From: Christine O'Neill [Redacted]@sgld.cjsm.net>
Sent: 27 September 2018 13:40
To: [Redacted]@scotland.gsi.gov.uk.cjsm.net
Cc: roddy.dunlop[Redacted]
Subject: Re: [CJSM] AS Petitioner - Note on Prospects
Importance: High

Dear [Redacted]

Apologies - I have been tied up with something else. We have updated the note with a new paragraph 7. Please see attached.

Regards

Christine

On 2018-09-27 10:24, [Redacted]@scotland.gsi.gov.uk.cjsm.net wrote:

Christine

Many thanks for the Note of Prospects. I have now had a chance to consider its terms and I have discussed this with [Redacted]

We anticipate that the one area where it would be helpful to have some further detail (in anticipation of being asked about it) is in respect of the area of risk you have identified on procedural unfairness. In particular, if the petitioner is successful on this ground what would the outcome be? I note from the pleas in law that he is seeking declarator and reduction of the decision. What would this mean in practice?

If the court declare the procedure to be flawed, would there be a legal consequence or would this just have to be handled in terms of comms etc?

It would be helpful to have your advice on this and in particular, what is the worst case scenario and is there anything we can do to mitigate or manage this?

It would be extremely helpful if a paragraph or 2 could be added into the Note of Prospects to address these points.

I am due to attend a meeting from 11am to 1pm, it would helpful, if possible to discuss this prior to 11am.

Thanks

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: Christine O'Neill [Redacted]@sgld.cjsm.net>
Sent: 27 September 2018 09:11
To: [Redacted]@scotland.gsi.gov.uk.cjsm.net
Cc: roddy.dunlop[Redacted]
Subject: [CJSM] AS Petitioner - Note on Prospects

Dear [Redacted]

Please find attached our note on prospects. We are of course happy to discuss.

We are still working on the draft answers but those will follow.

Kind regards

Christine

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ATTACHMENT 1

PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION

JOINT NOTE BY SENIOR AND JUNIOR COUNSEL

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

Re prospects of success

1 We have been asked for our views on the merits of the petition and the prospects of successfully resisting the judicial review proceedings that have been raised.

Summary

2 The petitioner relies on eight distinct grounds of challenge.

3 Some of the grounds of challenge concern the validity and fairness of the Procedure for handling complaints against ministers and former ministers that was put in place in early 2018; others concern the way in which the Procedure was applied to the petitioner.

4 Several grounds of challenge are in our view 'time barred'. Complaints about the validity and fairness of the Procedure itself – and the use of the Procedure to investigate complaints against the petitioner – should have been brought within 3 months of 7 March 2018, being the date on which the petitioner first became aware of the complaints and the investigation. While we are of the view that the time bar point should be taken, the merits of these complaints also need to be addressed.

5 In our view the majority of the grounds of challenge are weak and should be capable of being resisted successfully.

6 Nevertheless, we think that there is a real risk that the Court may be persuaded by the petitioner's case in respect of the ground of challenge based on 'procedural unfairness'. This is a lengthy ground of challenge attacking various aspects of the investigation process. We consider that the areas of greatest risk are in relation to the fact that witness statements and the initial report prepared by the investigating officer were not shared with the petitioner. The Procedure does not provide for the sharing of such information with the minister or former minister who is the subject of the complaint. We should stress that we do see an answer to this point and consider the defence to be perfectly statable, all for the reasons outlined below. However, it would be wrong to pretend that we do not see a vulnerability in this regard. Equally, we should stress that the vulnerability arises from the Procedure itself, and not from its implementation in this particular case.

7 Should the Court be persuaded by one of more of the petitioner's grounds of challenge, it may make an order quashing the decision made by the Permanent Secretary and requiring the Permanent Secretary to consider whether or not to order a fresh investigation. It is also possible that if the Court considers that the Procedure itself is flawed that it quashes the Procedure and requires Scottish Government to consider whether to put in place a new Procedure containing additional procedural requirements. If the Procedure is quashed then it is highly likely that the decision would also be quashed as flowing from a flawed Procedure.

General observations

8 The petition appears in some respects to have been prepared in a degree of haste. In particular the remedies sought by the petitioner do not always marry with the averments of fact that are intended to support the orders sought and certain challenges are directed to the Permanent Secretary which should instead be directed towards the Scottish Minsters.

