IN THE MATTER OF THE ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION

AND IN THE MATTER OF A POTENTIAL INQUIRY INTO THE UK'S INVOLVEMENT IN TORTURE AND EXTRAORDINARY RENDITION

OPINION

INTRODUCTION

1. On 20th May 2010, the Foreign Secretary, William Hague, announced that the new government would conduct a judge-led inquiry into allegations of British involvement in extraordinary rendition and torture. Shortly afterwards, it was reported that officials considered that such an inquiry would have to await the conclusion of ongoing civil and criminal proceedings involving allegations of torture and complicity in rendition.

2. The ongoing civil proceedings include claims brought by Bisher Al-Rawi and five others against the Security Service, the Secret Intelligence Service, the Attorney General, the Foreign and Commonwealth Office and the Home Office. The Claimants are seeking damages for false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The ongoing criminal proceedings include investigations into the involvement of a British official in the interrogation of Binyam Mohamed, and separate allegations relating to the conduct of an MI6 agent.

3. We are asked to advise the All Party Parliamentary Group on Extraordinary Rendition ("APPGER") on whether the existence of these ongoing civil claims and criminal investigations prevents, or otherwise limits, the holding of a public inquiry into the UK's involvement in torture and extraordinary rendition until the conclusion of the claims and/or investigations.

SUMMARY OF ADVICE

4. We consider that there is no rule of law preventing the Foreign Secretary from holding an immediate public inquiry into the UK's involvement in torture and extraordinary

rendition, notwithstanding the existence of ongoing civil and criminal proceedings in relation to the same.

5. The decision to hold an immediate inquiry would undoubtedly raise sensitive issues in relation to the effect of the inquiry on the fairness of the ongoing criminal prosecutions and civil trials. However, we consider that if the Foreign Secretary considers that the public interest is best served by the immediate commencement of a public inquiry, that decision will be lawful regardless of its effect on the parallel proceedings.

6. In any case, we consider that there are a range of measures available to the Foreign Secretary and/or Inquiry Chair to ensure that the inquiry is conducted in such a manner that it does not cause undue prejudice to the ongoing civil and criminal matters.

THE OBJECTIONS

7. The objections to an inquiry proceeding in parallel with civil and criminal claims include the risk that the inquiry may prejudice the fairness of the parallel proceedings, and the risk that such an inquiry does not enjoy the full cooperation of witnesses.

8. In relation to the fairness of parallel or subsequent criminal proceedings, it can be argued that:
    a. the procedural and evidential protections afforded to criminal defendants are not available to witnesses in a public inquiry, who may be compelled to give evidence or disclose documents that may breach the privilege against self incrimination;
    b. evidence given, or documents disclosed, in a public inquiry might be used against the witness in a subsequent criminal trial;
    c. a widely publicised public inquiry may infect the minds of a jury and prevent a fair hearing at a later criminal trial.

9. In relation to the fairness of parallel civil claims, the objection appears to be that the public inquiry could be used as a "fishing expedition", in which a civil claim could be rehearsed and perfected.

10. In relation to the contention that an inquiry run in parallel with civil and criminal proceedings would not enjoy the co-operation of witnesses, it can be argued that:
    a. witnesses in a public inquiry may be reluctant to give frank and open evidence where there is a risk of subsequent criminal prosecution or civil action;
    b. witnesses in a public inquiry may refuse to give evidence or disclose documents on the grounds that to do so would breach their privilege against self incrimination.

11. Some of these concerns have some force, but we consider that measures are available to mitigate the risks identified. In any case, we do not consider that the concerns above are reflected in any statutory or common law rule against the establishment of a public inquiry in parallel with civil and/or criminal proceedings arising out of the same or similar subject matter.

THE LAW

Inquiries Act 2005

12. The establishment and conduct of public inquiries was placed on a statutory footing in the Inquiries Act 2005 ("the 2005 Act"). Under this scheme, there is no rule preventing a Minister from establishing a public inquiry while civil or criminal proceedings relating to similar matters are ongoing. By section 1 of the Act, a Minister has a wide discretion to call for a public inquiry where it appears to him that (a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred.

13. Where there are ongoing civil or criminal proceedings arising out of the same matters to which the inquiry relates, the Minister has a power under section 13 of the 2005 Act to suspend the inquiry pending the conclusion of those proceedings. However, the Act imposes no duty on a Minister to do so and therefore anticipates the possibility of parallel proceedings.

