R(*Evans*) *v Attorney General*

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R(*Evans*) *v Attorney General*[1] is a case that encapsulates a subject. Parliamentary sovereignty, the rule of law, the separation of powers, the monarchy, constitutional conventions – *Evans* has it all. As a result, the case provides an excellent opportunity to see how diverse constitutional topics interact. It also provides a chance to reflect on the importance and strength of the principle of legality.

1. The request

King Charles III holds strong views on many matters – architecture, acupuncture, farming, and more. While Prince of Wales, Charles frequently wrote letters to ministers about government policy. In those letters, he would often try to shape ministers' decisions. In essence, he would lobby government.

In 2005, Rob Evans, a *Guardian* journalist, asked for copies of Charles' letters to ministers under the Freedom of Information Act 2000. (He also relied on the Environmental Information Regulations 2004. Here I will focus on the FOIA issues.) The government refused the request. It relied mainly on the exemption for communications with the royal family, under what was then s 37.

Evans complained to the Information Commissioner. He lost. Evans then appealed to the First-Tier Tribunal, which transferred the matter to the Upper Tribunal.

2. The Upper Tribunal's decision

The exemptions in FOIA for communications with the royal family were, when Evans made his request, qualified. They could be overridden if the public interest favoured disclosure. Evans said that the public interest

[1] *R (Evans) v Attorney General* [2015] UKSC 21.

favoured disclosure of Charles' letters. The Information Commissioner said it did not.

Evans' argument was simple. Disclosure would increase accountability and transparency.[2] It would increase public understanding about the government's interactions with the royal family.[3] It would also reveal the extent of Charles' influence[4]. All these things were in the public interest.

The government's argument went like this. First, there is an old constitutional convention that entitles the heir to the throne to educate themselves in the business of government. Second, at some point, this convention had been 'extended'[5] to entitle the heir to advocate – lobby – for policy positions. Third, Charles' letters fell within this extended convention. Fourth, the convention required confidentiality to survive. Fifth, its survival was in the public interest. So, disclosure of Charles' letters would be contrary to the public interest.

The Upper Tribunal rejected the second step of the government's argument. That is, it disagreed that the education convention had been extended to include advocacy correspondence. Advocacy was not regarded by Charles or the ministers 'as part of his preparation for kingship'[6]. Moreover, there was no good reason to entitle Charles to lobby ministers, especially given that there was already someone – the monarch – who was, by convention, entitled to do exactly this.[7] Having rejected the government's argument, the Upper Tribunal had no trouble concluding that, overall, the public interest favoured disclosure.[8]

3. The veto

Unless they are appealed or reviewed, the Upper Tribunal's decisions are normally final. But there is an exception. Section 53(2) of FOIA says that a decision ordering information to be disclosed:

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[2] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [131].
[3] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [142].
[4] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [159].
[5] *c* [64].
[6] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [105].
[7] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [106].
[8] I assessed the Upper Tribunal's decision in 'Constitutional Conventions and the Prince of Wales' (2013) 76 Modern Law Review 1119.

> shall cease to have effect if, not later than the twentieth day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure to comply with [the FOIA requirements].

The effective date is the date when the order was made or an appeal from that order is decided or withdrawn. The identity of the 'accountable person' depends on the case, but in this type of case it is the Attorney General. Thus, s 53 lets the Attorney General veto a decision ordering the disclosure of information. Note that the decision does not single out decision orders by courts; it applies generally to decision orders, including orders by, say, information commissioners.

Shortly after the Upper Tribunal's decision, the Attorney General at the time, Dominic Grieve, issued a s 53 certificate. If valid, the certificate would have prevented Prince Charles' letters from being disclosed.

4. The Supreme Court's decision

Evans challenged the certificate's validity. The basis of his challenge was that the Attorney General did not have 'reasonable grounds' to think that the departments had complied with FOIA, contrary to s 53's requirements. Evans lost in the Divisional Court but won in the Court of Appeal. The government then appealed to the Supreme Court.

