

The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

Attorney-General's Advice Ruling

Introduction

1. This ruling relates to the issue of legal professional privilege in respect of the Attorney-General's Advice of 2003 on the application of the European Convention of Human Rights (ECHR) to the British Army's operations in Iraq during Op Telic. The Advice is contained in seven documents, the earliest of which is dated 16 February 2003 and the latest 16 April 2003. I shall refer collectively to those documents as the Advice.
2. The detainees and a number of Core Participants represented by the Treasury Solicitor and one represented by Lewis Cherry invite me, in the exercise of my powers pursuant to s.21(2) of the Inquiries Act 2005 (the 2005 Act), to require the Ministry of Defence (MoD), itself a Core Participant, to produce the Advice to the Inquiry on the basis that the documents relate to a matter or matters in question in the Inquiry. The MoD assert that the Advice is subject to legal advice privilege, for these purposes, LPP.
3. I need not set out the background to this application. The Inquiry has now heard over 100 witnesses and is mid-way through the evidence relating to the third of four modules. The evidence and factual issues are well known to all Core Participants.
4. There can be no doubt that subject to issues of confidentiality and waiver of privilege the Advice attracts LPP. The right to assert LPP, which exists in civil proceedings, is preserved in the context of public inquiries by s.22(1) of the 2005 Act.
5. Four main issues arise out of the skeleton arguments submitted on behalf of the detainees and other Core Participants and the MoD. They can be summarised as follows:

- (i) Is the Advice relevant to any issue in the Inquiry?
 - (ii) Has privilege in the Advice been lost by it being put into the public domain?
 - (iii) Has privilege in the Advice been lost by collateral waiver?
 - (iv) If privilege has been lost by one or both of (ii) or (iii) above ought I to rule against directing disclosure in the exercise of my discretion?
6. Before dealing with these four issues I must first deal with a question of procedure canvassed by all parties. This question was whether I ought to see the Advice myself before making my decision. On this question, the parties are divided. Counsel for the detainees, Mr Rabinder Singh QC, submitted that I should not do so. The basis for this submission was that it would be unfair for me to see material which was not available to the detainees and would breach the requirement that the Inquiry process should be transparent. Further, it was submitted on behalf of the detainees that such a procedure would be contrary to the conventional practice that, for obvious reasons, a fact-finder should not see material or evidence which might be inadmissible.
7. Counsel for the Treasury Solicitor Core Participants, Mr Neil Garnham QC and Miss Fiona Edington, counsel for a Lewis Cherry Core Participant, submitted that I should see the Advice in order fairly to determine issues on relevance and confidentiality. Counsel for the MoD adopted a neutral stance. Counsel to the Inquiry advised that for similar reasons as those advanced by counsel for the Core Participants I should see the Advice.
8. At the end of the oral hearing I decided that I should see the Advice and accordingly I have done so. My reasons for reaching this decision are that whilst I am very conscious of the force of the submissions made on behalf of the detainees I think it necessary for me to see the Advice in order to assist my decision on whether or not the Advice is in the public domain and my decision on collateral waiver.
9. My ruling must therefore be seen in the light of the fact that I have read the Advice. I shall deal with the issues in the same order as above, save that it is convenient to leave issue (ii) to the end.

