

PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION

SUPPLEMENTARY NOTE BY SENIOR COUNSEL

for the Respondents in the Petition of Alex Salmond, Petitioner, for Judicial Review

Re reporting restrictions

- 1 I refer to the joint note circulated yesterday. This supplementary note follows a telephone discussion with the Lord Advocate. He has questioned, regarding reporting restrictions, what impact there may be in the fact that there are no “active” proceedings regarding FFM, in terms of the criminal justice system.
- 2 This query arises from the terms of s.4(2) of the 1981 Act, one of the possible sources for reporting restrictions, which apply where there may be a “substantial risk of prejudice to the administration of justice in [the proceedings in which the order is made: here, the Petition for Judicial Review] or in any other proceedings **pending or imminent**”. The point made by the Lord Advocate is that there is here no question of any “active” criminal proceedings, in the sense envisaged by s.2(3) of the 1981 Act; and that moreover it may, at this early stage, be difficult to say that any such proceedings are “pending or imminent”.
- 3 The fact that there are no active proceedings is not fatal. In *Horsham Justices Ex p. Farquharson* [1982] Q.B. 762 at 797, Shaw LJ said:
- “The words ‘pending or imminent’ have been held to include the possible (not necessarily the inevitable) outcome of legal process. This has nothing to do with proceedings being ‘active’. That expression is used as a term of art in the Contempt of Court Act 1981 for the purpose of defining the scope and application of the strict liability rule as defined by section 1. The purpose and intent of section 4(2) is wider and different. It is designed to prevent injustice to individuals whose interests might be unduly and unjustifiably threatened or prejudiced by premature publication of matters which could adversely affect their rights or status.”
- 4 In *Galbraith v HMA* 2001 S.L.T. 465; 2000 S.C.C.R. 935 at 940 at [11]-[12], the High Court expressed tentative agreement with this.
- 5 Moreover, in the *Horsham Justices* case, Ackner LJ held that proceedings could be “imminent” before the prospective accused is even charged.
- 6 In these circumstances, I take the view that s.4(2) is available, notwithstanding the very early nature of the police investigation. I also take the view that, even if that is not so, the common law powers

addressed in the Note of yesterday, allied to s.11 of the 1981 Act, should provide an alternative route to at least minimising the damage caused by publicity of the Judicial Review proceedings.

[Redacted]

Roddy Dunlop QC

18 September 2018

SP SGHHT