9 Relatively unusually for a petition for judicial review (and not in keeping with the style of petition envisaged by Form 58.3), there is no reference to case law (except indirectly in statement 18 by reference to De Smith).

10 It may be that the petitioner will seek the opportunity to adjust the petition in response to the answers to be lodged on behalf of the Scottish Ministers and the Permanent Secretary. In that event, the views set out in this note might require to be updated in light of any adjustments.

Scope of judicial review

11 We have been considering further whether any challenge should be taken to the competency of the petition on the basis that it seeks to challenge decisions that are not amenable to judicial review.

12 As discussed below, the Procedure is one means by which the Scottish Government discharges its duty of care to its employees. We understand that clients would take the view that the Procedure now forms part of the terms and conditions of employment of civil servants in the Scottish Administration.

13 That being so, if the complainers [Redacted] were dissatisfied with the outcome of the investigation into their complaints we consider that there would be good prospects of persuading a Court that any dispute arising was properly a contractual matter and that judicial review was not available per *West v Secretary of State for Scotland* 1992 SC 385. In a 'standard' grievance procedure involving a complaint about an employer or fellow employee, the remedies available to a dissatisfied employer or employee would also lie in the field of contract: *"the measures selected by an employer to investigate the conduct of an employee do not involve the conferring of quasi-judicial functions and do not involve the exercise of the supervisory jurisdiction of the Court of Session"* (*Gray v Braid Logistics (UK) Ltd* 2015 SC 222 at §26) The Court has held that the matter does not cease to be a contractual one

simply because the employer has delegated the inquiry/investigation to an internal body: *Dryburgh v NHS Fife* [2016] CSOH 116.

14 It may be doubted whether the petitioner's relationship with the Scottish Government and/or the complainers could properly be characterised as being contractual even while he was a minister (cf. *O'Brien v Scottish Ministers* 2017 SLT 1113). He certainly cannot be said to stand in any contractual relationship with the Government after leaving office or at the time the Procedure was put in place and invoked in connection with complaints made against him. The analogy with 'ordinary' employment law procedures goes only so far. The Procedure – being concerned specifically with ministers and former ministers – is not solely a means by which Scottish Government discharges its duty of care to staff but is also a mechanism by which ministerial conduct is held to account in terms of the Scottish Ministerial Code. Hence the provisions of the Procedure that involve reporting the outcome to the First Minister or leader of the relevant party.

15 That being so, to the extent that his interests are affected by the investigation of the complaints using the Procedure we think it likely that the Court will reach the view that the decision is amendable to judicial review and, indeed, that the petitioner has no remedy *other than* judicial review.

16 However in our view there is merit in emphasising to the Court that the Procedure is a response to concerns to ensure that civil servants were properly protected in the workplace and is in the nature of an employment policy. That may be useful in explaining to the Court the relative absence of procedural formality set out in the Procedure and persuading the Court that the panoply of procedural protections demanded by the petitioner were unnecessary and inappropriate given the purpose of the Procedure. This is a point upon which we elaborate below.

Ground 1 – ultra vires

17 At statement 12 it is said that the Procedure has no statutory or other legal basis and for that reason is *ultra vires* the powers of the Permanent Secretary.

18 However the petitioner does not seek any remedy vis-à-vis the Procedure itself. The first order sought is for declarator that the 'decision' is *ultra vires* the Permanent Secretary's powers, *viz*. the decision that certain allegations are well founded.

19 In our view this ground of challenge is out of time: it should have been brought by the petitioner within 3 months of him receiving the Permanent Secretary's letter of 7 March 2018. As acknowledged in recent consultations, while the time bar point can and should be taken, the merits of the ground of challenge will require to be addressed.

20 We consider that this is a weak ground of review and that there are good prospects of persuading the Court that (a) ultimate responsibility for the Procedure rests with the Scottish Government in its capacity as the 'employer' of Crown servants in Scotland; (b) while the Procedure was drafted by officials it was endorsed by the First Minister on behalf of the Scottish Government; and (c) creation of such a policy and its application to the petitioner was not unlawful.

