Case No: CO/5488/2016

Neutral Citation Number: [2018] EWHC 513 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2018

Before :

LORD JUSTICE IRWIN
MR JUSTICE GREEN

- -

Between :

(1) ABDEL HAKIM BELHAJ **(2) FATIMA BOUDCHAR**	**Claimants**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
- and -	
(1) SIR MARK ALLEN CMG **(2) COMMISSIONER OF POLICE OF THE METROPOLIS** **(3) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**	**Interested Parties**

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Ben Jaffey QC (instructed by the **Leigh Day**) for the **Claimants**
John McGuinness QC and Tom Little (instructed by **the Government Legal Department**) for the **Defendant**
David Perry QC and Victoria Ailes (instructed by **BCL Burton Copeland**) for the **1st Interested Party**
The 2nd Interested Party did not attend and was not represented
James Eadie QC and Ben Watson (instructed by **the Government Legal Department**) for the **3rd Interested Party**
Zubair Ahmad (instructed by **the Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing date: 14th February 2018

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JUDGMENT

OPEN JUDGMENT FOLLOWING HEARING ON 14th FEBRUARY 2018

The Issue

1. This is the judgment of the Court to which we have both contributed. The facts of the case are familiar. A summary can be found in the earlier judgment at [2017] EWHC 3056 (Admin). The case concerns a claim that the DPP erred in her decision not to prosecute for alleged involvement in the unlawful rendition of the Claimants to Libya. We will begin with the main issue. Privileged material was communicated by HM Government to the Metropolitan Police Service, and to the Crown Prosecution Service and Director of Public Prosecutions, and was further transmitted within the CPS, when the Victim's Right to Review ["VRR"] took place.

2. The information was communicated subject to a limited waiver in the following terms:

> "Legal Professional Privilege
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> There are some documents provided to the investigation that may be subject to legal professional privilege. The FCO provides these papers for the sole purpose of assisting with this investigation and do not consider to have waived legal privilege for any other purpose, including any future prosecution or civil claim. By convention the FCO would not confirm nor deny publicly whether the advice of the Law Officers has been sought."

3. Those terms, or terms indistinguishable from them, were applied to all privileged government information supplied.

Claimants' Submissions

4. Mr Jaffey QC for the Claimants acknowledges that LPP and legal advice privilege is an absolute privilege: where it exists it is not subject to any balancing exercise and cannot be overturned by reference to the public interest. Properly too, Mr Jaffey argues that privilege arises for Government parties, in relation to advice from in-house as well as independent lawyers. None of those points are in contention. The issue is the effect of the waiver.

5. It is worth emphasising that the argument arises now for the purpose of the application for a declaration under s.6 of the Justice and Security Act 2013 ["the 2013 Act"]. That is a discrete question from the effect of waiver on the substantive judicial review, perhaps particularly if a declaration is made and the judicial review includes closed material proceedings. At least to some extent, different considerations may apply.

6. However, the parties have argued the matter fully, perhaps realistically accepting that our decision now will be a highly persuasive starting point for the decision in the main proceedings.

7. We have already indicated that we take the view the Court has jurisdiction under s.11(4)(a) of the 2013 Act to hold a closed hearing "in relation to" an application for a declaration under s.6, and we have done so, in order to achieve clarification of the application of the terms of the waiver in this case.

8. The heart of Mr Jaffey's submissions can be summarised as follows. The material considered here, available to those taking or reviewing the decision whether to prosecute by reason of the waiver, may have been very important. When considering whether there was sufficient evidence to found a prosecution for misfeasance in public office (the critical point, since the decision was there was insufficient evidence to prosecute) the police and the DPP are bound to have paid considerable attention to the legal advice given or at least available to the potential criminal defendant. Without sight of such advice he argues the Claimant cannot mount an effective challenge to the decision. Without sight of the legal advice, the Court cannot perform the central task of reviewing the decision.

