

## **Alex Salmond assertions about SG consideration of sisting during the JR**

### **From written statement**

#### **Assertion:**

*Of particular interest to the Committee would be the extent to which various parties were informed of the progress of the case and in particular whether the Lord Advocate's expressed views on "sisting" (pausing) the Judicial Review pending the criminal case were discussed, how widely and with whom.*

#### **Also Assertion:**

*I believe there have to be such emails which show the Lord Advocate's advice on the possibilities of sisting (pausing) the Judicial Review behind the criminal case. The advantage of doing so in a context where the Judicial Review was likely to be lost was clear. Any adverse comment or publicity about the illegality of the Scottish Government actions would be swept away in the publicity of my arrest and subsequent criminal proceedings.*

### **From evidence session 26/02/2021**

Extracts from official report:

*Andy Wightman: I turn to my third question. In paragraph 24 of your submission on the judicial review, you say: "We have a witness precognition (statement) which recounts that in late November 2018 a Special Adviser told the witness that the Government knew they would lose the JR but that they would 'get him' in the criminal case." Can you say anything more about who that witness is, who the special adviser is or, indeed, whether you can supply the committee with a copy of the witness precognition statement*

*Alex Salmond: It certainly happened, and we have got the statement. I would have to consult the person concerned. The reason for it being there is that it demonstrates that, in November 2018, the hope on the part of that special adviser and others was that the judicial review would be overtaken by the criminal case. What substantive evidence for that we have beyond that statement lies in the whole question of sisting, which—as I know you will appreciate, but very few people who are watching are likely to understand—relates to the idea that if the criminal case had been advanced, the civil case would not have gone ahead, pending the outcome in the criminal case. **Many people seemed to invest a great deal of hope that the criminal case would ride to the rescue, like the cavalry over the hill, and that somehow the civil case would never be heard. Given that they were in a situation in which they had a high degree of expectation that they were about to calamitously lose a civil case, that was obviously a pressing concern for many people.***

*Andy Wightman: Yes, you say that in your fourth submission as well. The committee would welcome it if you were able to provide any further evidence that the Government was considering sisting. That would be useful to the committee.*

*Alex Salmond: That brings us on to one of the essential difficulties. There has been a lot of talk about section 162 and the case. You will know what that is; it is the*

prohibition on my supplying evidence. Much of that has been around text messages, which I know that the committee has been very exercised about. You realise that it also applies to Government documents. There are Government documents that I have seen that were disclosed as part of the disclosure in the criminal case that should have been provided to the committee. Under its remit, the committee should have seen those documents. They were disclosed during the criminal case, but they are not about the criminal case; they are about the judicial review. Sisting has been mentioned by a couple of the committee's witnesses. The committee has one single document on the question of sisting. You know that there were 17 meetings with external counsel. You know that Paul Cackette told you that there were "daily meetings", as he put it, to discuss how the case was going, and you know that Judith Mackinnon told you that she had thrice weekly meetings about it, yet the committee—barring that one single document—does not have an iota of that evidence, whether an email, a text message, a OneNote document or any other piece of information on a question that I can tell you was a huge preoccupation of the Government in September and October 2018. I think that it would be a wonderful reason for the committee to ask why, and I would dearly love to supply you with that— The

Convener: Excuse me, Mr Salmond. It is up to the committee to decide what it is going to ask and where it is going to go.

Alex Salmond: Convener, I am in the hands of the committee and have no observation on whether you should or should not ask to have the evidence. I am merely pointing out that, even if you did, the Crown Office would forbid me, on pain of a criminal penalty, from giving you those documents.

...

Alex Salmond: Sisting was being examined by the Lord Advocate because, quite clearly, you would expect him, as the Government's legal adviser, to be looking at that—and not just Mr Cackette and others; it would be very important for those to see it. **I am not suggesting for a second that the Lord Advocate was engaged in thinking, therefore, "We should accelerate the criminal case in order to avoid defeat in the civil case." I am not suggesting that for a second. I am merely suggesting that there was widespread knowledge by November 2018 that the judicial review was going to fail, on the part of the Government, and that there was a prospect of it being sisted if the criminal case came to a moment before the judicial review hearing in January 2019.**

The reason why I am saying this is that I can think of no other reason why you would postpone taking a decision on a case that you knew that, on the balance of probability, you were highly likely to lose, unless you thought that something else was going to happen that would avoid that. There is no point in saying, "Okay, we won't concede, and we'll put it off until January, when we'll lose cataclysmically"—remembering that the clock is ticking all the time in terms of expenses, so the case in January will be much more serious than conceding in October. Conceding in October would be embarrassing and difficult, but it would not be as cataclysmic as an open court case in January. Perhaps we will hear what other motivation there could

*possibly have been other than the belief that something might happen to intervene that meant that the judicial review never came to court.*

