

JOINT OPINION

Summary

- 1 We are asked to advise the Prime Minister, the Rt Hon Boris Johnson MP, in relation to the inquiry being conducted by the House of Commons Committee of Privileges. The inquiry concerns whether statements made by Mr Johnson on the floor of the House of Commons as to compliance with Covid Regulations in 10 Downing Street and in the Cabinet Office were misleading and so were a contempt of the House.
- 2 In our opinion, the Committee is proposing to adopt an approach to the substantive issues which is wrong in principle in important respects, and the Committee is also proposing to adopt an unfair procedure.
- 3 Because of Parliamentary privilege, the decisions of the Committee - procedural and substantive - cannot be the subject of judicial review, by contrast with the decisions of other public bodies. But for Parliamentary privilege, a court hearing a judicial review brought by Mr Johnson would in our view declare the approach taken by the Committee to be unlawful.
- 4 The Committee has set out the approach it intends to adopt in its Second Report of Session 2022-23 (HC632, 21 July 2022). The Report includes at Annex 1 a Resolution on Procedure adopted by the Committee, at Annex 2 a Memorandum of Legal Advice from the Rt Hon Sir Ernest Ryder, and at Annex 3 a Paper from the Clerk of the Journals (Eve Samson) on the definition of contempt.
- 5 There are six important areas where the Committee is proposing to adopt a fundamentally flawed approach.

- (1) The Committee has failed to understand that to prove contempt against Mr Johnson, it is necessary to establish that he *intended* to mislead the House. See paragraphs 7 - 47 below.
- (2) The Committee has failed to recognise that for an allegation of contempt to be established, it would need to be persuaded that the allegation is made out to a high degree of probability, that is that it is significantly more likely to be true than not to be true. See paragraphs 48- 52 below.
- (3) The Committee is proposing to apply an unfair procedure in that it says it may well not tell Mr Johnson the identity of witnesses whose evidence may be relied on to establish a contempt of the House. See paragraphs 53 - 61 below.
- (4) The Committee has failed to recognise that a fair procedure requires that before Mr Johnson gives evidence, he should be told the detail of the case against him - charges and evidence - so he has a proper opportunity to respond. See paragraphs 62 - 65 below.
- (5) The Committee has failed to recognise that a fair procedure requires that Mr Johnson should be able to be represented at a hearing before the Committee by his counsel. See paragraphs 66- 70 below.
- (6) The Committee has failed to recognise that a fair procedure also requires that Mr Johnson should be able, through his counsel, to cross-examine any witness whose evidence is relied on to establish a contempt of the House. See paragraphs 71 - 73 below.

6 We have read Sir Ernest Ryder's article of 23 August 2022 in the Telegraph, but it does not address, far less alter, the points discussed below.

To prove contempt against Mr Johnson, he must be shown to have intended to mislead the House

7 The Committee has concluded - see paragraph 6 of the Second Report - that "intention is not necessary for a contempt to be committed".

8 The Committee there stated that it accepted the analysis by the Clerk of the Journals in her Paper at Annex 3. She there stated at paragraph 15:

"It is for the Committee and the House to determine whether a contempt has occurred and the intention of the contemnor is not relevant to making that decision. Intent has been considered relevant when a Committee has been considering whether or not there should be penalties for a contempt, or the severity of those penalties; it is best thought of as an aggravating factor in respect of remedy rather than a component part of the allegation".

9 We disagree: a contempt by misleading the House requires it to be established that Mr Johnson *intended* to mislead the House - that is that he knew that what he told the House was incorrect. This is established by the contents of Erskine May, by previous resolutions and reports and by other relevant material.

Erskine May

10 Erskine May: Parliamentary Practice (25th edition, 2019) defines a contempt at paragraph 15.2:

"Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of their duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, as Parliamentary privilege is a 'living concept'".

11 The concepts of "obstruct or impede" are ambiguous as to whether an intention is required. As the definition states, such conduct "may" be treated as contempt so it is necessary to look for further guidance.