On the face of it, the government had a strong case. Section 53 says that the Attorney General can set aside a decision order on 'reasonable grounds'. In this case, the Attorney General had issued a 10-page set of reasons explaining why he disagreed with the Upper Tribunal. In those reasons, the Attorney General

> … began with a summary of the conclusions of the Upper Tribunal and … summarised the six main aspects of the public interest in disclosure which it had identified. … [H]e described them as good generic arguments for disclosure but explained that in his view they were substantially outweighed by public interest considerations militating against disclosure which were "centred upon The Prince of Wales' preparation for Kingship and the importance of not undermining his future role as Sovereign". Earlier in his statement the Attorney General had explained each of these two

> aspects in some detail. … The Upper Tribunal had recognised the existence of a tripartite convention under which, on a confidential basis, the Sovereign has a right to be consulted by government, to encourage it and to warn it; so preparation of the Prince for Kingship was, among other things, preparation for his exercise of rights under the tripartite convention.[9]

The Attorney General's detailed grounds for disagreeing with the Upper Tribunal were 'reasonable', in any ordinary sense of the term. So, on a natural reading of s 53, the Attorney General's certificate would be valid.

For Lord Neuberger, with whom Lord Kerr and Lord Reed agreed, things were more complicated. If s 53 were given its natural meaning, then the government could set aside a judicial decision by the Upper Tribunal just because it reasonably disagreed with it. That would violate the rule of law, in two ways.[10] The rule of law demands that judicial decisions be treated as binding. It also demands, with only rare exceptions, that actions of the executive be subject to judicial scrutiny. As the government interpreted it, s 53 would flout the first principle and stand the second 'on its head'[11].

Lord Neuberger then invoked the principle of legality. That principle tells courts to presume that Parliament intended to legislate consistently with certain rights and, more to the point, the rule of law. The presumption can, in theory, be rebutted, but doing so takes 'crystal clear' terms evidencing a contrary intention. Were the terms of s 53 clear enough to require the rule of law-threatening interpretation? Far from it, said Lord Neuberger. The main reason was that s 53 did not explicitly mention that it could be used to set aside a 'judicial' decision.[12]

If s 53 does not entitle the Attorney General to set aside a decision order because he reasonably disagrees with it, what does it entitle him to do? According to Lord Neuberger, s 53 allows the Attorney General to set aside a decision order in just two circumstances. The first is when the order is fundamentally flawed in law or fact. The second is when fresh information has come to light. Because neither circumstance was relevant obtained here, Lord Neuberger concluded that the certificate was invalid.

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[9] *R (Evans) v Attorney General* [2015] UKSC 21 [181] (Lord Wilson).
[10] *R (Evans) v Attorney General* [2015] UKSC 21 [51] (Lord Neuberger).
[11] *R (Evans) v Attorney General* [2015] UKSC 21 [52] (Lord Neuberger).
[12] *R (Evans) v Attorney General* [2015] UKSC 21 [58] (Lord Neuberger).

Lord Mance, with whom Lady Hale agreed, also declined to give s 53 its natural meaning. He thought that the section entitled the Attorney General to reasonably disagree with the Upper Tribunal on the relative weights of public interest factors. But it did not entitle him to set aside the Upper Tribunal's decision for reasons of law or fact, except in very unusual circumstances, perhaps of the sort that Lord Neuberger outlined.[13] Lord Mance thought that the Attorney General had disagreed with the Upper Tribunal on mainly factual matters.[14] He had done so 'without any real or adequate explanation'[15]. So, Lord Mance also concluded that the certificate was invalid.

Lord Wilson and Lord Hughes, dissenting in separate opinions, took a very different view. For them, Parliament *had* made itself crystal clear. Section 53 said, in 'plain words'[16], that the Attorney General could set aside a decision order if he reasonably disagreed with it. The Attorney General's grounds were, as even Lord Neuberger admitted, 'cogent' and 'reasonable'.[17] Thus, the certificate was valid. If Parliament had wanted to limit the power to issue a certificate to the circumstances that Lord Neuberger outlined, it would have said so.[18] It clearly did not.