21 There is no specific statutory basis for the creation of a policy by Scottish Government to deal with allegations of harassment against civil servants. As we understand it, clients' position is that the basis for the Procedure is the contractual obligation to ensure an effective grievance procedure for employees and in that respect is no different from the suite of other employment policies (including Fairness at Work) that apply to civil servants in Scotland.

22 We also understand that even absent a requirement to have in place any specific grievance process clients would take the view that they were empowered to introduce the Procedure by virtue of the Crown's common law powers. Notwithstanding criticism of Government reliance on common law powers and on the *Ram* doctrine, the courts continue to accept the proposition that Crown has the capacity of a natural person: cf. *R v Secretary of State for Health, ex parte C* [2000] HRLR 400; *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148; and *Cullen v Advocate General for Scotland* 2017 SLT 1.

23 As mentioned in previous advice, the High Court has held that it is permissible for a public authority to conduct (at least elements of) an investigation into alleged misconduct where there is no explicit statutory basis for that investigation: *R (Hussain) v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin).

24 We can see no basis for the suggestion that the Scottish Government is not entitled to extend the scope of the Procedure to grievances raised about former employees, employers or third parties. Indeed, we suggest that it would be surprising if the law were otherwise. Any employer is entitled to cater for grievances of past misconduct, even where that employer no longer has any control over or ability to impose sanctions upon the persons accused of such misconduct – if nothing else to learn from past mistakes. It would be odd to find that the state is denied such a basic measure when any other employer would be entitled to put same into effect.

25 At least three further issues have the potential to arise although neither is currently 'in play' in the petition.

26 The first is that the Procedure has been used to investigate a complaint made, in one case, by a person [Redacted] This is mentioned by the petitioner (statement 23.d) although it is not argued by the petitioner that the Procedure does not apply [Redacted] It would be helpful to us to understand the basis in employment law (if that is relied upon) for allowing the Procedure to be used by [Redacted] In particular it would be helpful to understand if there was specific consideration prior to the investigation being initiated of the question whether the Procedure extended to [Redacted]

27 The second is whether harassment of a civil servant by a minister in the Scottish Government is to be regarded as harassment of that civil servant by her employer or by a third party.

28 The law imposes less stringent duties on employers in respect of harassment by third parties than by the employer itself (or by an employee for whom the employer is responsible). The liability of

employers under the Equality Act 2010 for harassment by third parties (i.e. persons other than the employer or fellow employees) was removed in 2013 and there is a high threshold to be met before a claim that a failure to prevent harassment by a third party will constitute harassment by the employer itself (cf. *Unite the Union v Sally Nailard* [2018] IRLR 730).

29 This issue, if it is relevant at all, may be relevant to the justification for the introduction of a Procedure separate from the 'standard' Fairness at Work Policy and relating solely to ministers and former ministers.

30 The third issue is the appropriateness of applying the Procedure in circumstances in which there may be a competing statutory process by which a grievance might be raised and investigated. Again as mentioned in previous advice, where a statutory regime for investigation of complaints against elected representatives has been put in place, it has been held to be *ultra vires* to attempt to deal with such complaints through parallel grievance procedures: see *R (Harvey) v Ledbury Town Council and Herefordshire County Council* [2018] EWHC 1151 (Admin).

31 *Harvey* was concerned with a code of conduct applying to local councillors by virtue of the Localism Act 2011. The High Court concluded that allegations of bullying and harassment made by council employees against Councillor Harvey ought not to have been dealt with via employment grievance procedures where the code of conduct had already been invoked and where following the relevant procedures under the code the complaint had not been upheld.

32 Previous advice to clients referred to the existence in Scotland of the Scottish Parliamentary Standards Commissioner Act 2002 but considered that could be disregarded as a competing statutory procedure because the petitioner is no longer a parliamentarian. That advice overlooked the fact that the 2002 Act applies not only to current MSPs but to former members (2002 Act, s20).

