to be attributed to the competing public interests, on the other. The extent of the constitutional conventions and the balancing exercise were alike matters of judgment, affected by evidence and argument. His interpretation of section 53 reflects the strength of his commitment to the rule of law. He rightly pointed to the absence of any explicit statutory affirmation that a certificate should generally enable the executive to override a judicial decision. And he observed that Lord Mance's approach, while apparently endorsing a broader ministerial veto, would generally yield a similar outcome. The scope for disagreement with the Tribunal's overall assessment that Lord Mance purported to recognise is, as Lord Neuberger suggested, vanishingly small in practice.

Lord Neuberger's approach, then, is the most candid and convincing. The narrow construction of section 53 is the legitimate price of adherence to principle. The Attorney General's certificate had acknowledged that the veto should be exercised only in exceptional cases. Provided that some possible future application (as regards Tribunal decisions) could be envisaged, there was no violence to the statutory language. If it is part of the rule of law that courts should respect parliamentary sovereignty, as Lord Wilson insisted, it is also true that the idea of parliamentary sovereignty must be explained in the context of our commitment to the rule of law.

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GOOD CHARACTER DIRECTIONS IN CRIMINAL TRIALS: AN EXERCISE IN CONTAINMENT

IN criminal trials, just as a bad character may count against an accused, so a good character may operate in an accused's favour. It was settled by the Court of Appeal in *Vye* [1993] 1 W.L.R. 471 and by the House of Lords in *Aziz* [1996] A.C. 41 that any accused who possesses a good character becomes thereby entitled to a mandatory direction (known as a "*Vye* direction") in the summing-up. The trial judge is required to instruct jurors that the accused's good character is potentially of dual significance when they come to assess both (1) the credibility of an accused who has testified or who has made admissible, exculpatory pre-trial statements and (2) the likelihood of the accused's having committed the offence(s) charged. But matters do not stop there.

This seemingly simple edict can contribute to the fairness of summings-up. Judges, however, regularly bemoan the complexity of the good character rules, particularly in that exercise of judgment demanded when an accused "argues that he should be *treated* as being of good character notwithstanding the presence of (usually minor and/or spent) convictions or

where a defendant with previous convictions seeks a favourable direction as to propensity" (*Crown Court Bench Book 2010*, p. 162, emphasis original). Some of the difficulty stems from a preparedness in *Vye* and *Aziz* to treat defendants as being of good character simply on the basis of an absence of criminal convictions. This benevolent assumption, it might be noted, has received a mixed press in other common law jurisdictions. Both the New Zealand Court of Appeal in *Falealili* [1996] N.Z.L.R. 664 and the Hong Kong Court of Final Appeal in *Tang Siu-man v HKSAR* [1998] 1 H.K.L.R.D. 350, for example, declined to follow the English authorities, preferring to demand positive evidence of good character. The English courts' problems have been compounded by a willingness to treat those who have previous convictions or other bad character which can be regarded as irrelevant or of no significance in relation to the offence(s) charged as also entitled to a *Vye* direction. In the latter class of case, where it is in the discretion of the court whether to treat the accused as a person of good character, judges are enjoined to add to their directions suitable words of qualification that take into account any blemishes on an accused's character. Lord Steyn, in *Aziz*, declared that judges could only dispense with a *Vye* direction "if it would make no sense to give character directions". Judges, it was emphasised, cannot be required to deliver a direction that is absurd or meaningless. Otherwise, his Lordship considered that it was undesirable "to generalise about this essentially practical subject which must be left to the good sense of trial judges" (p. 53).