14. The Act also appears to anticipate the possibility of future civil and criminal proceedings arising out of findings of the inquiry. Section 2(1) of the 2005 Act provides that an inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability. However, section 2(2) provides that an inquiry

panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

15. Accordingly, the 2005 Act appears to anticipate the possibility of both parallel, and subsequent, criminal and civil proceedings.

Common law

16. There is no reported decision in England and Wales on the lawfulness of conducting a public inquiry in parallel with, or in advance of, civil and/or criminal proceedings in relation to the same matters. However, there are numerous examples of inquiries that have taken place where criminal investigations were ongoing or potentially possible (see, for example, the Red Lion Square inquiry (1975), the Ladbroke Grove Rail Crash inquiry (1999), and the Bloody Sunday inquiry (1999 - 2010)) and where civil claims were pending or imminent (see, for example, the Waterhouse Inquiry into Child Abuse in North Wales). In the Red Lion Square inquiry into the violent clashes in London's Red Lion Square, Lord Scarman considered the relationship between the inquiry and potential criminal liability for the death of Kevin Gately, saying:

> "It is not the object of this Inquiry to label people as offenders against the criminal law. This Inquiry is concerned with more general matters... Of course it is obvious that one cannot consider the events and actions which led to the disorder without also considering the persons who took part in it. There is bound to be, therefore, an overlap between the purpose of this Inquiry and the rights and obligations of individual persons."

17. The recent publication of Lord Saville's report into the events of Bloody Sunday has seen widespread discussion of the possibility of criminal prosecutions arising out of the Inquiry Report. In that case, the major barrier to prosecutions taking place is the length of time since the events in question rather than the impossibility of a fair trial.

18. Accordingly, past practice supports the view that a minister does not need to await the outcome of civil and/or criminal proceedings before establishing a public inquiry.

19. Further support for this can be drawn from the fact that there is no principle of law that a civil action must be stayed on the grounds that the defendant is facing a criminal prosecution in respect of the same matters. Where civil claims are issued in parallel to criminal prosecutions, criminal defendants frequently argue that the civil proceedings should be adjourned to avoid prejudice to the criminal trial. However, the extensive caselaw on this point establishes that it is always a matter of discretion for the trial

judge in the civil proceedings to decide whether to adjourn (***Jefferson v Betcha*** [1979] 1 WLR 898). The following principles apply:

a. The power to adjourn "must be exercised with great care" and only where there is a "real risk of serious prejudice" which may lead to injustice in the criminal proceedings (***R v BBC (ex p Lavelle)*** [1983] 1 W.L.R. 23; ***R v Panel on Takeovers and Mergers, ex parte Fayed*** [1992] BCC 524)

b. In deciding whether to adjourn, it is relevant to consider, *inter alia*, the public interest in the civil or disciplinary proceedings (***Secretary of State for Trade and Industry v Crane*** [2004] B.C.C. 825), and the length of time before the criminal proceedings will be completed (***Jefferson v Betcha*** [1979] 1 WLR 898);

c. Although the civil court will strive to avoid a manifest risk of injustice, the responsibility for doing justice in the criminal proceedings lies primarily with the criminal court. If civil proceedings are prejudicial to a criminal trial, the criminal court has extensive powers to remedy that prejudice by, for example, staying proceedings as an abuse of process or excluding evidence by operation of section 78 of the Police and Criminal Evidence Act 1984 if it would be unfair to admit that evidence (***Secretary of State for Trade and Industry v Crane*** [2004] B.C.C. 825, Ferris J.).

20. This caselaw is helpful in demonstrating that i) there is no common law rule that prevents parallel civil and criminal proceedings, ii) whether such proceedings ought to continue in parallel is a matter of discretion, iii) such discretion should be exercised with caution, and iv) the responsibility for protecting the right to a fair trial ultimately lies with the trial judge.

21. In large part, we consider that these principles apply equally to the decision of a minister to hold a public inquiry in parallel with, or prior to, civil and/or criminal proceedings. However, in one respect, we consider that different principles apply. The considerations involved in a ministerial decision to hold a public inquiry are different from the decision of a judge in civil proceedings on whether to adjourn pending the resolution of a criminal prosecution. The judge's decision predominantly involves the consideration of the interests of a discrete number of individuals involved in the civil litigation and criminal prosecution. By contrast, a minister's decision to hold a public inquiry is pre-eminently a decision in the wider public interest.

