

# Re: [CJSM] AS, Petitioner - Further Note on Prospects

**From:** Roddy Dunlop [Redacted]@foa.cjsm.net> Paul Cackette  
**To:** [Redacted]@scotland.gsi.gov.uk.cjsm.net  
**Cc:** Christine O'Neill, [Redacted]@sgld.cjsm.net,  
[Redacted]@scotland.gsi.gov.uk.cjsm.net, [Redacted]@scotland.gsi.gov.uk.cjsm.net  
**Date:** Fri, 07 Dec 2018 08:10:36 +0000

Paul

This one falls to me to answer. The issuing of the Note was at my insistence. I address the queries raised as follows:

**1) To ascertain the basis on which counsel felt the need to issue their note, at this point.**

I had not seen the whole correspondence, or precisely what the petitioner would make of it, when last we met. Substantial further documentation has, since then, been made available. It leads me to the conclusions discussed in the Note. The concerns I expressed at the con with the FM have deepened in light of the documents now disclosed.

I discussed my concerns in light of the material as a whole with Christine last week. I had previously indicated that an updated note on prospects would be required once the full picture was available, and this is it. Given the imminence of the hearing, I did not think it sensible to delay the communication of my concerns.

**2) Linked with that, the point was made to me that, while the note is clear about the case against us and its force, it is less clear about what our counter-arguments would be on the key issues, if we elected to proceed.**

The problem in this regard is the lack of arguments - hence my concerns. The only options are to argue (i) no breach, or (ii) breach but its effect does not vitiate. For the reasons given in the Note, I doubt either will work. (i) is probably unstatable. (ii) faces the problems identified in the note.

I am further concerned that any defence might expose the risk of individuals being forced to give evidence. I do not think that in anyone's best interest, but that is a subsidiary concern.

**3) your assessment of the material previously provided to them on other analogous HR practice in other similar, if not identical, circumstances and how we can deploy that.**

This does not alter my views. The respondents' case stands or falls on the procedure. If it was not followed, we have a problem. Other cases, which have not been litigated, either have different procedures; have procedures which *have* been followed; or have procedures which haven't been followed but haven't been challenged. None of that creates a precedent in law on which we can rely.

**4) our interpretation of what was meant and done in respect of paragraph 10 of the Procedure (as set out in previous papers), again cross-compared not with case law which she appreciates is for you but with such analogous HR practice in other similar circumstances.**

This has been explained previously. In short:

- > the actual intent behind para 10 is irrelevant. As with any utterance, it will be construed objectively.
- > the objective, ordinary use of English indicates that JM had "prior involvement".
- > that meaning is underlined by the following sentence in para 10 and its emphasis on "impartiality".

As you say, I can flesh all of this out at consultation, although if this is to take place on Monday I have time constraints. Tuesday I can be available all day.

Roddy Dunlop QC

On 2018-12-07 00:53, Paul Cackette [Redacted]@scotland.gsi.gov.uk.cjism.net wrote:

Christine/Roddy,

Thank you for your two emails of 6 December, and your Note on Prospects.

I'm sorry that our best laid plans (discussed with Christine on Tuesday) for managing the flow of information in a measured way through myself have gone awry and that the Lord Advocate, First Minister and Perm Sec have all, in the course of Thursday, seen your note.

That being the case may impact on arrangements for the planned consultation, on which others will be in touch in the course of Friday (as [Redacted] will be too, in respect of certain aspects of procedural matters which should – so far as possible – continue to be progressed, pending the chance to consult and reach views thereafter on the way forward).

I met with the Perm Sec on Thursday afternoon to discuss your Note.

Aside from some issues relating to practical arrangements for the consultation and matters concerning affidavit evidence (that I will pick up with you once further thought has been given to certain aspects), the actions I've been asked to pursue from that discussion with the Perm Sec are-

1) To ascertain the basis on which counsel felt the need to issue their note, at this point. I have consistently stressed to her and others the importance of our understanding the views and concerns of counsel and that it is right that counsel are clear to and with us about the weaknesses of our case as well as the strengths.

But the Perm Sec, having been aware of these concerns from the previous notes, the meeting with the FM, other advice from SGLD and on her own consideration of the matters and being fully sighted on the options that arise from these concerns and that advice, is unclear – in effect - about what has changed since the last notes and FM meeting that leads you to write as you do. I understand that the FM has the same question.

This may be that concerns derive from your deeper consideration of the relevant caselaw or it might be in light of the latest adjustments bringing in the Perm Sec (though, like us, you reach the view that these additional adjustments are "a weaker line of attack" (para 28)).

I've been asked to seek clarification from you on that issue, in light of what we already knew.

2) Linked with that, the point was made to me that, while the note is clear about the case against us and its force, it is less clear about what our counter-arguments would be on the key issues, if we elected to proceed. This can be explored when we consult, but the Perm Sec is keen to see and understand how counsel would capture and express those counter-arguments.

This may be a task for all of us to work on over the days ahead but is an issue she is keen to understand better. Such information is important in considering the options available, whether the two set out or additionally options in proceeding with use affidavit or oral evidence (covered in Christine's second email).

One specific aspect of that of particular importance to the Perm Sec is-

- a) your assessment of the material previously provided to them on other analogous HR practice in other similar, if not identical, circumstances and how we can deploy that; and
- b) our interpretation of what was meant and done in respect of paragraph 10 of the Procedure (as set out in previous papers), again cross-compared not with case law which she appreciates is for you but with such analogous HR practice in other similar circumstances.

Paul

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**From:** Christine O'Neill <[Redacted]@sgld.cjsm.net>

**Sent:** 06 December 2018 11:58

**To:** Paul Cackette [Redacted]@scotland.gsi.gov.uk.cjsm.net; [Redacted]@scotland.gsi.gov.uk.cjsm.net; [Redacted]@scotland.gsi.gov.uk.cjsm.net

**Cc:** Roddy Dunlop [Redacted]@foa.cjsm.net

**Subject:** [CJSM] AS, Pe oner - Further Note on Prospects

All

I attach a further joint note on prospects dealing in particular with the issue raised about the prior involvement of the Investigating Officer.

Clearly our advice will not be welcome and the contents of the note will be sensitive. I understand from our discussion on Tuesday Paul that you are likely to share this with the Lord Advocate before sharing more widely.

It goes without saying that we would be happy to consult and indeed think it would be sensible to do so sooner rather than later.

Kind regards

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Christine  
[Redacted]

SP SGHHC