In *Hunter* [2015] 2 Cr. App. R. 9, a full Court of Appeal, hearing five conjoined appeals, took the occasion to review the operation of the good character directions. Ominously, all five appeals were dismissed. After comprehensive consideration of the copious case law, the Court concluded that the existing rules had become "a significant problem for the Crown Court and the Court of Appeal" in that they hampered effective trial management, provoked protracted discussions at trial about directions to juries, necessitated convoluted jury directions, and prompted a flood of appeals. The principles, moreover, had been extended to a point at which defendants with bad criminal records (as in the five appeals under review) or who enjoyed no serious pretensions to a good character were claiming an entitlement to *Vye* directions. In consequence, many judges felt that they were being required to give absurd or meaningless directions – or, at least, overgenerous directions – to unworthy defendants. The high point perhaps was reached in *Durbin* (1995) 2 Cr. App. R. 84, where Hallett L.J. (V.P.) admitted that "it is now clear the law took a wrong turn" (at [20]) in insisting that a drug smuggler, who had several spent convictions for theft and fraudulent use of an export licence, who had persistently lied to the police in order to concoct a false alibi, and who admitted smuggling goods around Europe, had been wrongly deprived of a good character direction (see [1997] Crim. L.R. 247). The Court in *Durbin* had displayed misplaced indulgence

akin to Gibbon's memorable description of the indictment laid against Pope John XXIII at the Council of Constance: "The most scandalous charges were suppressed; the vicar of Christ was only accused of piracy, rape, murder, sodomy and incest" (*The History of the Decline and Fall of the Roman Empire*, 1788: London, vol. VI, chap. LXX).

In a bid to promote consistency of approach and, incidentally, to curtail the range of cases in which such directions are called for, the Court of Appeal has delivered important guidance in *Hunter* both on the extent and nature of good character directions and on the circumstances in which it is necessary or appropriate to deliver such directions. To this end, rejecting the suggestion that defendants need to adduce evidence of positive good character in order to earn a *Vye* direction, the Court distinguished between two broad categories of defendants: those of "absolute good character" and those of "effective good character". Defendants of "absolute good character" are those with no previous convictions recorded against them and no other reprehensible conduct alleged, admitted, or proven. They continue to be entitled to both the credibility and propensity limbs of the good character direction in full. In contrast, defendants of "effective good character" have previous convictions (or other bad character) that can be characterised as old, minor, and having no relevance to the charge. Here, the judge must make a decision. The judge is not obliged to treat such persons as of good character, but must be vigilant to ensure that only those who truly merit an "effective good character" are afforded one. The Court's guidance on which defendants of "effective good character" will merit such a direction is confined to observing: "it is for the judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates" (at [79]). The expectation seems to be that judges will be reluctant to deliver good character directions in most of these cases.

Taking up a theme first explored by Rix L.J. in *Doncaster* (2008) 172 J.P. 202, Hallett L.J. noted that alterations to the bad character rules made by the Criminal Justice Act 2003 have exerted an impact on the law relating to good character. A defendant's non-criminal "reprehensible behaviour" will now qualify as evidence of "bad character" within the meaning of sections 98 and 112 of that Act, thereby making it more difficult to overlook (at [74]). In cases where a defendant has no previous convictions, but evidence of other misconduct is relied upon by the Crown as probative of guilt, the judge is obliged to deliver a bad character direction. The judge may consider that, as a matter of fairness, he should weave into his remarks a modified good character direction, although there will be occasions when such a direction will offend Lord Steyn's absurdity principle. Certainly, when a defendant has previous convictions and the Crown is relying upon that bad character, it is difficult to envisage a good character direction that would not offend against the absurdity principle. Trial judges

enjoy a broad discretion whether or not to deliver a modified good character direction to defendants in this type of case. When defendants have no previous convictions but admit to reprehensible conduct that is not relied on by the Crown as probative of guilt, the judge retains discretion whether or not to deliver a good character direction. In light of the changes to the rules governing the admission of evidence of bad character wrought by the Criminal Justice Act 2003, this discretion is now "open-textured" rather than "narrowly circumscribed", as Lord Steyn had defined it pre-2003.

Addressing another concern, the court in *Hunter* indicated that, where a defendant adopts the tactic of adducing his previous convictions under section 101(1)(b) of the Criminal Justice Act 2003, if they are dissimilar to the category of offence alleged, in the hope of obtaining a favourable good character direction on propensity from the judge, a judge will be entitled to decline to deliver such a direction, not least because jurors will appreciate the significance of the point without judicial endorsement. Furthermore, there is the suggestion that counsel intending to pursue this tactic might be required to serve notice of their intention under CPR, rule 35. The Criminal Procedure Rules Committee has been alerted (at [102]).