22. We consider that a minister would be entitled to conclude that the public interest is best served by holding an immediate inquiry, notwithstanding a manifest risk that such an inquiry will jeopardise future criminal or civil trials. In weighing the public interest, it might be relevant to consider whether the scope of a public inquiry is similar to or broader than a criminal investigation. Where a public inquiry is charged with investigating a discrete event which also forms the subject of criminal investigation (for example, a murder, or a disaster, or a rail crash), the public interest may demand that the inquiry await the conclusion of the criminal trial. By contrast, where the scope of a public inquiry is substantially wider than that of a criminal investigation, the public interest may weigh in favour of an immediate inquiry.

23. Accordingly, we consider that so long as a minister considers the risk of prejudice to parallel proceedings, a decision to hold an immediate public inquiry will not be impeachable on the grounds that the inquiry risks prejudicing those proceedings.

24. This approach is supported by the judgment of the Supreme Court of Canada in ***Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),*** [1995] 2 S.C.R. 97, where the Court directly rejected the contention that the decision to establish a public inquiry into the Westray Coal Mine explosion was unlawful on the grounds that it infringed the rights of defendants facing criminal charges in respect of that explosion. The claimants advanced two main arguments, namely that i) the criminal defendants could not be compelled to testify at the inquiry, as this would breach the privilege against self incrimination; and ii) the hearing of the inquiry before their criminal trials would prejudice their right to a fair trial. The Supreme Court dismissed the application on both grounds. In holding that the public interest was a crucial factor to consider, the majority of the Court said:

> "96...There are, in this case, two separate sets of proceedings; one is a public inquiry and the other is a criminal trial. They are initiated by the government, which is ultimately responsible for their conduct. There is clearly a strong public interest in proceeding with the Inquiry, but there is also a public interest in seeing that those guilty of criminal offences are brought to trial. Even if, in the circumstances of this case, there is a reasonable likelihood that the immediate holding of the Westray Inquiry is constitutionally incompatible with later criminal trials, it will not, as a general rule, be for the courts to decide which of the two proceedings should take precedence.
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> 97. In the circumstances of this case, for example, the government must, and undoubtedly has, carefully considered the choices open to it. If it chooses to proceed with the Westray Inquiry and to endow the Commissioner with an unlimited power to subpoena, then it runs the risk that the criminal trials of the accused managers may possibly be irreparably compromised either because much of the evidence given at the Inquiry may prove to be inadmissible testimony or derivative evidence at the criminal trial, or because excessive publicity will make a fair trial impossible. On the other hand, if the government wishes to take every possible precaution to ensure that there is no risk to the criminal trials, then it

could choose to halt, delay, or limit the powers of the Inquiry. To follow this latter course, however, involves the inevitable risk that the public will lose faith both in the government's ability and willingness to get at the truth and in the political system as a whole. Whatever route is selected, the courts must, as a general rule, respect the government's choice. A similar approach has been taken in the United States in respect of criminal proceedings which followed a highly publicized congressional inquiry. In Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), Magruder C.J. stated at p. 114:

> *We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.*

98... The government is almost certainly better placed than the courts to assess the need for and value of the Inquiry. It is best able to calculate and weigh the risks and benefits to the public of proceeding with the Inquiry. In the absence of demonstrated misconduct on the part of government, such as a refusal to enforce the criminal law in a manner that amounts to a flagrant impropriety, courts should not interfere with the choice it has made.

99. To put it another way, unless it can be shown that the government is acting in bad faith, prior restraint of government action in creating and proceeding with a public inquiry that is within its jurisdiction will be rare. There is no evidence of bad faith or of a refusal to enforce the criminal law in this case. The government of Nova Scotia has appreciated and considered the possibility that Gerald Phillips and Roger Parry may never be brought to trial, and there is nothing to indicate that its decision should be reviewed by this Court. If the Inquiry were to be held prior to the criminal trials by jury, it would be for the trial judge to determine the appropriate remedy for the breach of any Charter rights which the hearings might have occasioned."

25. We consider that the same approach applies in England and Wales and that the decision to hold a public inquiry in parallel with ongoing proceedings is a matter of discretion for the relevant minister.

26. In conclusion, we consider that the Inquiries Act 2005, past practice, and the common law supports the proposition that a minister has a wide discretion to order a public inquiry, notwithstanding the possible prejudice to ongoing or potential criminal and civil proceedings. Such a decision is based on the public interest. It will be for the minister concerned to decide whether the public interest is best served by i) an immediate public inquiry which may prejudice future criminal and/or civil proceedings, or ii) the postponement of a public inquiry until the effective resolution of all criminal and/or civil proceedings.

27. Accordingly, we consider that there is no legal barrier preventing the Foreign Secretary from ordering an immediate public inquiry into torture and extraordinary rendition if he considers that it is in the public interest to do so.

