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Decision on prosecution - Mr Christopher Galley and Mr Damian Green MP

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The Director of Public Prosecutions, Keir Starmer, QC, has decided there should be no charges brought against MP Damian Green or Home Office civil servant Christopher Galley, following a Metropolitan Police Service investigation into leaks of information from the Home Office.

Introduction

1. The Metropolitan Police Service has investigated a number of leaks of information from the Home Office. That investigation led to the arrest of Mr Christopher Galley, a Home Office civil servant, on 19 November 2008 for an alleged offence of misconduct in public office. When interviewed by the police Mr Galley admitted passing various documents to Mr Damian Green, an Opposition MP. Mr Green was arrested on 27 November 2008 for an alleged offence of aiding and abetting, counselling or procuring the alleged offence by Mr Galley and also on suspicion of conspiring with Mr Galley for him to commit misconduct in a public office. He made no comment in interview.

2. In the course of the investigation by the Metropolitan Police Service searches were carried out at Mr Galley's home address and at Mr Green's home address, his Constituency offices and at his Parliamentary office. Various exhibits were seized at each of these addresses. Mr Green claimed that Parliamentary Privilege attached to most of the documents seized from his Parliamentary office. That claim delayed the investigation in this case, but I have now read and reviewed all of the relevant documents recovered from the searches of the various addresses of Mr Galley and Mr Green.

3. Having reviewed those documents and all of the other evidence available in accordance with the Code for Crown Prosecutors, I have concluded that there is no realistic prospect of a conviction against either Mr Galley or Mr Green for the offences alleged against them.

Accordingly I have decided that charges should not be brought against either Mr Galley or Mr Green for those alleged offences.

4. The following paragraphs explain the reasons for my decision.

5. It is important to bear in mind that the question I have addressed is whether there is enough evidence resulting from the investigation to provide a realistic prospect of conviction. That is the test set out in the Code for Crown Prosecutors issued by me as Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985. It is not my function to make findings of fact and I have not done so. I have reached conclusions based on my analysis of the evidence presented to me and I have set out those conclusions later in this document. As in every case, both Mr Galley and Mr Green are entitled to be presumed innocent and that is the basis upon which I have approached this case.

The alleged leaks

6. A series of articles in the national press between October 2007 and November 2008 referred to the contents of restricted and confidential documents that appeared to have been leaked from the Home Office. The Permanent Secretary, Sir David Normington, was seriously concerned about the damage that was being done by these leaks. He was also concerned that whoever was responsible for these leaks may have had access to Ministerial papers and that there was a potential risk that highly sensitive material relating to national security might be disclosed. The assistance of the Metropolitan Police Service was requested and a police investigation followed.

7. The police investigation focussed on six apparent leaks.

8. **Leak One**: On 14 October 2007, an article by Ben Leapman was published in the *Sunday Telegraph*. It was about the asylum and immigration system. It referred to a leaked Home Office memorandum which, it was claimed, had been "seen by this newspaper". There followed extensive quotes from the leaked document. The article reported that government critics claimed that the document exposed continuing failures in the asylum system even though the number of refugees entering the country was at a 14-year low. Mr Damian Green MP was quoted in the article as "the Conservative immigration spokesperson" commenting on "the chaos that still affects the asylum system". He added that "Ministers have toughened up their rhetoric but underneath the same old policies are producing the same old results.".

9. The leaked document was the "Asylum and Immigration High Level Monthly Performance Report July 2007". It was marked "Restricted-Management". A copy was recovered by the police from Mr Green's Parliamentary office bearing the name "Galley" in manuscript. In his interview with the police, Mr Galley denied passing this document to anyone. As noted above, Mr Green made no comment in interview.

10. **Leak Two**: On 11 November 2007, an article by Justin Penrose was published in the *Sunday Mirror*. It alleged that up to five thousand illegal immigrants had obtained security jobs in the UK. The article went on to allege that "Officials failed to check if any foreign workers in the security industry were legally allowed to be in Britain The scandal surfaced when the agency that vets security guards admitted it had not been checking if the applicants were in the country legally." A spokesman for the Home Office was quoted as saying "Ministers have ordered checks on all existing security licence holders and these will be considered shortly.".