12 As stated in Erskine May at paragraph 15.32, in 1978 (on 6 February) the House agreed that

"in general the House should exercise its penal jurisdiction
(i) in any event as sparingly as possible and
(ii) only when satisfied that to do so was essential in order to provide reasonable protection for the House, its Members or its officers from improper obstruction, or attempt at or threat of obstruction causing, or likely to cause, substantial interference with the performance of their respective functions".

(See Hansard, volume 943, columns 1155-1198) [emphasis added].

13 Obstruction could not sensibly be described as "improper" if the Member concerned did not know that what he was telling the House was incorrect. And to seek to categorise as a contempt a mere mistake, when the Member did not know that what he said was incorrect, could not sensibly be said to be to "exercise its penal jurisdiction as sparingly as possible and ... only when satisfied that to do so was essential ...".

14 Erskine May further addresses this issue at paragraph 15.27:

"The Commons may treat the making of a deliberately misleading statement as a contempt. ...

In 2006, the Committee on Standards and Privileges concluded that a Minister who had inadvertently given a factually inaccurate answer in oral evidence to a select committee had not committed a contempt, but should have ensured that the transcript was corrected".

15 This is a reference to the matter of Stephen Byers MP, as addressed in the Sixth Report of the Committee on Standards and Privileges 2005-06 (HC854, 30 January 2006) (see paragraphs 17 - 21 below).

16 The analysis in Erskine May was adopted by the Joint Select Committee on Parliamentary Privilege in its First Report of Session 1998-1999 (HL43 1998-99) (HC214 (1998-99), which addresses this issue at paragraph 264:

"Contempts comprise any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or officer. [300] [citing Erskine May's definition in the 22nd edition (1997) at page 108, which was materially similar to the current edition] The scope of contempt is broad, because the actions which may obstruct a House or one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether conduct amounts to improper interference and hence contempt. The categories of conduct constituting contempt are not closed. The following is a list of some types of contempt: ...

- deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition)" [emphasis added].

The Stephen Byers matter

17 Mr Byers was Secretary of State for Transport, Local Government and the Regions. There was no dispute that his evidence to the Transport Sub-Committee was factually inaccurate. He had apologised to the House. As the Committee Report stated at paragraph 30:

"The main issue for us has therefore been what lay behind the incorrect answer to Question 857. The Clerk of the House has advised us that, for a complaint to be sustained that a witness had wilfully misled the House or a select committee, and thus committed a contempt, it must be demonstrated not only that the statement or evidence was incorrect, but also that there was a deliberate intention to mislead. He continued: 'In order to find that Mr Byers committed a contempt in the evidence session of 14 November 2001, the Committee will need to satisfy itself not only that he misled the Sub-Committee, but that he did so knowingly or deliberately'. [emphasis added]

18 After examining the evidence, the Committee concluded at paragraph 57:

"While Mr Byers now accepts his answer was untruthful, we do not find the charge of contempt, as defined by the Clerk of the House, is sustained. We do not believe, on the evidence we have seen, that Mr Byers lied to the Transport Sub-Committee as alleged".

19 The advice given in the Stephen Byers matter by the Clerk of the House, Roger Sands, is set out at Appendix 1 to the Stephen Byers Report, at paragraphs 5 and 15. It is clear from the Advice that Mr Byers was only to be found to have committed a contempt if he deliberately intended to mislead the House. The Report of the Committee in the Stephen Byers matter proceeded on that basis.

20 It is no answer for the Clerk of the Journals to emphasise in the present matter - as she does at paragraph 12 of the Supplement to her Paper at Annex 3 - that the Stephen Byers Report arose in the context that it had already been acknowledged by Mr Byers that his evidence was untruthful and the issue was whether, as alleged, he had lied to the Transport Sub-Committee. That ignores the fact that the Clerk's Memorandum to the Committee in the Stephen Byers matter, accepted by the Committee, stated that to establish a contempt, it was necessary to show that Mr Byers had deliberately misled the Committee.

21 The Memorandum and the Report of the Committee in the Stephen Byers matter are inconsistent with the approach which the Committee proposes to adopt in the present case. On the approach now taken in the present matter by the Clerk of the Journals and accepted by the Committee, Mr Byers would have been guilty of a contempt for misleading the Sub-Committee, whether or not he deliberately intended to do so.