Issue 1 – Relevance

10. Mr Singh submits that the application of the ECHR is relevant to issues in the Inquiry for three reasons. First, it is submitted that although conditioning techniques might be unlawful under the Geneva Conventions, which on any view are applicable, many of the relevant personnel in the Armed Forces did not view the techniques as obviously contrary to the general requirement to treat prisoners humanely. It is submitted that they might have formed a different opinion and acted in a different way had they been aware of the decision of the European Court of Human Rights in ***Ireland v UK [1978] 2 EHRR (25)*** and the unequivocal undertaking given to the Court by the then Attorney-General. Mr Singh submits that an increased focus on the ECHR and its requirements in relation to all aspects of Op Telic operations might have impacted on military training so as to provide a greater awareness amongst the relevant lawyers, policy advisers and operational personnel of the appropriate response to conditioning techniques before the detention of Baha Mousa.
11. Secondly, Mr Singh submits by reference to e-mails and statements of some witnesses it may be seen that at best there was confusion over the application of the ECHR amongst some advisers. Although hooding was banned as a matter of operational policy, it is submitted that an authoritative long-term direction on the legality of the policy of hooding might have prevented this practice being carried out on the detainees.
12. Thirdly, it is submitted that Article 5 of the ECHR, providing more detailed procedural safeguards for those in detention than under Article 5 of the Geneva Conventions, would have increased the prospects of effective action being taken to prevent the unlawful treatment of the detainees.
13. For the MoD, Mr Charles Hollander QC, concedes that the ECHR may have some relevance to the events which are the principal focus of the Inquiry. However, he submits that its relevance in all the circumstances is greatly overstated by Mr Singh. Counsel to the Inquiry advise that the relevance can best be described as limited and not central to the Inquiry. Counsel to the Inquiry apply a low relevance threshold for disclosure of material to the Core Participants and they state that absent the LPP considerations, they would have wanted the Advice to be disclosed. Mindful of the full arguments from

others, they did not seek to contend for any particular outcome on the wider issue of whether or not I should rule that the Advice be produced. They instead made submissions that sought to elucidate the issues that need to be addressed, bearing in mind the inquisitorial context.

14. For my part, I accept that the ECHR and in particular Articles 2, 3 and possibly 5, are to an extent relevant to issues in the Inquiry. But, in my view, subject to further submissions at the end of all the evidence, their impact on the events with which I am concerned is likely to be comparatively small. I do not believe that whichever way I rule in this matter, save in respect of a small number of witnesses, the impact of this ruling will be more than marginal.

Collateral waiver

15. In response to a request by the Inquiry the MoD has disclosed a large number of documents for which privilege has been waived. The terms of the waiver of this material made it clear that privilege was not being waived in respect of the Advice. I shall not in this ruling set out these documents. They are referred to in a non-exhaustive list at paragraph 22 of counsel for the detainees' skeleton argument.
16. I shall not here attempt to summarise these documents. Mr Hollander concedes that in them there are various references to the applicability of the ECHR to operations in Iraq. Some of them refer to what is said to be advice given by the Attorney-General. It is these documents which give rise to submissions that they constitute collateral waiver of privilege in respect of the Advice so as to call for the Advice to be disclosed by the MoD.
17. Mr Hollander submits that the disclosure of these documents by the MoD does not constitute collateral waiver of privilege in respect of the Advice. He relies on passages in the judgment of Elias J (as he then was), President, in ***Brennan v Sunderland City Council*** [2009] ICR 479, a recent decision of the EAT, to support his argument. In particular he submits that ***Brennan*** makes it clear that before any question of collateral waiver can arise the MoD must have "deployed" and sought to rely on the privileged material which it has disclosed. Here, it is submitted, the MoD has voluntarily disclosed a number of privileged documents on which it has not at any stage sought to rely. For that reason it is submitted the element of deployment simply does

not arise. Mr Hollander submits that this disclosure must not be conflated with reliance on the material.