11. Follow up articles appeared in the *Daily Mail* on 13, 14 and 15 November 2007 referring

to "leaked documents" and "a fresh Home Office document leaked to the *Daily Mail* last night". Mr Green is quoted in many of these articles. For example, the *Daily Mail* reported on 13 November 2007 that "Tory immigration spokesman Damian Green said last night: "The Home Secretary has been caught red-handed putting the short-term interests of the government before the long-term task of solving a real problem."." There were also follow up articles in *The Times*, *The Independent*, the *Daily Express*, the *Daily Telegraph* and the *Evening Standard* on 14 and 15 November 2007.

12. The leaked document was a copy of high level submissions to Home Office Ministers in August 2007, updating them about various issues relating to Security Industry Authority (SIA) licences. It was marked "Restricted". In his police interview Mr Galley admitted sending this document to Mr Green at the House of Commons. Mr Green made no comment in interview.

13. **Leak Three:** On 10 February 2008, an article by Melissa Kite was published in the *Sunday Telegraph*. It was about an illegal immigrant working in the House of Commons and was based on leaked documents. The article claimed that "The Government stands accused of a cover-up after leaked documents, obtained by the *Sunday Telegraph*, showed that Liam Byrne, the immigration minister, was informed immediately of the case of the Brazilian woman, a cleaner, when she was arrested at Parliament 10 days ago. Yet the Home Office confirmed the security breach one of the most serious to affect Westminster only after being contacted by this newspaper last night.".

14. The article carried comments from Mr Green in the following terms: "The Conservatives demanded urgent action to prevent further breaches. Damian Green, the shadow immigration minister, said: "Of all the Home Office disasters, this has the biggest security implications. Ministers like to talk tough about cracking down on employers but it is clear that the system is failing in our most sensitive buildings. What makes this even worse is that ministers' first instinct was to cover it up."."

15. The leaked document was a copy of a report to Home Office Ministers dated 31 January 2008 about an investigation into an allegedly illegal worker at the Houses of Parliament. It was marked "Restricted-Investigation". In his police interview, Mr Galley admitted posting this document to Mr Green and acknowledged that he "knew it would obviously end up in the press". Mr Green made no comment in interview.

16. **Leak Four**: On 20 April 2008, an article by David Leppard was published in *The Sunday Times*. It described a list of Labour MPs identified by the party Whip's office as "plotting" against the Counter-Terrorism Bill. The following week the same newspaper published another article by Mr Leppard referring to a "leaked Whitehall document marked restricted" and prepared for the Home Secretary. This was said to have suggested that the government might make concessions on its counter terrorism reforms to win over disaffected opponents.

17. The leaked document was a Briefing on the Counter-Terrorism Bill marked "Restricted". In his police interview, Mr Galley denied passing this document to Mr Green, but he did admit that he passed him a Whips' list of the names of MPs who were undecided about their votes in respect of the Counter-Terrorism Bill. Mr Galley told the Police that he had access to this document which was kept in a safe belonging to the Special Advisers: he admitted photocopying the list and handing it to Mr Green. Mr Green made no comment in interview.

18. **Leak Five:** On 1 September 2008, *The Daily Mail* published an article based on a draft letter from the Home Secretary to the Prime Minister, which it claimed had been "leaked to the Daily Mail", predicting that the credit crunch would lead to a rise in crime. A similar article appeared in the *Daily Telegraph* referring to a "leaked Home Office letter". Mr Green

was quoted in the *Daily Mail* in the following terms: "Damian Green, the Tory immigration spokesman, said: "This rips the veil off the complacent comments we have been getting from the Home Office ministers about how their performance is improving. It is clear that almost all areas of the Home Office things are going to get worse."."

19. The leaked document was a copy of a "Draft letter to No 10" dated August 2008. It was not marked "Restricted", but from its contents it would have been clear to anyone reading it that it was a confidential document. In interview, Mr Galley admitted passing this document to Mr Green. Mr Green made no comment in interview. A copy of the draft letter was found in Mr Green's Parliamentary office.

20. **Leak Six**: On 15 November 2008, *The Daily Mail* published an article by Christopher Leake based on a "leaked" Home Office document suggesting that the levels of most violent crime had risen under the Labour government.