9. Mr Jaffey argues that poor legal advice may provide "cover" for an individual who might properly be prosecuted. Bad advice might broadly take two forms: advice given on the basis of inadequate or misleading instructions, or simply poor legal advice even in the face of adequate instructions. In either case the Court's principal function of reviewing the rationality of the decision might be frustrated or deflected if privilege prevented the parties or the Court examining what was done.

10. Mr Jaffey accepts that legal advice privilege may indeed have such an effect if it is maintained, but here we reach the crux of his argument. He says once privilege is waived at all, then it must be taken to be waived in respect of judicial review proceedings such as these, as well as in respect of the process under review for which an express limited waiver has been given. Mr Jaffey emphasises that in such a case as this, the processes of prosecutorial decision and review are similar in nature to review by the Court, and must have been (or should have been) in contemplation by HM Government when waiving privilege at all. He emphasises that the waiver was voluntary, and indeed could not have been compelled. But once a waiver was agreed, it could not be limited in the way expressed. Accepting that a limited waiver may be effective in other circumstances, the close relationship between, on the one hand the advice by counsel to the DPP, the decision by the DPP and the Review stimulated by the request of the alleged victim, and on the other hand the review by the Court, means that the expressed limit on the waiver is ineffective.

11. In this sense, he says, the case is a close analogy to the situation in *Scottish Lion Insurance Co Ltd v Goodrich Corp* [2013] BCC 124 ["*Scottish Lion*"]. Although that was a decision of the Court of Session, Inner House, the arguments were principally based on English authority, and carry the authority of Lord Reed who gave the opinion of the Court. As there, the steps from the waiver to judicial review are to be viewed as "part of the single process": *Scottish Lion* paragraph 58. We address that authority below.

Submissions of the Secretary of State

12. Mr Eadie QC for the Secretary of State began by emphasising the ambit of the privilege with which we are concerned. It is the privilege of others in respect of evidence given to the DPP: it is not the privilege of the Director, the Defendant. The

Defendant's privilege has been waived, although the disclosure following waiver is into CLOSED for other reasons.

13. In our view the terms of the waiver set out above are completely clear as to the subjective intentions of the parties, and indeed as establishing objectively the intended limits to the waiver. There is no ambiguity. The waiver was limited to specific expressed purposes, and cannot be read as a general waiver.

14. Mr Eadie accepts that the exercise of legal advice privilege can frustrate other legal interests. He cited the case of *British Coal Corporation v Dennis Rye Ltd.* [1988] 1 WLR 1113, where the Court of Appeal held that, even where privileged documents had been provided to assist a murder prosecution, the waiver for that purpose did not constitute waiver for the purpose of related civil proceedings, even in the absence of any express reservation of privilege.

15. Mr Eadie says this is not a case of ambiguity where the Court must resolve any difficulties of intention or objective meaning such as arose in *Berezovsky v Hine* [2011] EWCA Civ 1089. The case is obviously to be distinguished from the position in *Scottish Lion*. There is no call for the Court to infer a broader waiver than that expressed.

16. Mr Eadie emphasised the damaging consequences if the Claimants' arguments were to succeed. Limited waiver of this kind in the supply, for specific purposes, of privileged information, is relatively widespread in government. Unless the expressed limits of waiver are maintainable at law, the practice will cease. If criminal proceedings are contemplated, as here, the decision would have to be taken without sight of the official legal advice taken or given. A similar situation could arise in a number of contexts, aside from potential prosecution: inquiries being an obvious example. What would the public think if cooperation by HMG was curtailed in that way? However, Mr Eadie argues Government would have little choice.

17. Subject to argument arising from the "underclaim" of privilege and in relation to illegitimate "cherry-picking" (which we have dealt with in separate open and closed judgments) the intended distinction was clear, maintaining the full gamut of legal advice privilege other than for the consideration of prosecution by the DPP.

18. As to the difficulty for a reviewing Court and the problem of "bad" legal advice, that would be substantially addressed by adherence to the duty of candour by HMG. In particular, if legal advice appeared to have been given on the basis of inadequate or erroneous information that could be addressed.