18. Mr Hollander further submits that no unfairness arises from the disclosure of these documents in the sense that the MoD has not sought to mislead the Inquiry or the Core Participants in relation to the Advice, nor, he submits, has it done so. Unfairness in this sense, on the authorities, is a pre-requisite for a submission of collateral waiver to succeed.
19. Mr Singh submits that the MoD has a duty under Articles 2 and 3 of the ECHR to place all relevant material before the Inquiry in a non-misleading form. He submits that as a matter of principle and fairness it cannot be right for the MoD to waive privilege in respect of legal advice of members of such bodies as MODLA, FCOLA and ALS and in part of the Attorney-General himself, whilst withholding the full legal advice given by the most senior of its legal advisers.
20. Mr Singh argues that the requirements of deployment and reliance referred to in *Brennan* must be seen in the context of adversarial litigation and not in the context of an inquiry. If reliance is a requirement in proceedings in an Inquiry it is submitted that the threshold of reliance is a low one.
21. In addition, Mr Singh supports the submissions made by Mr Garnham that refusal to disclose the Advice is likely to lead to real unfairness to witnesses whose advice may be criticised by the Inquiry.
22. As I have already said, Mr Garnham does not specifically rely on the principles of collateral waiver. In his skeleton argument he submits, relying on *Great Alliance Insurance Co v Home Insurance Co* [1981] 1 WLR 172, that privilege and waiver of privilege are species of the doctrine of fairness. On the basis of dicta in *Great Alliance* he submits that those parts of the Attorney-General's Advice which have been disclosed by the MoD require me to consider whether fairness dictates that the whole Advice should be disclosed. In his oral submissions Mr Garnham went further. As I understand his oral argument it is that principles of waiver and fairness applicable to collateral waiver in civil litigation cannot be translated wholesale to proceedings before an inquiry. Concepts of deployment and reliance, he

submits, do not have the same application in an inquiry as in adversarial litigation. In this submission, Mr Garnham supports submissions to which I have already referred made by Mr Singh.

23. As to unfairness, Mr Garnham points to the obvious difficulties which may arise in the case of his clients who may be unable properly to defend themselves against criticisms made of them with reference to advice which they gave. It is submitted that they may be at a real disadvantage by not being able to refer to the advice of which they may have been informed or seen. In an eloquent passage in his oral submissions Mr Garnham pointed out some of the real difficulties which they will face and the real unfairness caused by the MoD's resistance to disclosure of the Advice.
24. Miss Edington makes no submissions on this issue.

Conclusions on this issue

25. *Phipson in Evidence* (17th Edition) states that the classic statement on collateral waiver is to be found in the judgment of Mustill J in ***Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation and Cape Bretton Development Corporation and others (No.2)*** [1981] Comm LR 138 at 139:

“...Where a party is deploying in court material which would otherwise be privileged the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.”

This has been referred to in some of the authorities and the text books as the “cherry picking” principle.

26. In reaching my conclusions on this issue I bear in mind the importance and status of LPP in English law. In ***Three Rivers District Council and others v Governor and Company of the Bank of England (No.6)*** [2005] 1 AC 610, the House of Lords underlined this importance and emphasized that it is absolute and cannot be overridden by some supposedly greater public interest. It is relevant to note that the issues in ***Three Rivers*** arose out of

LPP being claimed in communications between legal advisers and their client, the Bank of England, in preparation for giving evidence to an inquiry.

27. In **Brennan** Elias J set out in the judgment of the Court the relevant uncontroversial general principles applicable to the “cherry picking” aspects of collateral waiver before going on to make some observations on which, as I have indicated, Mr Hollander relies and Mr Singh and Mr Garnham have commented. At paragraph 67 of the judgment, Elias J said:

“However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure.”

28. It is on the element of reliance referred to in this passage of the judgment that Mr Hollander relies. Mr Singh, on the other hand, emphasizes the need to see the requirement of reliance and fairness in the context of an inquiry rather than adversarial proceedings.
29. The MoD have expressly disavowed any intention of putting a corporate case for the Inquiry to consider. It can well be said that by voluntarily providing to the Inquiry privileged material the MoD are not seeking to persuade me to reach a positive finding on any issue. To that extent, this material, in my opinion, has not been deployed in the **Brennan** sense. Nor, in my view, is it material upon which the MoD have sought to rely.
30. However, I am conscious that the procedures of an inquiry are different from adversarial litigation. It seems to me that it would be, to say the least, unfortunate if the disclosure of privileged material by the MoD was such as to mislead the Inquiry. For instance, if a party to an inquiry on request supplied privileged material which might be shown to be positively misleading by other

privileged material which it had not disclosed, there might be strong reasons for extending the **Brennan** meaning of deployment to that situation.