According to the dissenting judges, it was the majority that had undermined the principles of the constitution. Refusing to give effect to the plain meaning of s 53 undermined perhaps the central constitutional principle, namely, parliamentary sovereignty.[19] Since Parliament's will is law, refusing to give effect to s 53 amounted to a refusal to apply the law. If there is one thing that the rule of law abhors, it is officials disregarding the law. Ironically, by attempting to protect the rule of law, the majority itself violated the rule of law.[20]

In summary, the majority of judges (Lord Neuberger, Lord Kerr, Lord Reed, Lord Mance, Lady Hale) decided that the terms of s 53 were not

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[13] *R (Evans) v Attorney General* [2015] UKSC 21 [130] (Lord Mance).
[14] *R (Evans) v Attorney General* [2015] UKSC 21 [132]-[144] (Lord Mance).
[15] *R (Evans) v Attorney General* [2015] UKSC 21 [145] (Lord Mance).
[16] *R (Evans) v Attorney General* [2015] UKSC 21 [155] (Lord Hughes).
[17] *R (Evans) v Attorney General* [2015] UKSC 21 [52], [88] (Lord Neuberger).
[18] *R (Evans) v Attorney General* [2015] UKSC 21 [155] (Lord Hughes).
[19] *R (Evans) v Attorney General* [2015] UKSC 21 [168] (Lord Wilson).
[20] *R (Evans) v Attorney General* [2015] UKSC 21 [154] (Lord Hughes).

satisfied and held that the certificate was invalid. Two judges (Lord Hughes and Lord Wilson) dissented on this point.

The immediate effect of the decision in *Evans* was that Prince Charles' letters were disclosed. While there were some revelations, overall they were underwhelming. Those were the last letters we are likely to see for a long while. Even before the Supreme Court had made its decision, FOIA had been amended to create an absolute exemption for communications with the Royal Family. Doctrinally, the case was significant mainly as an addition to a growing line of Supreme Court decisions using the principle of legality to reach highly strained interpretations of statutes.[21]

5. The surprising strength of the principle of legality

How should we assess the disagreement between the majority views and the dissents? Who had the better view? The dissenting judges had a point. Parliament did say, quite clearly, that the Attorney General could set aside a judicial decision on 'reasonable grounds'. And the Attorney General's 10-page set of grounds certainly were reasonable, in an ordinary sense. It is easy to understand why Lord Wilson would say that Lord Neuberger's restrictive interpretation 're-wrote'[22] s 53. However, Lord Hughes and Lord Wilson underestimated the strength of the principle of legality. As a result, they underestimated just how strained the correct interpretation of a statute can be. To see why, it is worth reflecting on how interpretive presumptions operate.

Sometimes we presume that Parliament intends a meaning in the sense that we treat it as probable that Parliament intended that meaning. Other times, we presume that Parliament intends a meaning in the sense that we demand proof to a very low standard before we give the statute that meaning. The 'linguistic canons' like *ejusdem generis* are presumptions of the first type. They are based on generalisations about what Parliament intends. The old 'rule of lenity', which required any doubt as to the

[21] Jason Varuhas, 'The Principle of Legality' (2020) 79 Cambridge Law Journal 578, 602-4.
[22] *R (Evans) v Attorney General* [2015] UKSC 21 [168] (Lord Wilson).

meaning of a statute to be resolved in favour of the accused, was a presumption of the second type.[23]

The principle of legality combines these two types of presumption. One rationale for the principle of legality is that it is inherently unlikely that Parliament intends to act contrary to the rule of law. The other rationale is that, given the importance of the rule of law, reasonable doubts as to Parliament's intentions should be resolved in favour of a rule of law-respecting interpretation. Thus, the principle of legality is a composite presumption. As I have argued elsewhere, its composite nature means that the principle of legality can justify some *extremely* strained interpretations.[24]

A bit of math helps to show why. Bayes' theorem is a formula for updating the odds of an event given new evidence. We start with two hypotheses, which I will call H and $notH$. We have some evidence, which I will call E. P stands for probability and the vertical bar indicates a conditional probability. Bayes' theorem states:

Bayes' theorem

$$\frac{P(H)}{P(notH)} \times \frac{P(E|H)}{P(E|notH)} = \frac{P(H|E)}{P(notH|E)}$$