Discussion: Relevant General Legal Principles

19. There is in fact a considerable degree of common ground as to the core principles.

20. The existence of waiver is not dependent upon the subjective intention of the person entitled to the right in question. It is to be judged objectively: *Armia Ltd v Daejan Developments Ltd* [1979] SC (HL) 56 at page 72 *per* Lord Keith of Kinkel.

21. Waiver of LPP is determined by reference to an objective analysis of the conduct of the person asserting the privilege: e.g. *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

22. Further, privilege may be waived for a limited purpose without being waived generally, and the right to resist disclosure may be relinquished only in relation to a particular context. For instance in *Goldman v Hesper* [1988] 1 WLR 1238, a party to proceedings disclosed privileged documents to the court in support of the taxation of costs. The question arose whether the taxing officer could order disclosure of the documents to the paying party, to enable that party to raise a *bona fide* challenge to items of cost claimed. The Court concluded that, although disclosure would rarely be necessary in practice (since the taxation would not normally depend upon the contents of the document), the taxing officer had to see that the paying party was treated fairly and given a proper opportunity to raise a *bona fide* challenge. Disclosure could therefore be ordered where necessary. Taylor LJ (with Lord Donaldson of Lymington MR and Woolf LJ concurring), observed at pages [1244] – [1245] that any disclosure of privileged documents to the paying party would only be for the limited purposes of the taxation:

> "That it is possible to waive privilege for a specific purpose and in a specific context only is well illustrated by the decision of this court in *British Coal Corporation v Dennis Rye Ltd. (No 2)* [1988] WLR 1113. … By the same token voluntary waiver or disclosure by a taxing officer on a taxation would not in my view prevent the owner of the document from reasserting his privilege in any subsequent context."

23. Similar observations were made in *B v Auckland District Law Society* [2003] UKPC 38 where Lord Millett (for the Judicial Committee of the Privy Council) distinguished (ibid paragraph 68) between waiver generally and waiver for a limited purpose:

> "It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corpn v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 and *Bourns Inc v Raychem Corpn* [1999] 3 All EER 154. The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it."

The Nub of the Issue in the Present Case: Inferred Waiver

24. With these principles in mind it is helpful to crystallise the issue in the present case. The nub of the argument was that, as a matter of policy, the limited waiver given was ineffective, because the processes of decision and internal review formed a single, composite, whole, along with the subsequent process of judicial review, such that waiver for one meant waiver for all.

25. As to this proposition we were told that there was no direct authority on point.

26. The nearest authority that counsel could find was the opinion of Lord Reed in *Scottish Lion*. As we have said, Mr Jaffey relied upon this as supporting the proposition that even where the intention of the client entitled to assert privilege was acknowledged as being expressly limited, a court could nonetheless extend privilege upon the basis that the extension was to be inferred.

27. The facts of that case are important to the ruling. Since, in our judgment, they serve to highlight what may be the outer limits of inferred waiver and, by implication, why we do not consider that a case for such an extension can be made out in this case, it is helpful to summarise the facts. Lord Reed did so in the following way:

> "1. This appeal concerns a question which has arisen in the context of an application to the court to sanction an arrangement between the petitioner and its creditors under section 899 of the Companies Act 2006, following meetings of the creditors which were ordered by the court under section 896. At the meetings, the creditors cast their votes. Following the meetings, the votes were given a weighting according to the value placed upon each creditor's claims against the petitioner, on the basis that one vote would be allocated for each £1 Sterling which a claim was worth. For the purpose of that valuation exercise, creditors wishing to vote were invited to submit documentation supporting their valuation of their claims. The valuation exercise had a considerable effect upon the result of the voting: in broad terms, the claims of creditors who voted in favour of the scheme were attributed a relatively high value compared with the claims of creditors who voted against it. The application for sanction is opposed by the respondent creditors on grounds relating in part to the valuation process. There are, in particular, issues raised as to whether the voting majorities required by section 899 were actually attained, so as to confer jurisdiction on the court to sanction the arrangement, and as to whether in any event the arrangement, which provides for the valuation of claims on a broadly similar basis, is in consequence so unfair to creditors such as the respondents that it should not be sanctioned. In these circumstances, the Lord Ordinary has not only appointed an officer of the court as a reporter, to enquire into the regularity of the proceedings and to report to the court, but has in addition appointed that the hearing of the application for sanction should take the form of a proof, at which each party will be entitled to lead evidence in support of its contentions. For the purposes of that proof, the Lord Ordinary has made an order for the production of the documentation which was submitted to the petitioner by certain creditors in support of the valuation of their claims, subject to conditions designed to protect confidentiality.
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> 2. The question which has arisen, against that background, is whether the noters, who are amongst the creditors whose documentation is to be produced under the order, are entitled to object to the production of certain of the documents, and to the inspection of the documents by the reporter or by the court itself, on the ground of legal professional privilege. The Lord Ordinary has held that privilege cannot be claimed, since any privilege which might otherwise have attached to the

documents was waived when they were submitted to the petitioner. The noters have appealed against that decision to this court."

28. The test applied was derived from the starting point that the essence of privilege was based upon confidentiality and that it could thereby be *lost* if the information in question ceased to be confidential, because for instance it was published in the press. Waiver was different to loss of privilege (see for example *B v Auckland District Law Society (ibid)* at paragraphs 68 and 69) and could arise:

> "… where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context. Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to say, with the maintenance of the confidentiality which the privilege is intended to protect" (paragraph 46)

29. In *Scottish Lion* the process by which the approval of a scheme of arrangement was sought involved three closely connected stages. These were described by Chadwick LJ in *Re Hawk Insurance Co Ltd* [2001] BCLC 480 at paragraphs 1-12. First, there must be an application to the court for an order that a meeting or meetings be summoned. At that stage a decision is taken whether to summon more than one meeting, and, if so, who should be summoned to which meeting. Second, the scheme proposals are put to the meeting(s) held in accordance with the court order and were approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy. Third, if approved at the meeting(s), there then had to be an application to the court to obtain the court's sanction of the arrangement. In *Scottish Lion* Lord Reed recognised that whilst each of these stages served distinct purposes (paragraph 10) they nonetheless "form part of a single process" (paragraph 58). No stage could be considered in isolation from the other. He accepted that the mere fact that there was a "nexus" between the meeting and the subsequent judicial hearing was not sufficient to conclude that waiver at the first stage necessarily meant that the waiver extended to the judicial stage. What was required was a careful consideration to occur at the later judicial stage.

30. There then followed a close analysis of the connection which existed between the meeting and the judicial stage. This led to the following conclusion:

> "61. In the present case, in particular, creditors who submitted documentation to the petitioner for the purpose of its being assessed for voting purposes – that is to say, to establish their status as scheme creditors, to determine which class of creditors they belonged to, and to fix the value of their claims for the purpose of voting – did so in circumstances in which that documentation might require to be scrutinised in a number of different contexts. First, the documentation would require to be considered by those involved in fixing the value of their claims for voting purposes: that is to say, the petitioner, the Scheme Actuarial Adviser, the IVA and the chairman of the meeting. Secondly, the documentation might also require to be considered in the course of the proceedings before the court – proceedings which, as we have explained, are inseparably connected to the meetings ordered by

> the court and to the process of valuation of claims, for the purpose of the meetings, which was authorised by the court. That consideration of the documents would be liable, even in the absence of opposition to the application under section 899, to involve scrutiny by the reporter approved by the court. In a case in which the application was contentious, however, and relevant grounds of challenge to the reported results of the meetings were put forward, it might also be necessary for the documentation to be considered at a contested hearing involving the petitioner and the opposing creditors.
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> 62. Against this background, when the noters submitted privileged documents to the petitioner with the intention that they should be relied on for the purpose of valuing the noters' votes, they must be taken to have done so in the knowledge that the disclosure of those documents to the court, to the reporter, and to creditors who opposed the granting of the application under section 899, might be necessary to satisfy the court that it had jurisdiction to grant the application and that sanction ought to be granted. In these circumstances, the noters must be taken to have waived any right to object to the disclosure of the documents in question in the present proceedings, to the extent that disclosure is necessary to enable the court to deal with the petitioner's application and the respondents' answers. Since the Lord Ordinary's assessment that disclosure is indeed necessary for that purpose is not challenged, it follows that the documents in question must be produced."