21. The leaked document was a Briefing Pack for incoming Ministers at the Home Office. It was marked "Restricted Policy". In his police interview, Mr Galley denied leaking this document to anyone. Mr Green made no comment in interview.

The alleged offences

22. As already noted, Mr Galley was arrested for an alleged offence of misconduct in public office and Mr Green was arrested for an alleged offence of aiding and abetting, counselling or procuring the alleged offence by Mr Galley and of conspiring with Mr Galley for him to commit the offence of misconduct.

23. This is not a case which falls within the framework of the Official Secrets Acts and I therefore intend to focus on the offence of misconduct in public office. This is a common law offence which has existed for many years. As the Court of Appeal noted in the case of *Attorney General's Reference No.3 of 2003* [2004] EWCA Crim 868, the circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse.

24. There are four essential elements of the offence, namely:

1. the suspect must be a public official acting as such;
2. s/he must have wilfully breached his/her public duties;
3. the breach must have been such a serious departure from acceptable standards as to constitute a criminal offence; and to such a degree as to amount to an abuse of the public's trust in the public official; and
4. there must have been no reasonable excuse or justification.

25. The third and fourth elements are critical. They make it clear that not every act of misconduct by a public official is capable of amounting to a criminal offence. There is a threshold and it is a high one. In particular, as the Court of Appeal recognised in the case of *AG's Reference No.3 of 2003*, to attract criminal sanctions, the misconduct in question would normally have to amount to an affront to the standing of the public office held and to fall so far below the standards accepted as to amount to an abuse of the public's trust in the office holder.

26. In this case, where the alleged misconduct in question is the leaking of information to an Opposition MP and, apparently through him, to a national newspaper, some assistance on

the threshold for criminal culpability is provided by Article 10(1) of the European Convention on Human Rights (incorporated into our law by the Human Rights Act 1998), which strongly protects the freedom of the press. It does so by safeguarding the right of everyone to receive and impart information and ideas without interference. Although this right is not absolute it can be restricted where restriction is prescribed by law, legitimate, necessary and proportionate where it touches on matters of public interest which the press has a legitimate interest in publishing, it attracts special protection. That is because of the well-recognised and special role of the press as a public watchdog. As a result any criminal proceedings which restrict the ability of the press to publish information and ideas on matters of public interest calls for the closest scrutiny. In particular, the need for a criminal prosecution must be convincingly established. However, that does not mean that restricted and/or confidential information cannot ever be protected by the imposition of criminal sanctions in cases of unauthorised disclosure.

The evidence

27. In this case, I have concluded that there is evidence upon which a jury might conclude that the conduct of Mr Galley in passing various documents to Mr Green amounted to a clear breach of his public duties. The documents in question were clearly restricted and/or confidential and in leaking the documents to Mr Green, Mr Galley seriously breached the trust placed in him by the public.

28. I have also concluded that there is evidence upon which a jury might conclude that Mr Green aided or abetted Mr Galley's conduct and, in particular, his breach of the public's trust. There is, additionally, evidence upon which a jury might conclude that there was an on-going relationship between Mr Galley and Mr Green, which Mr Green encouraged in the hope and expectation that Mr Galley would continue to supply restricted and/or confidential information to him.

29. As the Court of Appeal recognised in the *Attorney General's Reference No 3 of 2003*, it will normally be necessary to consider the likely consequences of any breach of duty by public officials in deciding whether the conduct falls so far below the standards of conduct expected as to constitute a criminal offence. Therefore, I have considered the extent to which there has been any actual damage arising or the extent of any potential damage that could have arisen as a result of the conduct under investigation in this case.

30. I have concluded that there is evidence upon which a jury might conclude that there was damage. The integrity of the Home Office arrangements for handling restricted and/or confidential information was breached. That caused damage to the proper functioning of the Home Office, which was exacerbated by the prolonged period of the alleged leaks, the on-going relationship between Mr Galley and Mr Green and the sensitivity of the material to which Mr Galley had access. One of the principal concerns at the Home Office was that whoever was responsible for the leaks in question may have had access to Ministerial papers and that there was a potential risk that highly sensitive material relating to national security might be disclosed. This damage should not be underestimated and once the pattern of leaks was established in this case, it was inevitable that a police investigation would follow.