Measures available to mitigate the risk of prejudice and encourage co-operation with the inquiry

28. If an immediate public inquiry were called, there would be sensitive substantive and procedural issues to grapple with in order to mitigate the risk of prejudice to ongoing proceedings and to encourage the co-operation of witnesses with the inquiry. The responsibility for the procedure and conduct of the inquiry falls on the chairman (s.17 of the 2005 Act). It is arguable that it is implicit in the chairman's duty to act fairly (s.17(3) of the 2005 Act) to mitigate, insofar as is possible, the risk of prejudice to other ongoing proceedings. However, it might be open to a Minister to require, in his terms of reference, that the inquiry panel did so.

29. In our opinion, there are a range of options available to an inquiry chairman to mitigate the prejudice to parallel proceedings and to encourage the co-operation of witnesses with the inquiry.

30. First, in order to eliminate concerns that witnesses in the public inquiry may expose themselves to criminal prosecution and/or be compelled to give evidence in breach of their privilege against self-incrimination, **the Attorney General may be asked to undertake not to use any evidence given in the course of the inquiry in any subsequent criminal prosecutions against the witnesses**. This form of undertaking was given in the Scott Inquiry into the Export of Arms to Iraq, the Bloody Sunday inquiry, the Dunblane inquiry, and the Ladbroke Grove Rail Crash inquiry. The undertaking does not amount to the grant of immunity from prosecution, but does mean that witnesses may give evidence or disclose documents freely to the inquiry without risk that the evidence will be used against them. It also means that evidence given in the course of the inquiry cannot breach the privilege against self-incrimination. In Sir Roy Beldam's 2002 "Review of Inquiries and Overlapping Proceedings"[1], undertakings of this sort were considered important to encourage witnesses "to disclose what they know with the utmost candour".

31. Second, in relation to the concern that the publicity of the inquiry may infect the minds of a jury and therefore render impossible a fair criminal trial, the following can be said:

[1] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/606/4052504.htm#n48

a. First, a background knowledge of some of the facts of a case does not prevent a criminal jury from dealing with a case fairly. Juries are no longer expected to have no knowledge of a case; in trials involving high profile, well publicised murders, a jury is still considered capable of conducting a fair trial even where its members have a significant background knowledge of the case. Accordingly, the publication of evidence given in a public inquiry is unlikely, on its own, to render a fair criminal trial impossible.

b. However, knowledge of certain facts or documents that would not be admissible in criminal proceedings may prejudice a criminal trial. In that respect, **the inquiry chair would be entitled, under s.19 of the 2005 Act, to order that any evidence that might prejudice the course or outcome of any ongoing criminal inquiry ought not to be released or heard in public**. The Iraq Inquiry Protocol on the treatment of sensitive written and electronic information contains such a clause.

c. Additionally, it might well be considered prejudicial for the inquiry report to be published in advance of criminal verdicts. While a jury may be able to put out of its mind the evidence of witnesses in an inquiry, it may be more difficult to ignore the conclusions of a judge on the evidence heard. Accordingly, **it might be appropriate for the inquiry chair to delay the release of the inquiry report until the conclusion of any criminal trial.**

32. Third, in relation to any perceived prejudice to parallel civil proceedings, it is difficult to see the likely prejudice that would arise. By section 22 of the 2005 Act, any evidence that is not disclosable in a civil trial will not be compellable in a public inquiry. As there is no privilege against self-incrimination in relation to civil claims, it is not entirely clear how a public inquiry would prejudice ongoing civil claims. Although it might be contended that a public inquiry could be used as a "fishing expedition" in which a civil claim is trialled and perfected, there is no general objection to using evidence obtained in one set of proceedings in future proceedings. However, if an inquiry chairman considered that certain documents or pieces of evidence might prejudice parallel civil proceedings, he might require that evidence to be heard in private.

CONCLUSION

33. In our opinion, the Foreign Secretary is entitled to order an immediate public inquiry into the UK's involvement in torture and extraordinary rendition. Were he to do so, we consider that there are measures available to ensure that the inquiry is carried out in a manner that does not cause undue prejudice to ongoing civil and criminal matters, and in a way that encourages the cooperation of witnesses.

34. Nonetheless, even if no such measures were taken, the decision to hold an immediate public inquiry is likely to be lawful, notwithstanding any prejudice to ongoing criminal and civil proceedings, so long as the Foreign Secretary considered it to be in the public interest to do so.

35. If there is anything further we can assist on, we can be contacted in Chambers.

RICHARD DRABBLE QC

TOBY FISHER

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Landmark Chambers

180 Fleet Street

London EC4A 2HG