33 Nevertheless there are a range of other reasons why we consider that the existence of the 2002 would not prevent the use of the Procedure to investigate complaints made by civil servants against ministers in the Scottish Government. The 2002 Act is not directly comparable to the provisions of the Localism Act in issue in *Harvey*: in particular, s28(4) of the 2011 Act provides that "a failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection(6)". The High Court considered that the terms of the 2011 Act were such that Parliament's clear intention was that complaints against councillors should be dealt with only under 2011 Act procedures. There is no such provision in the 2002 Act. In addition, the Code of Conduct for Members of the Scottish Parliament excludes from investigation by the Scottish Commissioner complaints about an MSP's treatment of the Parliament's staff (which is instead to be dealt with via HR). We think it highly unlikely that the Court would conclude that the 2002 Act is a 'compulsory' route for complaints about ministers' conduct vis-à-vis Scottish civil servants. As the issue is not raised in the petition we do not discuss it further here.

Ground 2 – error of law

34 The petitioner complains (statement 13) that the sentence in the Permanent Secretary's letter of 21 June 2018 that *"The Scottish Government is not asserting any jurisdiction nor can it impose any sanction on the petitioner"* constitutes an error of law.

35 The petitioner does not narrate the remainder of the paragraph, viz: *"Your client is free to choose whether or not to participate in the investigation. However, the Scottish Government cannot, as a consequence of any non-participation be prevented from taking steps to investigate complaints".*

36 The Permanent Secretary was responding to specific aspects of the letter of 8 May 2018 from the petitioner's agents in which they ask the Permanent Secretary to explain the *"legal basis for your claim to have jurisdiction over our client under the Procedure"* and in which they refer to the fact that the Procedure is not a contract to which the petitioner is a party and that the petitioner did not voluntarily agree to subject himself to the Procedure.

37 We consider this to be a weak ground of review. The Permanent Secretary clearly proceeded on the basis that she was entitled to investigate the complaints against the petitioner in terms of the Procedure. She was correct about that or she was not: the sentence relied upon by the petitioner has had no practical impact on the process or on the petitioner's rights or interests.

38 In any event, the import of the challenge is far from clear. Assume that the sentence complained of (*"The Scottish Government is not asserting any jurisdiction nor can it impose any sanction on the petitioner"*) is, in law, erroneous. What then? We do not consider that this would, in and of itself, justify any remedy.

Ground 3 – incompetency

39 The petitioner contends (statement 14) that it is incompetent for allegations made against the petitioner in respect of events occurring before the Procedure was put in place to be investigated under the Procedure. It is said that the Procedure "does not bear to have retrospective effect and does not have that effect".

40 This is not a complaint about the 'retrospective' application of the Procedure in relation to Allegation D (see paragraphs 72 to 74 below) but a more general complaint about the Procedure being applied to the petitioner at all.

41 The Procedure is clearly broad enough to encompass complaints made after a minister has left office and concerning the minister's conduct while in office. Complaints about former ministers are dealt with at paragraphs 10 to 17 of the Procedure.

42 That does not fully answer the question whether the Procedure applies only to ministers who have left office after the Procedure was put in place or whether it was intended to, and does, apply to complaints made about the conduct of ministers who left office prior to the Procedure coming into being.

43 As with the complaint that the Procedure is *ultra vires*, we consider that this ground of review is time barred. The petitioner knew on 7 March 2018 that the Procedure was being applied to him and should have raised proceedings in respect of any complaint about that application by 6 June 2018.

44 On the merits, our view is that this is a weak ground of review. Although it is characterised as a complaint about 'incompetency' it appears that the complaint is in fact another complaint of error of law: the Permanent Secretary was simply wrong to consider that the Procedure was broad enough to encompass complaints about a minister who left office prior to the creation of the Procedure.

45 We consider that the Procedure is broad enough to allow for investigations into allegations about conduct that took place before the Procedure was put in place: it certainly does not exclude such investigations.

46 In addition, the context in which the Procedure was one in which there had been an increased public focus on historical allegations of harassment and on the 'failure' of those who had experienced harassment to make complaints at the time of the alleged harassment (as to which 'failure', in the context of sexual abuse and rape, see the helpful opening paragraphs of the Opinion of Lord Glennie in *MM v Criminal Injuries Compensation Authority* [2018] CSOH 63).

47 The Procedure does not purport to render subject to investigation conduct that would not previously have been understood to be unacceptable. What has changed is the process by which such conduct is investigated, and such changes (i.e. changes in procedure) are often retrospective, and legitimately so: *Gardner v Lucas* (1878) 3 App Cas 582.