*As I said, if the judicial review had never come to court at that stage and had been postponed or sisted behind the criminal case, and—let us be frank here—if I had been convicted of anything at all, this inquiry would have been moot. Nobody would have cared about the civil case, the judicial review or anything like that. This inquiry would not be sitting and would have been entirely overtaken by events. Fortunately for me, and, I believe, fortunately for justice in Scotland, that did not happen, and this inquiry is taking place. Hopefully, the lessons that come from this will improve the Scottish institutions, so that people can have more confidence in them, whether they believe in devolution or independence.*

**Factual position:**

The Scottish Government considered the possibility of moving for a sisting of the Judicial Review in September 2018, as part of wider consideration of whether to oppose permission for proceedings to go forward, and any reporting restrictions. Evidence has been provided to the Committee that shows this and the Lord Advocate confirmed it in his evidence.

In his evidence on 26/02/2021 Mr Salmond seemed to be focussing on separate, later consideration of sisting the case, in response to a belief that SG was likely to lose the case. He does not specify who was involved in these discussions but makes clear it was not the Lord Advocate. He mentions November 2018 and implicitly links these issues with a precognition statement, possibly from a special adviser, and text messages.

For a joint note of 4 September 2018 for a consultation the same day, Counsel raised amongst other things the possibility of sisting the JR because of the ongoing police investigation. Counsel asked that Law Officers offer their views on this.

- 1 *“We have been asked for our views on whether the respondents should seek to have the judicial review proceedings sisted pending the outcome of any police investigation and/or criminal proceedings that may follow that investigation.*
- 2 *In the week commencing 20 August 2018, in the course of discussions about the extent to which the Permanent Secretary might publish information about the complaints against the petitioner, it became clear that the Crown Agent was highly concerned about the risk of prejudicial pre-trial publicity that might arise if information about the complaints was put into the public domain.*
- 3 *In particular, he was concerned about the risks arising from a combination of information (a) that a referral had been made to the Police; and (b) as to the findings made by the Permanent Secretary.*
- 4 *The fact that matters have been referred to the Police has been the subject of widespread reporting in the media. We are not aware of any reporting that discloses the Permanent Secretary’s findings. We assume, but it can be confirmed, that the Crown Agent would remain concerned about the potential for information about the Permanent Secretary’s findings to create a risk to a future trial.*

- 5 *The petition narrates the Permanent Secretary's findings and the Decision Report of 21 August has been lodged. It would seem to us impossible for a substantive hearing of the judicial review to take place without the findings and the contents of the Decision Report being discussed very fully.*
- 6 *This risk of prejudicial pre-trial publicity could be addressed by:*
- 6.1 *sisting the petition proceedings until the criminal investigation is concluded; or*
- 6.2 *imposition of sufficiently wide reporting restrictions in connection with the conduct of the petition proceedings.*
- 7 *On the second option, clients may have concerns about endorsing a situation in which the petition for judicial review is effectively argued 'behind closed doors' given the concerns expressed earlier in the process about the need for transparency and given the general public interest in the issues raised by this case.*
- 8 *Equally, in relation to the first option clients may not wish to be seen to be delaying the judicial review proceedings. However, the reasons for seeking to do so would in our view be likely to attract the sympathy of the Court.*
- 9 *We can also see strength in the argument that the criminal investigation may make the entire Petition pointless: if there is a criminal conviction then surely this case will not proceed; and if there is a trial and an acquittal then the Ministers would be faced with a very different situation than that which presently obtains.*
- 10 *It would be helpful, in this regard, to have the views of the Law Officers: from the point of view of the criminal investigation, would they prefer this Petition to be sisted? "*

On 17 September 2018 the Lord Advocate circulated a note on various procedural matters including the impact of the police investigation. He concluded that there were two options – sist or reporting restrictions. If Counsel agreed that there would be a basis for reporting restrictions, SG would seek these instead of sisting.

On 18 September Roddy Dunlop provided a supplementary note on reporting restrictions, concluding that the power to impose restrictions under section 4(2) of the Contempt of Court Act 1981 was “available” and should be used to “at least minimise the damage caused by the publicity of the judicial review”.

On 27 September Roddy Dunlop QC indicated that he would be prepared to speak to the petitioner’s Senior Counsel to explore whether a sisting would be appropriate. A note by SGLD of the phone call records that Mr Dunlop advised that a motion for a sisting was unlikely to be successful as previously an ongoing police investigation has not been considered sufficient basis for sisting.

On 27 September the petitioner’s lawyers intimated a motion for various matters including reporting restrictions.

The SG did not oppose the motion and agreed with the court that Counsel did not need to attend the hearing. The court granted the reporting restrictions as sought.

## **Evidence:**

Paul Cackette, Lord Advocate, Judith Mackinnon and Nicola Richards have commented on the consideration given to the possibility of sisting the JR. Whether the Lord Advocate gave legal advice on this point would be covered by the Law Officers' Convention.

