

## **FURTHER OPINION**

### **Introduction**

- 1 On 1 September 2022 we provided our Opinion to the then 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 Our Opinion, which was published on gov.uk, was that the Committee was 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 On 26 September 2022, the Committee published a Report commenting on our earlier Opinion (Third Report of Session 2022-23, HC 713).
- 4 The Committee says at paragraph 6 that our earlier Opinion is  

"founded on a systemic misunderstanding of the parliamentary process and misplaced analogies with the criminal law".
- 5 We are puzzled by this criticism as our earlier Opinion was largely based on Parliamentary papers, including Parliamentary resolutions (including the 1997 Resolution of the House of Commons) and reports of previous contempt proceedings in Parliament, as well as passages from Erskine May: Parliamentary Practice. Most of this material is not addressed in the Committee's Report.
- 6 We hope it may assist the Committee if we briefly respond to the Committee's recent Report. In doing so, we shall, of course, not repeat the detailed contents of our earlier Opinion.

7 We shall respond, in turn, to what the Committee says about each of the six criticisms which we made of the Committee's approach.

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

8 The first criticism which we made was of the Committee's express approval at paragraph 6 of its earlier Report (see paragraph 8 of our earlier Opinion) of the analysis by the Clerk of the Journals that

"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".

9 We advised that this was wrong in principle: 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 when he made the statement (or, we accept, if it could be established that he later discovered that what he had told the House was incorrect and he knowingly failed to correct the record). As we explained, that intent is a necessary ingredient of contempt by misleading the House is recognised by the contents of Erskine May, by Parliamentary resolutions, and by reports of Parliamentary Committees.

10 The further Report from the Committee now says (at paragraph 7) that

"Nothing in the impartial advice from the Clerk of the Journals precludes the Committee from considering intent".

But the further Report ignores the express approval by the Committee (see paragraph 8 above) of the Clerk of the Journals' statement that intention is not relevant to whether a contempt has occurred.

11 Nor does the further Report of the Committee address the many Parliamentary materials to which we drew attention which say that intention is a necessary ingredient

of contempt. These include the 6 February 1978 resolution in which 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" (emphasis added).

(See Erskine May at paragraph 15.32, and Hansard, volume 943, columns 1155-1198).

The Committee does not address how there can be "improper obstruction" where there is no intention to mislead.

12 Nor does the Committee address, far less dispute, that the House of Commons debate when this matter was referred to the Committee proceeded on the basis that the alleged contempt requires an intention to mislead.

13 This is all very unsatisfactory. The Committee needs to clarify that there is no question of a contempt by Mr Johnson in the circumstances of this case unless an intention to mislead the House is established.

### **Standard of Proof**

14 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".

15 In our earlier Opinion, we advised that a higher standard had been required in previous Parliamentary inquiries: "whether the allegations were significantly more likely than not to be true". We gave details. The Committee does not address any of that material.

16 Although the Committee criticises our Opinion, it now says at paragraph 16 of its Report that it accepts that "because the allegations are very serious, we are mindful that

evidence to be relied upon should be of especially high quality and cogency". We welcome that acknowledgement.

### **Anonymity of witnesses**

17 We drew attention in our earlier Opinion to paragraph (18) of the Committee's Resolution on Procedure which stated:

"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".

18 We advised that fairness requires that Mr Johnson be told the identity of witnesses on whose evidence the Committee proposes to rely to make any findings against him. Otherwise Mr Johnson could not, for example, draw attention to motives or interests of the witness which may undermine the credibility of their evidence.

19 The Committee now accepts (at paragraph 20 of its Report) that "the prospect of anonymous evidence may raise issues in relation to fairness which will need to be tackled". It says that it has

"not yet identified any credible evidence where a witness wishes to have their identity withheld from Mr Johnson, and it may be that this situation does not arise".

20 We welcome this clarification. It is unfortunate that the Committee raised the prospect of anonymous evidence - that is evidence from a person whose identity is not disclosed to Mr Johnson. We repeat that if the Committee were to propose to rely on such evidence, we do not see how that could be fair to Mr Johnson.

### **Details of the Case against Mr Johnson**

21 We explained in our earlier Opinion that 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.

22 It is not sufficient for Mr Johnson to be told that it is an inquiry into whether he misled the House of Commons on whether there had been compliance with Covid Regulations in 10 Downing Street and in the Cabinet Office. Fairness requires that he be told what specific statements are said to have misled the House, in what respects they misled the House, and on what evidence it is said that he knew the statements were false.

23 The Committee's Report now says at paragraph 21 that

"It is not the case that Mr Johnson would be called to give evidence without knowing the detail of the case that he has to meet".

We welcome that clarification. Fairness requires that the detail be provided to Mr Johnson in advance of any request that he respond to the Inquiry.

#### **Representation by counsel and cross-examination of witnesses**

24 Our fifth and sixth criticisms of the procedure to be adopted by the Committee were that it was unfair to deny Mr Johnson the opportunity to be represented by counsel at a hearing, and the opportunity to have counsel cross-examine witnesses on whose evidence the Committee proposes to rely.

25 The Committee says at paragraph 22 of its Report that those two points "are essentially the same".

26 We will not repeat the reasoning which we set out in our earlier Opinion. But one issue does require attention.

27 The Committee says at paragraph 23 of its Report that a select committee may only hear counsel if authorised to do so by the House. Yet it accepts that in 1992 the House of Commons Social Security Committee did hear submissions from leading counsel for Kevin Maxwell and for Ian Maxwell without authorisation from the House. See paragraph 69 of our Opinion and see the First Special Report of the Social Security Committee, Session 1991-1992 (HC 353) at paragraphs 7-8.

28 In addressing this point, the Committee notes at paragraph 24 of its Report that leading counsel for Kevin Maxwell and Ian Maxwell were "appearing as witnesses" alongside their clients in 1992. Be that as it may, leading counsel made representations on behalf of their clients as to why those clients should not be required to answer questions. There is no good reason, in our opinion, why Mr Johnson should be denied the opportunity to have his counsel address the Committee as a "witness" on any issues of principle which arise. The Committee points out that, unlike Kevin Maxwell and Ian Maxwell, Mr Johnson is not facing a criminal trial. But he is, of course, facing very serious allegations and potentially severe penalties.

### **Conclusion**

29 At paragraph 74 of our earlier Opinion, we emphasised the context in which these issues arise. That bears repetition. The Committee is composed of MPs some of whom are political opponents of Mr Johnson, 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. Moreover, the Committee (unlike almost all public bodies) is not subject to judicial review. The allegations against Mr Johnson are grave, and the potential penalties severe. 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.

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