48 We also note the terms of the opinion of Tom Linden QC of 27 June 2018 on "pre-Scheme cases" that is appended to the UK Parliament's Independent Complaints and Grievance Scheme Delivery Report of July 2018 in which he expresses the view – with which we agree – that there must be doubt as to whether the presumption against retrospective effect has particular application in the context of complaints of harassment and bullying not least because what is in issue is a *"proposed complaints procedure which is voluntary in the sense that no one is obliged to participate in it and its outcomes are not binding per se. As I understand it, a responder to a complaint would be perfectly free to decline to participate, the proposed Investigator/Case Manager merely has a power to investigate and make findings, and his or her conclusions do not bind anyone"* (para 11).

Ground 4 – procedural unfairness

49 This is a lengthy ground of challenge. It involves challenges both to the Procedure itself and to the application of the Procedure by the Permanent Secretary.

50 The petitioner asserts that the Procedure involves a quasi-judicial procedure. For reasons discussed elsewhere in this Note we consider that there are good prospects of persuading the Court that the Procedure is analogous to other employment law grievance procedures and is not 'quasi-judicial' in nature.

51 The petitioner complains that the Permanent Secretary assumed the role of fact finder and that in doing so she acted *ultra vires* the Procedure. In our view it is inherent in the task of deciding whether a complaint is well founded – which decision-making is clearly for the Permanent Secretary in terms of the Procedure – that a view has to be taken about whether the matters complained of did or did not take place (by reference to an appropriate standard of proof).

52 The petitioner also complains that he was not permitted to share the complainers' personal data with anyone except his legal advisers and that this was unfair. However the Permanent Secretary's letter was to the effect that the sharing of personal data should not take place without the consent of the complainers. We do not understand that consent to have been sought directly or indirectly: we should be grateful if clients would confirm.

53 There are other complaints in respect of which we understand to be factually inaccurate, namely (i) that the petitioner was denied the opportunity to consult official records and diary entries, and (ii) that the petitioner was denied the opportunity to make submissions to the Permanent Secretary before she made her decision.

54 The remainder of the petitioner's complaints concern the terms of the Procedure itself which does not provide for the sharing of witness lists or witness statements or for the presentation of evidence by the petitioner. These complaints are, in our view, time-barred for the reasons discussed above.

55 On the merits, we consider that this ground of challenge should be addressed by emphasising the context in which the Procedure arises and by distinguishing the process set out in the Procedure from more formal disciplinary or adjudicative proceedings. Of assistance is *O'Brien v Scottish Ministers* and the discussion in that case of *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 560. The propositions drawn by Lord Pentland from *ex parte Doody* (at §54) include that (i) what fairness demands is dependent on the context of the decision; (ii) that a person who may be adversely affected by a decision should ordinarily have the opportunity to make representations on his own behalf before a decision is taken; and that (iii) that person is entitled to be informed *"of the gist of the case which he has to answer"*.

56 Here, the petitioner was given specific details of the complaints made by complainers A and B. This seems to us to meet the requirement to give the "gist", as *per ex parte Doody*.

57 The question remains whether the remainder of the Procedure afforded the petitioner sufficient procedural protections. It is here that, as we see it, there is greatest risk. The authorities on procedural fairness are well-known, and many of them were considered by Lord Uist in *Christina S FR224 v Scottish Ministers* [2013] CSOH 85. There, an administrative decision (regarding fishing quotas) had been imposed without giving the subject of the decision sight of all the evidence underpinning same. Lord Uist ruled that unlawful, saying:

"In my view it was plainly an administrative decision: it was not a judicial decision. That being so, the maxim nemo judex in causa sua does not apply. Nevertheless, the maxim audi alteram

partem does apply, with the consequence that the respondents were under a duty to reach their decision fairly, and in the context of this case that meant following a fair procedure. It is not in dispute that the petitioners were not provided with the full evidence on which the decision was based, and so were not given an opportunity to comment on or contradict it, before the decision was made. In my view it follows inevitably from that that the decision was not reached in a fair manner. The failure of the respondents to give the petitioners the opportunity to see and challenge the evidence against them was to the material prejudice of the petitioners and in my view vitiates the decision reached. … [I] conclude that the decision of the respondents dated 10 April 2007 is vitiated by reason of procedural unfairness. Indeed, I regard the circumstances of this case as constituting a blatant breach of natural justice."