The basis on which this matter was referred to the Committee

22 In the Opposition Day debate in the House of Commons on 21 April 2022 referring this matter to the Committee, Members made repeated reference to the criterion of "deliberately" or "knowingly" misleading the House. There was no suggestion that the

motion had been framed so as to disapply the long-standing principle that intent was required to establish a contempt by misleading the House.

- 23 The Leader of the Opposition, Sir Keir Starmer, opened the debate on his Opposition Day motion, asserting (Hansard, columns 352, 355, 356):

"The Prime Minister has been accused of repeatedly, deliberately and routinely misleading the House ... our good faith that no Prime Minister would ever deliberately mislead this House He can make his case as his defence that his repeated misleading of Parliament was inadvertent".

- 24 The Chairman of the Standards Committee, Chris Bryant, cited the Memorandum by the Clerk in the Stephen Byers matter, noting that the criterion was "that he did so knowingly or deliberately", adding "that is quite a high bar, but it is for the Privileges Committee to decide that". Sir Bill Cash then added: "the question rests on 'knowingly', and I am grateful to the hon. Gentleman for making that point clear" (column 367).

- 25 It is therefore very clear that the Committee was asked to investigate and report on whether the Prime Minister "deliberately" misled the House.

The 1997 Motion following the Scott Inquiry

- 26 On 19 March 1997, the House of Commons approved (with cross-party support) a motion stating how Ministers should be accountable to Parliament. See Hansard, columns 1046-1047. The motion was drafted in consequence of the Scott Inquiry into the export of defence equipment to Iraq. The Scott Report concluded that Ministers did not intend to mislead the House of Commons. The Motion stated (see Erskine May at paragraph 11.40):

"it is of paramount importance that ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister ...".

This Resolution remains in force.

27 Ian Lang, the Secretary of State for Trade and Industry, noted in the House of Commons when the Report was published (Hansard, 15 February 1996, column 1143):

"The crucial issue is whether those junior Ministers intended to mislead this House and the country. Sir Richard [Scott] gives an unequivocal answer on that. He accepts that the Ministers believed that they were avoiding a formal change to the guidelines and that in holding that belief, they had, to quote his words, 'no duplicitous intention'. In respect of my right hon. Friend the Chief Secretary to the Treasury, who was at the time one of the junior Ministers concerned, Sir Richard goes on to say: 'he did not intend his letters to be misleading and did not so regard them'. My right hon. Friend is therefore absolved of the charge that he intended to mislead Members of the House or anyone else".

The requirements of the Ministerial Code

28 The concepts of "inadvertent" and "knowingly" in the 1997 Motion were included in the Ministerial Code.

29 The Code states (Cabinet Office Ministerial Code, May 2022, paragraph 1.3):

"b Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;

c It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister."

30 In her Paper in the present matter, the Clerk of the Journals contends at paragraph 33 that

"The Ministerial Code is not relevant ...".

We disagree. It is relevant because its language reflects an extant resolution of the House - that is the 1997 motion. As noted by the Clerk to the House in his Memorandum in the

Stephen Byers matter (at paragraph 7), the inclusion of the words "inadvertent" and "knowingly" in the Ministerial Code "help to demonstrate the continuing force of the 1997 Resolution".¹ The Speaker referred with approval to the Ministerial Code as helping to define what is expected of Ministers when he made a statement on this subject on 11 March 2021 (see paragraphs 31 - 32 below).

The Speaker's statement on correcting mistakes

31 In a formal statement on 11 March 2021 (Hansard column 1001), the Speaker ruled:

"The Speaker cannot be dragged into arguments about whether a statement is inaccurate or not. This is a matter of political debate. All Members of this House are honourable. They must take responsibility for correcting the record if a mistake has been made. It is not dishonourable to make a mistake, but to seek to avoid admitting one is a different matter".

The Speaker referred with approval to the Ministerial Code.