31. In this instance, however, in my view the material disclosed by the MoD cannot be said to be misleading in the cherry picking sense. It consists, as I have already indicated, of a number of documents disclosed *en masse* by the MoD voluntarily in response to a request from the Inquiry. As one might expect, the expressions of opinions on the applicable law depend to some extent on the day when they were given and the factual situation at the time or as might be foreseen in the future. The opinions expressed are in some instances contradictory, one with another. All this, in my view, is to be expected where different legal advisers are asked for their opinions.
32. There are in some of the documents expressions of opinions of what the Attorney-General may or may not have advised, by individuals who may or may not have seen his Advice but, in my judgment, the effect of this material is not misleading and, as I have said, is not relied on by the MoD.
33. As to Mr Singh's submission that the MoD has a duty under Articles 2 and 3 of the ECHR to place all relevant material before the Inquiry in a non-misleading form, in my judgment any such duty cannot override the right of the MoD to assert LPP expressly preserved by the 2005 Act. If it were otherwise, in an inquiry such as this, LPP could never arise.
34. In respect of Mr Garnham's argument based on **Great Atlantic Alliance**, in my judgment this case is not authority for the proposition that partial disclosure of legal advice must inevitably lead to full disclosure. In my opinion the authorities show, as do the judgments in **Great Alliance Insurance**, that it is only if the undisclosed legal advice shows that the disclosed part of the advice on its own is misleading that it would clearly be unfair in those circumstances not to disclose the whole advice.
35. Finally, I need to make some comments in respect of the unfairness to witnesses who may be disadvantaged by not being able to refer to the Advice in their evidence to the Inquiry. I recognise that there are witnesses who may be at a real disadvantage when seeking to defend advice which they gave before or at or about the time of Op Telic. However, I accept Mr Hollander's

submission that this is not a species of unfairness which is relevant to a submission of collateral waiver of privilege. As Mr Hollander submits, the assertion of privilege may very well lead to unfairness in respects other than the respect relevant to the principles of collateral privilege. As he further points out, unfairness to witnesses caused by LPP itself is not a relevant consideration (see *R v Derby Magistrates ex parte B* [1996] 1 WLR 114).

36. It follows from the above that in my judgment the MoD has not deployed or relied on the privileged material which it has so far disclosed. In any event, I am satisfied that the material disclosed is not misleading so as to give rise to unfairness in the collateral waiver sense. Accordingly, in my judgment the argument based on the collateral waiver of privilege that LPP no longer attaches to the Advice, fails.

Confidentiality

37. Counsel for the detainees and counsel for some of the Core Participants submit that the Advice has ceased to be confidential and should therefore be disclosed. The bases for these submissions are matters concerning the Advice which it is submitted are now in the public domain. For ease of reference I repeat here the references to some material which is relied on.

38. This material consists of:

(i) e-mails exchanged between Commander Brown and Rachel Quick. Each was at the time a legal adviser to PJHQ. Each referred to the Attorney-General's Advice. Commander Brown, in his e-mail, stated "At the moment, as per the A-G's advice, ECHR has no application ...". Rachel Quick, referring to the Attorney-General's Advice, stated: "This concluded the better view was that the HRA was only intended to protect rights conferred by the Convention ...". "This" was a reference to the "A/G's Advice".

- (ii) A statement in a Cabinet memo to the following effect:

"The Government is arguing the case [Al-Skeini] that the Convention does not apply. Our legal advice has been however that we are likely to be unsuccessful with this argument and that the ECHR will be held to apply."

- (iii) Passages in Lord Goldsmith QC's evidence when he was Attorney-General to the Joint Committee On Human Rights of the Houses of Parliament on 26 June 2007.