58 We understand, of course, why matters proceeded in the way in which they did in the present case. The concerns to protect the complainers are, in particular, understandable and the Procedure itself does not provide for the sharing of witness statements or the Investigating Officer's initial report with the minister or former minister concerned. But this aspect of the case creates the greatest vulnerability. The only answer to this argument is that the specific context means that the requirements of *ex parte Doody* were met by the various protections that were put in place.

59 We consider that this answer is perfectly statable, and supported by the recent advice of the Privy Council in *Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago* [2018] UKPC 23. There, the respondent Law Society had incepted an investigation into the Chief Justice in order to decide whether or not to make a complaint to the Prime Minister. Having cited *ex parte Doody*, the Board said:

"39. It is apparent that the standards of fairness required vary enormously according to the type of decision in question. Doody was concerned with the minimum time which a prisoner serving a mandatory sentence of life imprisonment would have to serve before being considered for release on licence. That is a very different matter from a decision whether or not to make a complaint to the Prime Minister.

40. The Chief Justice complains that the LATT did not provide him with copies of the material which its committee was considering until asked and has not undertaken to provide him with a copy of its interim or final report, nor has it disclosed its terms of reference or the procedure it has adopted. The Court of Appeal held that, in providing the material when asked and in giving the Chief Justice an opportunity of responding to the questions asked in the letter of 20 January, the LATT had done all that could reasonably be required of it. Indeed, Bereaux JA struggled to understand the nature of the duty of fairness which the Chief Justice had sought to place upon the LATT in the circumstances (para 63). But, as Jamadar JA pointed out, from its very first meeting with the Chief Justice on 30 November, "the LATT has been open and transparent about its intentions and process". The written correspondence and emails "reveal a cooperative and facilitative, even if firm, approach" (para 101). "There is just no evidence of deceit, deception,

misinformation or mala fides on the part of the LATT. There is rather evidence of openness, transparency, disclosure and invitation" (para 102).

41. The Board finds it unnecessary to consider precisely what the minimum requirements of fairness were in the circumstances. It agrees with the Court of Appeal that on any view of the matter they were met in this case."

60 We find the present case broadly comparable to that considered by the Board, and thus consider that the procedures adopted here are defensible. But, with apologies for repetition, this aspect of the case does seem to us to be the most difficult, and we cannot say that there is anything other than a material possibility that the Court will agree with the petitioner's complaints in this regard.

Ground 5 – General irrationality

61 The contention (statement 25) is that because the Permanent Secretary knew that the petitioner was offering only limited responses to the allegations against him, and that he was doing so because of his objections to the procedure, *"there was no reasonable or rational basis upon which the [Permanent Secretary] could make findings of fact on these disputed allegations on the basis of these documents alone which included unequivocal denials of the causes of concern which are the subject matter of the decision".*

62 This ground of review is articulated in a slightly odd way. In essence it appears to be a complaint that (per *Wednesbury*) no reasonable Permanent Secretary, acting reasonably, could have made findings that the allegations against the petitioner were well founded or (per *CCSU*) that her decision to do so *"is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".*

63 Notwithstanding that the test for irrationality in decision-making is now accepted to be more flexible and fact-dependant than suggested by *Wednesbury* (cf. *Kennedy v Information Commissioner* [2015] AC 455) our view is that this ground of review is weak.

64 Assuming the Court is prepared to accept that it is permissible to have a Procedure in terms of which it is not necessary to provide the petitioner with all of the material that he lays claim to, the Permanent Secretary cannot be criticised as having behaved irrationally in applying the Procedure and reaching a view on the material before her. The correspondence between the Permanent Secretary and the petitioner's agents makes clear the Permanent Secretary's view that the petitioner was not entitled to exercise an effective 'veto' over the investigation of complaints against him.

Ground 6 – article 6 ECHR

65 The petitioner contends (statement 26) that the Permanent Secretary's decision is a determination of the petitioner's civil rights and that the decision was taken in circumstances that contravened the petitioner's rights under article 6 ECHR.

