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CASE AND COMMENT

THE RULE OF LAW, PARLIAMENTARY SOVEREIGNTY, AND A MINISTERIAL VETO OVER JUDICIAL DECISIONS

R (Evans) v Attorney General [2015] UKSC 21; [2015] 2 W.L.R. 813 is a case of real constitutional interest and importance. The division of opinion within the Supreme Court reflects divergent conceptions of fundamental principle. While all the Justices affirmed the principles of parliamentary sovereignty and the rule of law, they understood them differently, resulting in disagreement about their correct reconciliation on the facts of the case. The majority of Justices achieved a real integration of these basic principles in a manner that the dissentients' superficially more straightforward approach did not.

Evans, a *Guardian* journalist, sought disclosure of certain correspondence between the Prince of Wales and various government ministers (the so-called "black-spider memos") in which Prince Charles had pressed his views about aspects of public policy. The Information Commissioner, applying the Freedom of Information Act 2000, upheld the Government's refusal to release the letters. The Upper Tribunal, on appeal, ruled in an erudite and elaborate judgment that the balance of public interests lay in favour of disclosure (noted in [2013] C.L.J. 1). The Attorney General, however, issued a certificate, under section 53 of the Act, purporting to overrule the Tribunal's decision. Section 53(2) provides that an "accountable person" (here the Attorney) may give a certificate stating that he has "on reasonable grounds" formed the opinion that the statute permits non-disclosure. When Evans sought judicial review, the Divisional Court upheld the certificate. The Court of Appeal, however, held it to be an unlawful exercise of the Attorney's veto. A majority of the Supreme Court has agreed with the Court of Appeal, Lord Hughes and Lord Wilson giving dissenting opinions.

Lord Neuberger (with whom Lord Kerr and Lord Reed agreed) invoked basic precepts of the rule of law: first, that a judicial decision is binding

between the parties and cannot be set aside by anyone, least of all by the executive; second, that executive actions and decisions are generally reviewable by the court. The Attorney General was flouting both principles, in Lord Neuberger's view, by purporting to override a ruling of the Upper Tribunal, which enjoys the same status as the High Court. The Attorney's interpretation of section 53 involved "saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it" (at [52]). Where a court has conducted a full and open hearing to determine the balance of public interests, a minister is not permitted to overrule the judgment merely because, having considered the same facts and arguments, he takes a different view. Any parliamentary intention to a contrary effect would have to be made "crystal clear": there is, in effect, the strongest presumption in favour of the integrity of the rule of law.

What then was the correct interpretation of section 53? Adopting the conclusions of Lord Dyson M.R. in the Court of Appeal, Lord Neuberger would allow the issue of a certificate only exceptionally – in the case of a material change of circumstances since the Tribunal's decision or where that decision was "demonstrably flawed in fact or in law" (at [71]). There is at least a possibility that facts or matters might arise to indicate serious flaws in a First-tier or Upper Tribunal determination that could not form the basis of an appeal, limited to questions of law. So section 53 retains a potential function where a court or Tribunal has ordered disclosure, even if there are likely to be few such occasions. The expression "reasonable grounds" has here a narrower than ordinary meaning, "highly dependent on its context" (at [88]).

In contrast, Lord Hughes remarked that "the rule of law is not the same as a rule that courts must always prevail, no matter what the statute says" (at [154]), observing that Parliament has explicitly provided for an accountable person to override the court's decision if he disagrees with it on reasonable grounds. That person is entitled to disagree with the court's evaluation of where the public interest lies. It is simply a matter of the "plain words of the statute": if Parliament had wished to limit the power to issue a certificate to exceptional cases, the statute would have said so. Lord Wilson reached similar conclusions, observing that the Government's disagreement with the Upper Tribunal's evaluation of public interests could not have amounted to a point of law on which to base an appeal to the Court of Appeal: the only recourse was to issue a certificate.

It is significant, however, that Lord Hughes and Lord Wilson agreed that it was incumbent on the Attorney General specifically to address the Tribunal's conclusions. While it would be surprising, in Lord Wilson's view, if the Divisional Court had found that the Attorney's opinion lacked reasonable grounds – having regard to the acknowledged public interests

both for and against disclosure – he conceded nevertheless that "once the Upper Tribunal's determination was disseminated, the Attorney General's opinion would be reasonable only if, in his statement of reasons, he demonstrated engagement with its reasoning" (at [181]).

Here, then, is the crux of the matter. Whereas Lord Hughes and Lord Wilson seemed content with the Attorney's explicit rejection of the Tribunal's reasoning and conclusion, Lord Mance (with whom Lady Hale agreed) demanded something more. How were such different conclusions plausibly to be explained? Even if the Attorney were entitled, in principle, to re-evaluate the competing interests identified by the Tribunal, he was not thereby at liberty to challenge the constitutional basis that underlay the Tribunal's own assessment. In Lord Mance's view, the Attorney's certificate was "based essentially on differences in his account of the relevant circumstances, including the constitutional conventions, by reference to which the relevant issues of public interest fell to be evaluated" (at [32]). In particular, the Tribunal had carefully examined and rejected a submission that the correspondence in issue should be treated as falling under the "education convention", whereby the heir to throne is instructed in the business of government. The Prince's "advocacy correspondence" did not come within the education convention and formed no part of his preparation for kingship; there was no analogy with the monarch's role of advising and warning (as memorably explained by Bagehot). Lord Mance rightly objected that the certificate did "not engage with, or begin to answer, the problems" with a view of the relevant conventions that the Tribunal "had so forthrightly and on its face cogently rejected" (at [37]).

Once it was conceded that the Attorney General must address the findings of the Tribunal, rather than simply falling back on his own initial assessment, there was considerable force in the objection that he had not, in substance, done so. Lord Wilson contended that the Attorney had differed from the Tribunal only on the weight of the respective public interests, denying that the minister had undertaken a redetermination of the relevant factual background. It is hard, however, to resist the conclusion that these distinctions between law, fact, and public interest are sufficiently flexible to accommodate one's considered view of constitutional propriety. Lord Wilson's disapproval of the "surprising concentration in the evidence before the tribunal and in its judgment on the theoretical ambit of constitutional conventions" (at [182]) reflects his desire to preserve ministerial discretion. Lord Mance, in effect, followed the Upper Tribunal – notwithstanding its proclamation of Diceyan orthodoxy – by making the correct delineation of convention an integral part of the applicable *law*. As Lord Wilson observed, there was no dispute about the "facts" in any ordinary sense of that word.

Lord Neuberger explicitly rejected any useful distinction, in this context, between findings of fact and law, on the one hand, and the weight properly

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