"The substantive standards of treatment which are laid down particularly in Articles 2 and 3 of the European Convention in my view do – and this has always been my view – apply to those held in British-controlled and run detention facilities in Iraq." (Oral evidence Q185)

"So there has been an argument that the ECHR does not apply. I, personally, because of another case called *Ocalan*, did not think that was right and it did apply outside the European space." (Q193)

"What I can say is my view has always been the same as the one I have indicated to you." (Q207)

"In relation to the question whether the United Nations obligations apply or the ECHR obligations in relation to procedures apply, she was right to say, in my view, as the Court of Appeal has said, that it is the United Nations obligations which trump ... or not trump, but which operate in that specific area in relation to the procedures." (Q233)

"It was perfectly proper for the Government to argue the *Al Skeini* case as it did in the Divisional Court, but you will be aware that the Government conceded and did not further contest the application of the ECHR in those specific circumstances before either the Court of Appeal or the House of Lords. I have made clear that my personal view was always in line with that concession. (Written memo to JCHR – PLT000036).

- (iv) Evidence given by Lord Goldsmith QC to the Chilcot Inquiry on 27 Jan 2010 at pp 227-9:

Q: What about the MOD and anything to do with human rights issues?

A: I don't recall specifically. There were other issues in relation to our responsibilities, which really meant soldiers' responsibilities towards Iraqi detainees or members – civilian members; for example, did the European Convention of Human Rights apply to activity or at least some activity in relation to Iraq? It is not a part of Europe, but that is a question which I did have to advise and then we got on to the question of treatment of detainees. Fundamentally, my advice was that the obligations about the proper treatment of people, which are contained in the European Convention, did apply in relation to detainees, and, subsequently, I became involved in issues where there were allegations that detainees had not been treated properly, and, indeed I authorised certain prosecutions as a result and was concerned

...

Q: But initially, you had given advice on these issues before the specific cases arose?

A: I'm not sure that's right. I gave advice on – I have to recollect this: I gave advice on the application of the European Convention to certain aspects of the conduct, advising those standards did need to be complied with. Subsequently, a specific issue arose, when it came apparent – this is quite a long time later – that methods of treatment had been used in relation to certain detainees which actually were methods which had been outlawed by – I think by the Heath government in 1972, arising from Northern Ireland. I was surprised that those methods were being used. The prosecution was authorised. We still have not got to the bottom of who it was that apparently said such methods were legitimate. I most certainly did not."

39. Mr Hollander submits that these passages, which refer to the Advice, whilst themselves in the public domain, are not sufficient to demonstrate that the Advice is no longer confidential. On the contrary, he submits, the Advice is highly confidential. He relies on a passage in *Bourns v Raychem* [1993] 3 AER 154, in which Aldous LJ said (see p.167):

“Raychem do not suggest that under English law privilege is lost in England because privilege cannot be claimed for documents in another country. To suggest otherwise would mean that a court, when deciding whether to uphold a claim for privilege, would need to be informed as to whether privilege could be claimed in all the countries of the world. ‘Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party’s inspection all documents in their possession, custody or power relating to the issues in the action.’ (See *Ventouris v Mountain, the Italia Express* [1991] 3 All ER 472 at 476, [1991] 1 WLR 607 at 611 per Bingham LJ.) Privilege is an exception to that rule justified on the ground of public interest. It involves a right to keep confidential the document and the information in it. The fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.”

40. Mr Hollander goes on to submit that the fact that a part or parts of legal advice are in the public domain does not mean that the whole of the Advice must be disclosed. He emphasizes the difference between loss of confidentiality and waiver, and submits that where confidentiality has been lost for a part or parts of legal advice, this cannot be used as a sword to force the party claiming privilege to disclose the whole of the privileged advice.
41. Counsel for the detainees and the Core Participants make the simple submission that those documents already in the public domain contain the substance of the Advice, so removing the element of confidentiality in relation to the Advice itself. The effect is to put the Advice into the public domain.

