF proposes to challenge is not independent of the actions of FF but has arisen due solely due to the fact that FF has passed a dossier of evidence on the Prince to the CPS and, after the CPS passed it to the Home Office, has requested that the Home Secretary exclude the Prince from the UK.

63. Mr Birdling has not sought, on behalf of the Director, to dispute the factual basis for any of these factors. His position is that none of them, even taking what has been said on behalf of FF at its highest, can amount to a "benefit" within Paragraph 19(3). These factors, he submitted, only establish that FF has a particular interest (whether objectively justified or otherwise) in the outcome of the proceedings. They do not show that the judicial review proceedings that FF proposes to bring against the Home Secretary has the potential to produce for FF a real, tangible and individual benefit. Therefore, the Director was bound to refuse FF's application for civil legal aid to bring the proposed judicial review.

64. Mr Birdling noted that Mr Hickman conceded that the claimant in *Evans*, who was a peace activist who had previously been arrested and convicted in respect of her activities protesting the Iraq war and who was seeking to challenge the UK government's practice of handing over suspected insurgents detained by UK armed forces in Afghanistan to the Afghanistan National Directorate of Security, would not derive a "benefit" from those proceedings in the sense required by Paragraph 19(3). That is despite her well-defined interest in the outcome of the proceedings, namely, that as a UK citizen she was not a mere bystander to the activities of her government, that she was driven by a moral obligation to prevent her own government exposing individuals to the risk of torture and that her challenge would produce a benefit in that, if successful, she could devote her time and energies to other matters.

65. Mr Birdling submitted that Mr Hickman was correct to concede that a significant personal interest in the outcome of a proposed judicial review claim, as in the case of the claimant in *Evans*, is not enough to constitute a benefit of the type contemplated by Paragraph 19(3).

66. Mr Birdling submitted that FF's significant personal interest in the outcome of his proposed judicial review proceedings against the Home Secretary is not a concrete and tangible benefit, and therefore the Director was right to conclude that public funding is excluded by Paragraph 19(3).

67. In my view, each decision on whether there is a sufficient benefit for purposes of Paragraph 19(3) is a matter of evaluative judgment. The Director's decision on each such case will be entitled to appropriate deference, in accordance with ordinary principles of public law. Each such decision will be fact-specific.

68. This case, in my view, is an exceptional one. Having regard to the factors highlighted by Mr Hickman, which I have summarised at [62] above, it seems to me that FF has more than merely a "significant interest" in the case. His position, in my view, goes well beyond the position of the claimant in *Evans*.

69. None of the factors relied on by FF would, perhaps, in isolation, be sufficient to establish that FF would obtain a benefit within the meaning intended by Paragraph 19(3), but the Director needed to consider all of the factors and make a judgment on the whole. Taking the relevant factors together, it is clear to me that his decision in this case was, with respect, wrong, and that FF's proposed judicial review proceedings against the Home Secretary do have the potential to produce a direct, personal and real benefit to FF, in accordance with the principles that I have outlined at [60] above, albeit not one that is likely to result in any financial or other material (as opposed to psychological or moral) benefit.

70. Mr Hickman submitted that there are other specific errors of law in the Director's reasoning in reaching the Decision that are sufficient to vitiate it as a matter of public law. In light of my conclusion above, it is not necessarily for me to comment on each of his arguments specifically, but broadly he submitted that (i) the Director applied too narrow a concept of "benefit" in reaching his decision and (ii) the Director defended his decision in his letter of 12 December 2018 on the basis that he was entitled to reach the Decision on the basis of the information that was available to him "and in accordance with the discretion afforded to him". In relation to the latter, Mr Hickman submitted that the Decision was not a matter of discretion, and it should be clear from my judgment above that I agree. I also agree with Mr Hickman that the Director appears to have applied too narrow a concept of "benefit" in reaching the Decision.

Conclusion

71. This claim for judicial review is upheld. The Decision will be quashed, and a declaration will be made that the proposed judicial review proceedings are not excluded by Paragraph 19(3). If necessary, I will hear further submissions on whether it is necessary for me, in addition to the foregoing, to make a mandatory order requiring civil legal aid to be granted for the proposed judicial review proceedings FF seeks to bring against the Home Secretary.