31. However, it has to be recognised that some damage to the proper functioning of public institutions is almost inevitable in every case where restricted and/or confidential information is leaked and, for that reason, such damage will rarely be sufficient, without more, to reach the high threshold required before a criminal prosecution for misconduct in public office can be justified as appropriate. This was recognised by the European Court of Human Rights in

the cases of *Roemen and Schmidt v Luxembourg* (25 May 2003), *Ernst v Belgium* (15 July 2003), *Tillqack v Belgium* (27 November 2007) and *Voskuil v Netherlands* (22 February 2008). It is important that public officials should not leak restricted and/or confidential information. But, it is important that a breach of duty that might best be considered as a disciplinary matter should not be elevated to a criminal offence simply by virtue of the fact that the person leaking the information is a public official. Thus there is a need for an intense focus on any additional damage actually or potentially caused.

32. In this case, I have concluded that there is little evidence of any additional damage caused by the leaks in question. The documents leaked undoubtedly touched on matters of legitimate public interest and Mr Green's purpose in using the documents was apparently to hold the government to account. The extensive coverage of the issues by the national press, along with comments from Government and Opposition sources is evidence of this.

33. The information contained in the documents was not secret information or information affecting national security: it did not relate to military, policing or intelligence matters. It did not expose anyone to a risk of injury or death. Nor, in many respects, was it highly confidential. Much of it was known to others outside the civil service, for example, in the security industry or the Labour Party or Parliament. These examples are not an exhaustive list of the types of information that may be damaging for the purposes of the offence of misconduct in public office.

34. The threshold for criminal proceedings in such circumstances is particularly high, bearing as it does on the freedom of the press to publish information and ideas on matters of public interest. I have reviewed the leaked documents and all the other evidence available as a result of the investigation by the Metropolitan Police Service, in accordance with the Code for Crown Prosecutors. Having done so, I have concluded that, notwithstanding the evidence upon which a jury might conclude that there was a clear breach of duty by Mr Galley and the evidence of damage to the integrity of arrangements of handling restricted and/or confidential information within the Home Office, the overall evidence of damage in this case is not capable of meeting the threshold necessary for the institution of criminal proceedings.

35. In those circumstances, I have concluded that there is no realistic prospect of a conviction in Mr Galley's case because his alleged conduct is not capable of reaching the threshold necessary to make out the criminal offence of misconduct in public office. Equally, I have concluded that there is not a realistic prospect of a conviction against Mr Green for aiding and abetting Mr Galley's conduct or for conspiring with Mr Galley for him to commit the offence of misconduct.

Conclusion

36. For the reasons set out above, I have concluded that there is no realistic prospect of a conviction against either Mr Galley or Mr Green for the offences alleged against them. Accordingly I have decided that charges should not be brought against either Mr Galley or Mr Green for those alleged offences.

37. My conclusion should not be misunderstood. The unauthorised leaking of restricted and/or confidential information is not beyond the reach of the criminal law. The fact that the overall evidence of damage or potential damage in this case is not such that the offence of misconduct in public office is made out should not be taken to mean that the absence of sufficient damage actual or potential will always lead to a decision not to prosecute. Where the threshold identified in the case of *AG's Reference No.3 of 2003* is met, a criminal

prosecution would be justified. Each case will have to be carefully considered on its facts. My conclusion is simply that, on the particular facts of this case, there is no realistic prospect of a conviction against either Mr Galley or Mr Green.

38. In coming to a conclusion in this case, it has not been necessary for me to resolve the question of the legality of the searches of Mr Galley's home address and Mr Green's home address, his Constituency offices and at his Parliamentary office. I do not propose to do so. However, as noted above, once the pattern of leaks was established in this case it was inevitable that a police investigation would follow. There has been a thorough investigation and, without it, I would not have been able to reach a conclusion on the particular facts of this case.

39. The conclusion that charges should not be brought against either Mr Galley or Mr Green in respect of the six leaks investigated by the Metropolitan Police Service is mine. I have been assisted by Gavin Millar QC (a leading media law specialist), James Lewis QC (on various matters relating to Parliamentary privilege), and by senior and experienced lawyers at the Crown Prosecution Service. However, I have not been asked to consult, nor have I consulted, any Minister before coming to my conclusion.

KEIR STARMER QC
Director of Public Prosecutions
16 April 2009