Conclusions on this issue

42. There is no doubt that confidentiality in a document which is *prima facie* privileged is lost when that document is put into the public domain. It does not matter how the document comes into the public domain; once there, confidentiality is destroyed. This is so even if the document is “leaked”.

43. I have carefully read the documents which comprise the Advice. Not surprisingly, the majority of the documents are closely linked. Some raise questions for which answers are sought. Some provide answers but raise further questions. One sets out clear advice but can only properly be understood by reference to previous documents. It follows that in my opinion there is no single document which provides a clear picture of the Advice.
44. In my judgment, Mr Hollander is correct when he submits that the loss of confidentiality of part of a document or part of legal advice cannot be used as a sword to obtain those parts of the document or advice which remain confidential. In this respect it is important to note the difference between loss of confidentiality and collateral waiver of privilege. Since I have ruled that collateral waiver does not apply, in my judgment, it would only be those parts of the Advice which are in the public domain which could be used.
45. In my opinion, the high point of the argument on loss of confidentiality is provided by the evidence of Lord Goldsmith to the Chilcot Inquiry. However, having seen the Advice, which consists of a number of different documents, each of which contains an element of material not currently in the public domain, in my view this evidence is not sufficient to rule that the Advice itself is no longer confidential.
46. It follows that in my opinion the documents which form the Advice remain confidential and I cannot direct that any of them be produced by the MoD.
47. I should add that if there were one single document which incorporated the Advice in substantially the same terms as enunciated by Lord Goldsmith to the Chilcot Inquiry I would have directed that it be disclosed. I do not accept Mr Hollander's submission that whilst advice may be in the public domain a document containing the substance of that advice cannot be the subject of a direction to disclose. In such circumstances, in my opinion, the answer to the submission that loss of confidentiality cannot be used as a sword is that the Inquiry has a statutory power to order disclosure of relevant documents. If the document or documents are not confidential they can be made the subject of such an order. However, that has no application in this instance.

Discretion

48. It follows from my conclusions above that no question of discretion arises. I should, however, add that if I had reached a conclusion other than set out above, I would have unhesitatingly ordered disclosure of the Advice. I might well have considered ordering disclosure of part of the Advice if it could properly be separated from other parts. Bearing in mind the potential unfairness to witnesses, referred to above, I have no doubt the balance would have come down firmly in favour of directing disclosure.

Practical application of this ruling

49. In the event that I ruled as I have all counsel recognised that this might cause unfairness to witnesses who wished to defend themselves from criticism from the Inquiry by reference to the Advice. I would wish steps to be taken to remove or at least reduce as far as possible any such unfairness.
50. In his submissions Mr Hollander made five suggestions as to what topics and questions witnesses might or might not deal with or answer in the light of my ruling. Some of these are accepted by counsel for the detainees and the Core Participants. But one of them, paragraph 40(b), suggested that “witnesses should answer questions about what their personal view of the law was but not reveal whether their view was based upon an acceptance of the Advice.” Mr Garnham submitted this was bound to cause substantial unfairness.
51. Mr Hollander at paragraph 40(d) of his skeleton sensibly and realistically recognised that a witness can and should answer questions about evidence concerning the Advice which is already in the public domain, provided the answers go no further than the strict confines of what is already in the public domain. Unfortunately, the clarity of this concession does not sit easily with the proposal in paragraph 40(b).
52. At this stage, it seems to me inadvisable and unnecessary for me to make any definitive ruling on what questions can or can not be asked of witnesses. In this connection I note counsel for the detainees’ comment in the last paragraph of their skeleton argument with which I agree. I invite all counsel to meet counsel to the Inquiry and co-operate over a formula which will best

reflect my ruling, whilst at the same time reducing, if not eliminating completely, any unfairness to a witness. I recognise that it may not be possible to devise one formula which will fit all witnesses in the same way.

53. In the event that agreement cannot be reached I shall rule on such questions, but I make it clear I shall do my best to ensure that all witnesses are treated as fairly as possible.