32 So again it is plain that an honest mistake merely leads to an obligation to correct the record. Such a mistake is not dishonourable.

Other previous cases

33 In the Supplement to her Paper, at paragraph 1, the Clerk of the Journals referred to the expulsion of Gary Allighan MP from the House for contempt in 1947. In fact, that matter involved intent and a recognition that intent was a necessary element of contempt.

¹ See also the observations of Harriet Harman MP, as Shadow Secretary of State in 2012. In moving a motion calling for an investigation into comments made by the then Culture Secretary, Jeremy Hunt MP, she stated: "[T]here is the obligation to give accurate and truthful information to the House. On 19 March 1997, this House resolved that one of the principles that the House sees as being of paramount importance is 'that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity.' The seriousness that the House places on this is underlined by the resolution going on to say: 'Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister'. That is the wording of paragraph 1.2.c. of the ministerial code. This is not just some old-fashioned relic of House pomposity; it matters." The then Culture Secretary responded: "It is because I wish to make my case that I want to draw the House's attention to the very important distinction between inadvertently misleading this House and lying. Lying implies that there is deliberate intent." Hansard, 13 June 2012, columns 341 - 345.

34 Mr Allighan wrote a newspaper article alleging that MPs gave information about private Parliamentary party meetings to newspapers in return for money, publicity or free drinks. In fact, it was Mr Allighan himself and another MP who sold such information to the newspapers. The other MP admitted the offence to the Committee of Privileges. Mr Allighan denied the allegations, but he was found guilty of "aggravated contempt and gross breach of privilege" and expelled from the House.

35 The Resolution of the House asserted the MP had been "persistently misleading ... in respect of the very matter of which he knew himself to be guilty". The Leader of the House, Herbert Morrison, explained when he moved the motion (Hansard, 30 October 1947, column 1106):

"these offences were aggravated by his evidence, in which he sought to cast suspicion on others and persistently to mislead the Committee ... It has often been held that wilfully misleading evidence is a substantive offence" [emphasis added].

36 The most infamous case of contempt in recent history was the conduct of John Profumo. In 1963, the House resolved that Mr Profumo (who was no longer a Member of the House) had been guilty of contempt by making a personal statement to the House as Secretary of State for War which contained a deliberate lie concerning his relationship with Christine Keeler (Hansard, 20 June 1963, column 655).

37 The Leader of the Opposition, Harold Wilson, stated (Hansard, 17 June 1963, column 34):

"What concerns us directly is that the former Secretary of State for War, faced with rumours and innuendoes that could not be ignored, chose deliberately to lie to this House."

The Prime Minister, Harold Macmillan, agreed (at column 54) that the House was concerned with

"a Minister of the Crown who has told a deliberate lie to his wife, to his legal advisers and to his Ministerial colleagues, not once but over and over again, who has then repeated this lie to the House of Commons as a personal statement ...".

The views of Sir Bernard Jenkin MP

38 Despite the contents of the Committee's Report, a senior member of the Committee, Sir Bernard Jenkin, has publicly agreed that the criterion for establishing contempt in the present context is that the Member intended to mislead the House.

39 In an interview on BBC Radio 4 on The World at One on 9 August 2022, Sir Bernard stated:

"I just think we should be absolutely clear that for anyone to be held in contempt of the House of Commons, it's not just whether they misled the House, it's whether the functioning of the House was significantly impaired by that and whether it was the intention of that person to mislead the House of Commons. This is all laid out in our Report".

40 Unfortunately, this is not "all laid out in [the] Report" of the Committee. The Report adopts an approach inconsistent with Mr Jenkin's comments.²

The adverse consequences of the Committee's approach

41 The approach adopted by the Committee - that an inadvertently inaccurate statement to the House is or at least may be a contempt - would, if adopted, have very undesirable consequences.