At one point, the court possibly betrays its true sentiments, casting doubt on the very *raison d'être* of the *Vye* direction: "many have questioned, *with some justification in our view*, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend" (at [67], emphasis added). Be that as it may, in *Hunter*, the Court of Appeal has sought to eliminate the wilder excesses of *Vye* directions, as exemplified in cases like *Durbin, PD* [2012] 1 Cr. App. R. 33 and *GAI* [2012] EWCA Crim 2033, and to delineate more clearly the rules to which judges must adhere. In future, it has resolved that fewer accused will be entitled to lay claim to *Vye* directions, just as the court signals that judicial failures to give adequate *Vye* directions will seldom lead to the quashing of convictions. Is the strategy likely to succeed? In *Hanson* [2005] 1 W.L.R. 3169, at [15], it will be recalled that, when ushering in the new bad character provisions of the Criminal Justice Act 2003, Rose L.J. prophesied: "If a judge has directed himself or herself correctly, this court will be very slow to interfere with a ruling … as to admissibility …. It will not interfere unless the judge's judgment … is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense: … (cp *Makanjuola* [1995] 1 W.L.R. 1348, 1351)." Just as Canute was powerless to control the tide, every student of the law of evidence will be aware that, even if very seldom allowed, the Court of Appeal has been unable to staunch the flow of appeals involving rulings on bad character. Good character directions look set to follow a similar course. Finally, in a dirigiste "postscript", the court hazarded that, thanks to its thoroughgoing distillation of prior case law, henceforth even

citation of authorities may be radically pared back as "reliance on this judgment, *Vye* and *Aziz* should suffice" (at [102]).

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WILKINSON V DOWNTON REVISITED

IN *OPO v Rhodes* [2015] UKSC 32, the Supreme Court clarified the elements of the tort of intentional infliction of harm. Created in *Wilkinson v Downton* [1897] 2 Q.B. 57, the tort has long attracted the attention of academic commentators, but has rarely been argued successfully in English courts. In *Wilkinson*, the jury awarded the plaintiff damages for the physical suffering she endured as a result of severe shock that was caused when the defendant, playing a practical joke, falsely informed her that her husband had been injured in an accident. Wright J. held that the tort required an act be done "wilfully", that is "calculated to cause physical harm", and which does in fact cause "physical harm" (at 58–59). The *Wilkinson* formulation was subsequently endorsed by the Court of Appeal in *Javier v Sweeney* [1919] 2 K.B. 316 and again, 70 years later, in *Khorasandjian v Bush* [1993] Q.B. 727. In the latter case, the Court of Appeal emphasised that the wrongful conduct must cause "physical injury" – as distinct from "mere emotional distress" – and it must also be "calculated to cause" the same (at 735–36). Later, in *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 172; [2003] 3 All E.R. 932, Hale L.J. appeared to qualify the mental element of the tort, observing that *Wilkinson* does not require actual subjective intent to cause physical harm; rather, according to her Ladyship, "calculated" means deliberately doing an act that is "likely", all things considered, to result in the degree of physical harm that was in fact suffered (at [10]–[11]). Subsequently, Lord Hoffmann, writing the principal judgment for the House of Lords in *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 A.C. 406, revisited both elements of the tort. He affirmed that, traditionally, it requires proof of actual harm, such as psychiatric illness, as distinct from mere distress (at [45]); and, consistently with Lady Hale's judgment in *Wong*, he interpreted *Wilkinson* as providing that the intent to cause such harm can be "imputed" to the defendant if it is an obvious consequence of a deliberate act, even though such harm may not have been subjectively appreciated or intended (at [37], [40]). Additionally, His Lordship contemplated expanding the tort to capture mere distress short of physical harm, but cautioned that, if the law was to expand to such cases (which he left to future courts to decide), "imputed intention will not do" (at [45]). Rather, mere distress should in His