The first term, $P(H)/P(notH)$, is the prior odds of H versus $notH$ (that is, the odds prior to considering the evidence). The last term, $P(H|E)/P(notH|E)$, is the posterior odds of H versus $notH$ (the odds after taking into account the evidence). The middle term, $P(E|H)/P(E|notH)$, is the likelihood ratio. The likelihood ratio is a measure of which hypothesis the evidence supports and to what degree. If the ratio is greater than 1, then the evidence supports H over $notH$, in the sense that the posterior odds of H versus $notH$ are greater than the prior odds. If the ratio is less than 1, then the evidence supports $notH$ over H.[25]

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[23] R Cross, J Bell, and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995) 134.

[24] Adam Perry, 'Strained Interpretations' (2019) 39 Oxford Journal of Legal Studies 316, 336. The following two paragraphs draw on this article.

[25] There is a good introduction to Bayes' theorem in N. Fenton and M. Neil, *Risk Assessment and Decision Analysis with Bayesian Networks* (CRC Press 2013) ch 5.

When interpreting statutes, the relevant hypotheses are that Parliament intended one meaning or another. The evidence consists of statutory text, context, and other markers of legislative intent. An interpretation is 'strained' if it accounts for the text, context, etc. less well than the competing interpretation. More precisely, if the possible meanings of a statute are A and B, and E is the evidence of legislative intent, then B is a strained interpretation just if $P(E|A)/P(E|B) > 1$.[26] In words, this means that an interpretation is strained if it is less likely that we would see the evidence we do if Parliament intended that interpretation than if it intended the competing interpretation.

Returning to *Evans*, let us call the government's favoured interpretation, which threatens to upend the rule of law, $upend$. Let us call $respect$ an alternative interpretation that respects – i.e., does not upend – the rule of law. It is safe to assume that Parliament very rarely intends to upend the rule of law. So, let us set the prior odds – the odds that Parliament intends $upend$ rather than $respect$, prior to considering the evidence – at 1 to 100. Given the importance of the rule of law, we will refuse to give a statute that interpretation unless we are convinced beyond a reasonable doubt that Parliament intended that meaning. Proof beyond a reasonable doubt is, let us assume for the sake of argument, equivalent to odds of 1 to 10.[27] Those are the posterior odds we demand to adopt $upend$.

Using Bayes' theorem, we can calculate the strength of the evidence needed to justify $upend$. First, we rearrange the equation to isolate the likelihood ratio:

$$\frac{P(upend|E)}{P(respect|E)} \times \frac{P(respect)}{P(upend)} = \frac{P(E|upend)}{P(E|respect)}$$

Then we input the values:

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[26] Adam Perry, 'Strained Interpretations' (2019) 39 Oxford Journal of Legal Studies 316, 325.

[27] L Laudan, 'Is Reasonable Doubt Reasonable?' (2003) 9 Legal Theory 295, 310, 312–13; A Walen, 'Proof Beyond a Reasonable Doubt: A Balanced Retributive Account' (2015) 76 La L Rev 355, 374

$$\frac{10}{1} \times \frac{100}{1} = \frac{1000}{1}$$

So, the likelihood ratio is 1000. This means that the evidence – including the words of s 53 – would have to be 1000 times more likely under the government's interpretation than the alternative to require the court to adopt the government's interpretation.

Of course, these values are only estimates. Provided they are in the right neighbourhood, though, the point remains: even a *tiny* chance (roughly 1 in 1000) that Parliament intended to respect the rule of law and enacted s 53 anyway means that the court should opt for *respect*. It seems obvious that there is at least this tiny chance – the equivalent of correctly guessing a three-digit PIN on the first try – that Parliament wanted to uphold the rule of law. Even though it is very strained, the court was correct to adopt the rule of law-preserving interpretation.

Overall, *Evans* is an illustration of the significance that some judges have attached to the principle of legality. The judges themselves have not clearly justified that approach. Bayes' theorem helps to provide that missing justification. It shows that even extraordinarily strained interpretations can be justified, assuming that Parliament generally intends to respect the rule of law and that contrary intentions need to be proved to a high standard.