² See also the observations of Sir Bernard Jenkin MP expressed in respect of the Chilcot report into the Iraq war: "On whether Parliament was deliberately misled, the Select Committee just did not feel qualified to make that judgment. We do not have the procedures and wherewithal in this House to conduct a fair trial of the facts. Were such a Committee to be established to do that, it would need to be a very different kind of Committee with a different kind of quasi-judicial procedures. We suggest that the House should be prepared to do that if further facts and information emerge, but Sir John Chilcot was clear that he did not hold former Prime Minister Tony Blair culpable in deliberately misleading the House, and we have to accept that view." Hansard, 16 March 2017, column 571.

- 42 Ministers are required to be accountable to the House on a daily basis - through oral questions, oral statements, urgent questions, debates, written questions and evidence to Select Committees. And rightly so.
- 43 But, especially in oral responses, the nature of Parliamentary debate is that Ministers must respond speedily and not always with prepared scripts. Mistakes are - inevitably - made which mislead the House. And they must be corrected.
- 44 But to rule that an inadvertent mistake not merely imposes an obligation to correct the record, but is also to be castigated as a "contempt" would devalue the currency of contempt and would be likely to have a chilling effect on Ministerial comments in the House. Ministers would be less willing to try to be helpful in answering comments and questions during debate if they know that inadvertent mistakes which mislead the House amount to a contempt. Ministers would be far more likely to respond: "I will write to the Hon. Member". Such a development would impede the effective conduct of the business of the House.
- 45 Of course, the criteria for establishing contempt apply to all Members, not just to Ministers. If intent is not a necessary ingredient of a contempt, all Members will need to be very careful indeed in their statements in the House. Members seek to ensure that what they say is accurate, and mistakes must be corrected. But the threat of contempt proceedings for unintentional mistakes would have a seriously chilling effect on all Members. Freedom of speech is, of course, fundamental to proceedings in Parliament. The Committee's novel approach to contempt would, if adopted, threaten to impede the functioning of the House, and fetter the rights and liberties of Parliament that the concept of Parliamentary privilege seeks to protect.

Conclusion on the criteria for contempt

46 All of this demonstrates that an inaccurate statement by a Minister (or a Member) to the House is only a contempt if the Minister (or Member) knew that the statement was false and intended to deceive the House.

47 There is no basis for the novel approach which the Committee has adopted.

Standard of Proof

48 Paragraph (15) of the Resolution on Procedure agreed by the Committee on 19 July 2022 states:

"When considering the allegations against Mr Johnson, the Committee will decide whether the allegations are proved on the balance of probabilities".

49 The Memorandum from the Clerk of the House in the Stephen Byers matter suggests a higher standard of proof is required before a contempt can be established. At fn.115 of his Memorandum, the Clerk of the House stated:

"In its Second Report of Session 2000-01, Complaint against Mr John Maxton and Dr John Reid (HC 2000-01, 89), the Committee on Standards and Privileges stated that, in respect of serious allegations against Members, it would need to be persuaded that they 'were **significantly more likely** [emphasis in the original] to be true than not to be true' (paragraph 20). In his memorandum to the Committee's Third Report of 2002-03, Complaints against Mr Michael Trend (HC 2002-03, 435), the Parliamentary Commissioner for Standards wrote, 'when considering the issue of possible dishonesty, the proof required should be one of a high degree of probability' (p.14, paragraph 37). The Committee endorsed the Commissioner's findings".

50 This is consistent with the standard of proof that was applied by the Committee in its inquiry into allegations that Colin Myler, Tom Crone, Les Hinton and News International misled a select committee during successive inquiries into privacy and phone-hacking. The standard of proof applied by the Committee in that case was "whether the allegations were significantly more likely than not to be true", which was described as

"the standard applied under the House's disciplinary proceedings to serious cases involving MPs": First Report of Session 2016-17 (HC662, 14 September 2016), at p.5; see also at paragraphs 53 - 55.

51 Such an approach is also consistent with:

(1) the statement of principle in the 1978 Resolution of the House:

"the House should exercise its penal jurisdiction

(i) in any event as sparingly as possible and

(ii) only when satisfied that to do so was essential ...".