Extract from official report for Lord Advocate evidence 17/11/2020:

- **Alex Cole-Hamilton:**

*The date that I have is 11 September 2018; it is in the timeline of events with which we have been provided by the clerks. I do not have a reference to that meeting in particular, but that was roughly the time at which the court was deciding whether it would grant permission for the judicial review to proceed.*

*Without going into the case—you made it very clear that the law officer convention prevents you from doing so—can you tell me the reasons, in general, why counsel would suggest not contesting permission to proceed with a judicial review against the Government? What are the kinds of reasons that it would come up with?*

- **The Lord Advocate:**

*In any judicial review, the first question for a respondent—a public authority that is responding to a judicial review—is whether it should contest permission. Essentially, at that stage, the question will involve consideration of the nature of the case and the test that has to be met before the court grants permission.*

*Question 1 is whether that test, which is a relatively low hurdle—it is deliberately set at a level that is intended to allow a seriously arguable case to proceed rather than to stop cases proceeding—is met in the particular case. Other considerations may come into play in particular cases, such as whether it is appropriate to resist permission or whether the Government recognises that the issue ought properly to be fully aired in court.*

*With regard to the specifics of what happened at a particular meeting, I cannot help the committee, but I can say that, at that stage of the case, the Government was addressing a number of issues. Those included whether the Government should contest permission; who was the appropriate respondent; whether the issue needed to be aired; and how to deal with the potential for prejudice to the criminal investigation, which by that point was under way.*

***On the last point, the Government considered—I think that this point was raised with Paul Cackette—whether it would be appropriate for the petition to be sisted or whether the public interest in relation to the on-going criminal investigation could be adequately protected by reporting restrictions. On that issue, the Government took the view that the public interest could be adequately protected by reporting restrictions and, ultimately, that was a matter of agreement. A number of issues were being addressed at that preliminary stage, one of which was the question of whether to contest permission.***

Documents provided to the Committee show that sisting was considered at the beginning of the JR process:

Emails from Judith Mackinnon to Ms A and Ms B on 28/08/2018 (provided to the Committee as [INV212](#)) refer to the possibility of sisting as part of a general description of the process of a JR:

*“One important question that will be addressed in early course is whether it is thought that the hearing of arguments in the judicial review could possibly prejudice the criminal investigation and any subsequent criminal trial and whether therefore there is any need/desire to seek to have the judicial review sisted (put on hold) pending the outcome of police investigations. It is not unusual in circumstances where there are be criminal and civil proceedings running at the same time, for the civil proceedings to be sisted. It is difficult to say how long a delay this might mean for the civil proceedings.”*

Subsequent emails from Judith Mackinnon to Ms A and Ms B on 05/09/2018 show that sisting was being considered at that time:

*“On the JR – the first thing to note is that nothing will happen quickly on this. We have further consultation with the Lord Advocate next week to decide things like whether to contest the permission. Advice so far is that we would be unlikely to contest the petition as it would be unlikely to be successful (there is a very low bar to get over to have a petition heard). If we did contest it and we were not successful, that may appear to be a victory for the FFM. We are very comfortable contesting the substance of the petition (the process etc). **We are considering requesting that the petition be sisted (delayed) while the police investigation is ongoing,** however, even if it is not postponed, it would be unlikely to be hear before the new year. I don't think there is likely to be an update on this until next week.”*



**Line to take:**

- The Committee has already asked about and received extensive evidence on the consideration and discussion of the possibility of sisting the JR.
- It was one issue amongst many others that were considered when the JR was first raised, including the SG's desire to see appropriate reporting restrictions put in place.
- Once reporting restrictions were granted, with the agreement of the SG, in late September, the possibility of sisting was not considered again.
- It seems the narrative has moved on from criticising the SG for not requesting a sist, to criticising us for even considering the possibility.
- Scottish Government consideration of potential sisting of the Judicial Review was in September 2018, at the beginning of the JR process.
- The Lord Advocate has explained to the Committee that the reason for considering sisting was to protect the public interest in relation to the ongoing police investigation, but that the Government concluded that reporting restrictions would be sufficient to achieve this. Reporting restrictions were granted by the court with the full agreement of the SG on 27 September 2018.
- Sisting was considered at a time when the SG was satisfied that all of the grounds of the JR could, and should, be resisted – as the Lord Advocate set out in evidence.
- Mr Salmond seems to be suggesting that there was later consideration of sisting, after those involved in this consideration had decided the SG was likely to lose the JR and that it was a “huge preoccupation”. He has provided no further details (such as when or who was involved) or any evidence to substantiate this claim.
- It is very difficult to respond definitively to allegations as vague as what Mr Salmond has set out.
- However, SG can find no evidence of consideration of sisting once the reporting restrictions were in place in late September.
- At no time, either in September or later – did the Scottish Government make any application to the Court to seek to sist the judicial review.