31. If one applies the logic of the ruling in *Scottish Lion* to the present facts, in our judgment the distinctions are clear. In this case there is no inevitable or necessary nexus between, on the one hand, the advice to the DPP, the decision on prosecution and the review, and, on the other hand, a subsequent judicial review of the ultimate decision arrived at. These are discrete processes not one composite process.

32. The existence of judicial review is a generic remedy available to supervise all decisions of the executive. It is not in any way particular or special to the procedures which led to the instant decision being challenged. The decision in issue (to prosecute or not) is one taken on countless occasions in any given month or year. Challenges in the courts to such decisions are rare. The process leading to the decision and the legal challenge are quite different and reflect a fundamental separation of function and responsibility. The latter is not a "composite" part of the former. The "nexus" between the two is limited.

33. Moreover, if judicial review and the earlier decision to prosecute were treated as having a sufficiently close connection as to lead to an inferred extension of waiver, the consequences would be profound. It would indicate that in almost any case where one government department waived privilege to assist another government body, then that limited waiver might inferentially be extended to cover subsequent judicial reviews. That would be a remarkable consequence, and strongly against the public interest.

34. It seems to us that *Scottish Lion* identifies what is, or is near to, the outer limits of inferred waiver. We are clear that the present case falls well beyond the outer perimeter of that doctrine.

Conclusion on Implied/Inferred Waiver

35. For these reasons, we conclude that the expressed limits to the waiver were effective. No further waiver was implied or can be inferred and privilege inheres.

36. As the parties are aware by reason of permitted communications from the Special Advocates, we have proceeded to hear argument in a Closed hearing as to the claimed under and over disclosure of material in closed documents: in other words some material disclosed in error and some withheld in error. We address that issue in separate open and closed judgments. Here all we need add is that nothing in Closed touches the conclusions we have reached above.

The Duty of Candour

37. We add one point of some significance as a consequence of the argument in this case. HM Government has a duty of candour and a proper exercise of that duty is often of great importance. It is the critical safeguard to address the risk of "bad" but privileged legal advice.

38. The duty of candour is an important common law duty and, classically, includes the duty to approach the court with "its cards face up on the table": *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941 at page 945. The duty applies not only to documents in the possession of the state but also to information known to it: In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 the Court was concerned with what appeared to it to be a reluctance on the part of the Defendant to give full sight of the reasons which motivated the decision being challenged. At paragraph [50] Laws LJ observed:

> "… there is no duty of general disclosure in judicial review proceedings. However there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G – 1062A."

39. Over and above the common law, it is evident from decided cases that the duty emanates also from Article 6 ECHR and the right of any party to receive a "fair" hearing: *McGinley & Egan v United Kingdom* (1999) EHRR 1. In *Roche v United Kingdom* [2006] 42 EHRR 30, the European Court of Human Rights held that Article 8 may also, in some circumstances, be engaged. In cases where fundamental rights are engaged, the duty may be especially onerous.

40. Those acting for the Government who properly exercise privilege must give thought to the basis of privileged advice and to the advice itself. If it is clear that the advice was given on an inadequate basis, or a basis clearly at odds with the evidence which will be before a court in the absence of the privileged material, then the duty of candour will require HM Government to correct any misapprehension. Any concern that a contested action was taken in reliance on privileged legal advice obtained on a misleading basis, calls for careful consideration and, if the concern is well-founded and unless the point is immaterial, is likely to call for correction pursuant to the duty of candour.