(2) the approach set out in the Procedural note: Parliamentary Commissioner for Standards (April 2012), at paragraph 39, which was cited by the Committee in its First Report of Session 2016-17, at paragraph 53:

"When considering allegations against Members, the Commissioner and the Committee normally require allegations to be proved on the balance of probabilities, namely, that they are more likely than not to be true. Where the Commissioner and the Committee deem the allegation to be sufficiently serious, a higher standard of proof will be applied, namely that the allegations are significantly more likely than not to be true".

(3) the approach endorsed by the Joint Select Committee on Parliamentary Privileges in its First Report of Session 1998-1999, at paragraph 281:

"In determining a member's guilt or innocence, the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. In the case of more serious charges, a higher standard of proof may be appropriate."

52 No reason has been given for according Mr Johnson a lesser degree of protection as to standard of proof than in those other cases.

Anonymity of witnesses

53 In conducting this inquiry, "A fair process is necessary" (see the Paper from the Clerk of the Journals, paragraph 7). As recognised by the Joint Select Committee on Parliamentary Privileges, "the more serious the consequences, the more extensive must be the safeguards if the procedure is to be fair": First Report of Session 1998-1999, at paragraph 281, cited with approval in Erskine May at paragraph 11.22. The same Report recognises that "[c]ontempt is a serious matter", that "in a particularly serious case a member of the House of Commons faces the prospect of suspension and significant financial loss and, which may be more worrying for him, the destruction of his political career", and "[i]t is important, therefore, that the procedures followed in the investigation and adjudication of complaints should match contemporary standards of fairness."³ The Report goes on to recognise the "minimum requirements of fairness" in "specially serious cases" at paragraph 281:

- "- a prompt and clear statement of the precise allegations against the member;
- adequate opportunity to take legal advice and have legal assistance throughout;
- the opportunity to be heard in person;
- the opportunity to call relevant witnesses at the appropriate time;
- the opportunity to examine other witnesses;
- the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence."

54 The Committee intends to rely on evidence from witnesses whose identity will not be disclosed to Mr Johnson. See the Resolution on Procedure, paragraph (18):

"Responses received from witnesses will be shared in confidence with Mr Johnson, save that the Committee may take steps to conceal the identity of a witness where this is appropriate".

55 Fairness requires that Mr Johnson be told the identity of witnesses on whose evidence the Committee relies to make findings against him. It is only if he knows their identity

³ The adverse consequences of a finding of contempt are made more acute by the Recall of MPs Act 2015.

that Mr Johnson can respond to such evidence by drawing attention to material that might undermine its credibility such as an animus or a grudge or other rebuttal evidence.

56 The Committee's Legal Adviser, Sir Ernest Ryder, recognised at paragraph 14 of his Memorandum that

"Fair process normally requires that the subject of the inquiry receives all of the information upon which the Committee intends to rely ...".

That is undoubtedly correct. Courts have regularly held that procedural fairness requires that a person whose conduct is criticised and who is threatened with sanctions is entitled to know the identity of a witness against him. See, e.g., A (A Child) (Disclosure of Third Party Information), Re [2013] 2 AC 66, at paragraph 34; R v Davis [2008] 1 AC 1128. There is an obvious distinction between a public inquiry which does not involve the potential imposition of a sanction of an individual (where anonymised evidence might be appropriate), and an inquiry such as the present, where the Committee may recommend the imposition of sanctions. That distinction was recognised in R (Associated Newspapers Ltd v The Rt Hon Lord Justice Leveson) [2012] EWHC 57 (Admin), at paragraph 54 ("It has to be stressed that this is an inquiry; it is not the same as a criminal trial or a disciplinary proceeding").

57 Parliament has authorised statutory exceptions in cases concerned with national security and allied interests. Because of the need to ensure fairness even in such exceptional cases, Parliament has provided for the appointment of a special advocate to represent the interests of the person concerned. There are also statutory exceptions in the context of criminal proceedings (see Coroners and Justice Act 2009, sections 86 – 90⁴), where

⁴ Section 88 sets out three conditions which must all be met – see sections 80(3)-(5): "(3) Condition A is that the proposed order is necessary – (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise). (4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial. (5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and - (a) the witness would

Parliament has imposed very strict criteria before the court can hear evidence of a witness whose identity is not disclosed to the defendant. Parliament has imposed these criteria because it has recognised that fairness so demands, and that it is not sufficient for an anonymity order that the witness will not otherwise give evidence. The Committee is applying far looser standards which are plainly unfair to Mr Johnson.