66 We consider that this is a weak ground of review.

67 The first line of defence is that the decision made by the Permanent Secretary does not constitute a determination of any of the petitioner's civil rights. The petitioner makes no specific averments as to the nature of the right that is said to be determined. The Permanent Secretary's decision is not of a judicial character and is not binding on either the complainer or the person who is the subject of complaint.

68 Decisions taken in the course of employment grievance processes – even where they result in dismissal – do not engage the civil right to practise one's profession for the purposes of article 6 in the manner that such a right would be engaged in proceedings before a formal regulatory body with powers to impose binding sanctions such as suspension or striking off: *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* 2013 ICR 270; *Dryburgh v NHS Fife* [2016] CSOH 116. The lack of any sanction here means that there is a strong argument that article 6 is not in play: see *Regina (Thompson) v Law Society* [2004] 1 W.L.R. 2522.

69 Civil rights can encompass the right to one's reputation but in *Fayed v United Kingdom* (1994) 18 EHRR 393 the Strasbourg Court concluded that, in relation to an unfavourable report by inspectors appointed to investigate a take-over, the functions performed by the Inspectors were essentially investigative, their object had not been to resolve any dispute between parties and their report did not "determine" the applicants' civil rights to a good reputation for the purposes of article 6 nor was its result directly decisive for such right. The Court expressed the view that acceptance of the applicants' argument would *"unduly hamper the effective regulation in the public interest of complex financial and commercial activities".*

70 Reference might also be made to *Marusic v Croatia*, Application 79821/12, 23 May 2017 in which the ECtHR held that proceedings against a teacher for alleged plagiarism which might result in sanctions including public reprimand did not engage article 6: "*With regard to the applicant's argument that the proceedings in question affected her professional reputation, the Court notes that in order for Article 6 to come into play, the outcome of the proceedings must be decisive for a "civil right". This will be the case where the outcome of the proceedings depends on an assessment of an unjustified attack and harm to good reputation (see, for instance, Helmers v. Sweden, 29 October 1991, § 29, Series A no. 212‑A)…In the case at issue, it was not the applicant's professional reputation in itself which was the subject matter of the proceedings but the question whether she had plagiarised parts of her book. The question of good reputation was only remotely related to the proceedings in question as one of the possible consequence of the findings of plagiarism. However, in the case at issue, the applicant continued exercising her profession as a university teacher and researcher by assuming functions in the University of Split School of Medicine. It cannot therefore be said that the proceedings at issue even remotely affected her professional reputation sufficiently seriously."* (§§76-77). While it cannot be said in this case that the impact on the petitioner's reputation is quite as remote as suggested in *Marusic* we remain of the view that the Permanent Secretary's decision was not decisive of the petitioner's right to reputation for the purposes of article 6.

71 It is also of note that in *Hewson v Commissioner of the Police of the Metropolis* [2018] 4 WLR 69 the claimant contended that the issuing of a Prevention of Harassment Letter (for which there was no statutory basis: para 23) was challenged by reference to articles 8 and 10 ECHR but not by reference to article 6.

72 The second line of defence is that should the Permanent Secretary's decision amount to a determination of civil right(s) the petitioner has access to a court of full jurisdiction (and indeed in these proceedings has exercised his right of access) that is sufficient to meet the petitioner's rights under article 6 per *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *R (Thompson), cit.sup.*

Ground 7 – allegation D – breach of legitimate expectation, irrationality and oppression

73 This is the ground of challenge to [Redacted]

74 In relation to this ground of review we will need clear instructions on the factual matters raised by the petitioner. [Redacted] We would wish to have confirmation of those matters.

75 [Redacted]

Ground 8 – privacy and confidentiality

76 The petitioner contends that, in that the decision is *ultra vires* etc, the communication or publication of the decision (or of material relating to the decision) is an unlawful infringement of the petitioner's rights of privacy and of the obligation of confidentiality owed to him by the respondents.

77 This strength of this ground of review depends on the degree of success or otherwise that is ultimately enjoyed by the petitioner in relation to the other grounds of review. We consider that the most sensible way to deal with this ground of review is to invite the Court to hear submissions on it following its determination of the other grounds of review raised in the petition.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

26 September 2018