58 As Sir Ernest acknowledges (at paragraph 14 of his Memorandum), in the present context

"There is no statutory or statutory instrument based scheme ... to support confidentiality ...".

59 The argument for anonymity here (see paragraph 11 of the Committee's Report) is simply that

"Some witnesses may only be willing to give evidence if their identity is not made public".

That is not sufficient to allow for anonymity in a criminal trial. And that is because it is unfair to the defendant. It is impossible to understand why such unfairness should be tolerated in the present context. We can find no precedent for a Committee refusing to

not testify if the proposed order were not made, or (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made."

Section 89 sets out the relevant considerations which a court "must have regard to" in deciding whether the conditions set out in section 88 have been met. The considerations are: "(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings; (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed; (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant; (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed; (e) whether there is any reason to believe that the witness - (i) has a tendency to be dishonest, or (ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant; (f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court."

Section 90(2) provides that "The judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant."

inform a person of the identity of persons who have provided evidence which may lead to his or her conduct being criticised.

60 The Independent Complaints and Grievance Scheme operated by Parliament has published a document on Confidentiality. It addresses the question "What happens if I do not want to be identified to the person I am making the complaint against? " The answer given is:

"You can call the helpline for confidential support and advice at any time. No information about those calls is shared with the person complained about (unless a formal investigation is launched). However, if a formal complaint is made, it cannot be investigated without informing the respondent of the details of the complaint, including the name of the person who made it".

This is unsurprising as fairness so requires. We can see no good reason for the Committee adopting a different, and unfair, approach to anonymity.

61 Mr Johnson should seek from the Committee an assurance that if it receives evidence from any witness, Mr Johnson will be told their identity so that he has a proper opportunity to respond.

Details of the case against Mr Johnson

62 The Resolution on Procedure states at paragraph (6) that "The Committee will take oral evidence from Mr Johnson". It adds at paragraph (9) that

"The Committee will invite final evidence from Mr Johnson, and may, if necessary during its subsequent deliberations, seek further evidence from him, either oral or in writing".

63 It would be unfair for Mr Johnson to be required to give any evidence (written or oral) until he knows the specific allegations against him and the evidence on which it is based. Mr Johnson denies the allegation that he made statements to the House which he knew to be untrue. He has repeatedly apologised for errors in what he told the House. Mr

Johnson is entitled to know what precisely is now said against him and by reference to what evidence. Any other approach would be unfair to Mr Johnson because of the factual complexity of the (unclear) allegations and the risk of this becoming an unfair memory test. The days are long gone in which criminal or civil procedure operates on the basis of trying to catch out a witness. Instead, evidence is disclosed and charges are formulated in advance of a hearing. Courts proceed in this way because that is what fairness requires. As Lord Steyn recognised, "[i]n our system of law surprise is regarded as the enemy of justice": R (Anufrijeva) v SSHD [2004] 1 AC 604, at paragraph 30.

64 In the present context, procedural fairness requires that Mr Johnson (i) know the case that he has to meet and (ii) has a reasonable opportunity to adduce evidence and make submissions in relation to that case: see, e.g., R (Miller) v Health Service Commissioner for England [2018] EWCA Civ 144, paragraph 43 (Ryder LJ describing the "fundamental right" to "a reasonable opportunity of learning what is alleged against him and of putting his own case in answer to it"). See also Hopkins [2014] EWCA Civ 470, at paragraphs 62, 85-88; and SSHD v AF (No 3) [2010] 2 AC 269, at paragraphs 63 and 83. Applying these principles, fairness requires that Mr Johnson be told specifically what is alleged that he said that was untrue and in what respects it was untrue. The adoption of a procedure which allowed Mr Johnson to be ambushed by questions to which he had no fair opportunity to prepare himself, or present evidence in advance of the hearing, would not be a fair process.

65 Mr Johnson should ask the Committee to confirm that it will ensure that Mr Johnson knows what is alleged against him, and the evidence upon which it is based, before he is required to give any written or oral evidence.

Representation by counsel

66 The Resolution on Procedure states at paragraph (7):

"At evidence sessions, Mr Johnson and any other witness may be accompanied by a legal or other adviser, and may take advice from them during the session, but must answer in person".

67 It is unfair to prevent a person who faces serious charges which (if proved) may lead to sanctions to be denied the right to have a lawyer speak on their behalf at a hearing to make any points of principle.

68 Courts have regularly recognised the importance of legal representation to a fair hearing. See, e.g., R v SSHD, ex p Tarrant [1985] QB 251, 277; Maynard v Osmond [1977] QB 240, 252.

69 Parliamentary Committees have allowed such legal representation on occasions. For example, in January 1992, Kevin Maxwell and Ian Maxwell were summoned to appear before the House of Commons Social Security Committee to answer questions about the disappearance of a large sum of money from the Mirror Group Newspapers' pension funds. They were represented by George Carman QC (appearing with one of us, David Pannick) and John Jarvis QC. Mr Carman made submissions explaining to the Committee that the witnesses would not be giving evidence as they were facing criminal charges.

70 Mr Johnson should ask the Committee to exercise its discretion to allow similar representation by counsel in the present matter to explain the points of principle taken by Mr Johnson.

Cross-examination of witnesses

71 Fairness also requires that Mr Johnson should be able, through his counsel, to cross-examine any witness whose evidence is relied on to establish a contempt of the House in so far as there are material disputes of fact. This is consistent with the "minimum requirements of fairness" set out by the Joint Select Committee on Parliamentary Privileges in its First Report of Session 1998-1999, at paragraph 281 (see paragraph 53 above).

72 Cross-examination is the standard tool recognised by the courts as enabling the weaknesses of apparently incriminating evidence to be exposed. A refusal to allow for such a process (of course, controlled to ensure it is conducted efficiently and courteously) has been regularly recognised by the courts as making unfair a process leading to the imposition of sanctions on a person. See, e.g., R (Bonhoeffer) v General Medical Council [2011] EWHC 1585 (Admin), at paragraphs 84-85; Bushell v Secretary of State for the Environment [1981] AC 75, 116D.

73 The Resolution on Procedure makes no provision for cross-examination. Mr Johnson should seek from the Committee an assurance that if it proposes to rely on the evidence of any witness to make findings against Mr Johnson, he will be given an opportunity, through his counsel, to cross-examine that witness on any material disputes of fact.

The context in which these issues arise

74 The Committee is composed of MPs some of whom are political opponents of the Prime Minister, and many of whom have made personal criticisms of his conduct. It is also a Committee which (unusually) seeks both to investigate and to determine facts. As already mentioned, the Committee (unlike almost all public bodies) is not subject to judicial review. The allegations against the Prime Minister are grave, and the potential penalties substantial. In such a context, it is of especial importance that the Committee ensures that it correctly directs itself on the relevant principles and adopts a procedure which is fair – and is seen to be fair.

Conclusion

75 For the reasons set out above, we advise Mr Johnson that the Committee is proposing to proceed by reference to substantive errors as to the ingredients of contempt and the standard of proof required, and is proposing to adopt an unfair procedure. But for Parliamentary privilege, a court hearing a judicial review application brought by Mr Johnson would declare the Committee's Report to be unlawful.

76 On 19 August 2022, the Committee published a document entitled "Privileges Committee Inquiry into Rt Hon Boris Johnson MP - Frequently Asked Questions". One of the Questions was

"What can I do if I think the process is not fair or is prejudiced in some way?".

The Answer given by the Committee was:

"Please write to the Committee Chair or any member of the Committee about your concerns. The Committee is committed to the principles of fairness and will take seriously any reasoned critique of its processes, that is why the Committee set out its procedures in detail in a report in July in the interests of transparency and fairness".

77 For the reasons set out above, the approach taken by the Committee is fundamentally flawed in a number of important respects.

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