From: [Redacted]
Sent: 06 December 2018 12:16
To: Lord Advocate <[Redacted]@gov.scot>
Cc: Solicitor General <[Redacted]@gov.scot>; [Redacted]@gov.scot; [Redacted]@gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>
Subject: FW: [CJSM] AS, Petitioner - Further Note on Prospects
Importance: High
Sensitivity: Confidential

Lord Advocate,

AS Petitioner v Scottish Ministers

Please find attached a joint note of prospects just received from Counsel. In summary, due to the prior involvement of the IO their advice is that there are two options going forward are:

(1) Concede the petition and, if so advised, return to square one (para 30)
(2) press on regardless (para 31)

Counsel are of the view that the "least worst" option would be to concede the Petition. They understand how unpalatable that advice will be, and they do not tender it lightly.

Should you wish to consult Counsel would be available to do so in the course of Monday afternoon.

Please note that as yet [Redacted] has not had the chance to consider this note and it will not be circulated more widely until we have had the opportunity for your views on the matter.

Kind Regards

[Redacted]

[Redacted]

From: Christine O'Neill <[Redacted]@sgld.cjsm.net>
Sent: 06 December 2018 11:58
To: [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]
Subject: [CJSM] AS, Petitioner - 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 [Redacted] 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

Christine

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PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION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

Overview

1 In September we gave our views on the merits of the petition and the prospects of successfully resisting this judicial review.

2 Clients also have Senior Counsel's note of 31 October 2018 which discussed the concerns that had arisen in light of the information then available about the Investigating Officer's "prior involvement" with Complainers A and B, in advance of their making formal complaints.

3 Since then there has been substantial further development of the pleadings, accompanied by disclosure of a volume of information about, among other things, the discussions that took place with Complainers A and B prior to them making formal complaints. The disclosure of information was necessary, as can be seen from Lord Pentland's comments at the Procedural Hearing on 6 November 2018 regarding his expectations as to candour on the part of the respondents (although by then, of course, the need for candour had already been expressly recognised at consultation).

4 New grounds of challenge have been introduced by the petitioner based on the Investigating Officer's ("IO") prior contact with the complainers. In our view these are now the petitioner's strongest grounds of challenge. Moreover, and with regret, we are now jointly of the view that those grounds are more likely than not to succeed. At the outset, we recognise the dismay that this advice will cause. However, we feel it necessary to tender this advice, and the reasons for it, given the views which we have, independently at first and now of consensus, taken in this regard.

The Procedure

5 Paragraph 10 of the Procedure provides that:

"In the event that a formal complaint of harassment is received against a former Minister, the Director of People will designate a senior civil servant as the Investigating Officer to deal with the complaint. ***That person will have had no prior involvement with any aspect of the matter being raised.*** *The role of the Investigating Officer will be to undertake an* ***impartial collection of the facts****, from the member of staff and any witnesses, and to prepare a report for the Permanent Secretary. The report will also be shared with the staff member".*

The IO's involvement with Complainers A and B

6 The key relevant facts are, in summary:

- On 22 November 2017, Judith Mackinnon (JM) was one of the recipients of a note prepared by Gillian Russell (Director of Safer Communities) which described a meeting that Ms Russell had had with Complainer A, in which Complainer A described the events involving the petitioner that were, in due course, the subject of the formal complaint. Ms Russell's covering email explains that *"I am looking to meet with 2 other people. One of those will relate to a similar set of circumstances. The other I do not know".*

- On 28 November 2017 JM was copied into an email to Gillian Russell and Barbara Allison in which Nicky Richards asked GR and BA to contact the members of staff who had been in contact *"to check if they would be prepared to speak to us. The purpose of the conversation would not be to ask them to revisit statements already made – unless they wish to do so – but rather to respond to them on a more formal organisational footing".* She also explained that as part of the proposed discussion "we'd like to share with them the developing policy for handling complaints against former and current ministers. This would give them an opportunity to test whether this would have helped them at the time and also to explain the options open now".

- On 5 December 2017 Nicky Richards and JM met with Complainer A to discuss the options available to her. The details of her complaint were not discussed.

- On 7 December 2017 JM had a telephone discussion with Complainer B. The details of Complainer B's potential complaint were not discussed.

- On 8 December 2017 JM emailed Complainer B setting out options in relation to any formal complaint that might be made. In that email the IO said *"As I mentioned earlier, there may be other individuals who are also prepared to submit a complaint. I would confirm to you if this is the case".*

- On 14 December 2017 JM was copied into an email to Complainer A in which Nicky Richards explained to Complainer A that *"We have now spoken to two other people who are also considering their position",* described further work that was being done to the draft policy and suggested that Complainer A takes stock and makes a decision in the New Year on how to proceed. In relation to a formal complaint the email concludes by saying that if there was a formal process *"it is likely that Judith would take the role of the 'senior officer', given she had no involvement at the time and her professional experience".*

- In November and December 2017 JM was copied into a variety of emails about the fact that individuals had raised informally concerns about harassment, about the provision of support to those individuals and how that should be managed, and about the development of the Procedure for dealing with those complaints.

- Complainer A sent her formal complaint to Nicky Richards by email on 16 January at 12.19. By email of 12.46 Nicky Richards appointed JM as the IO and explained that she (NR) had *"thanked Ms A and said that you will be in touch. I have offered her my personal support should she need to contact someone".*

- Complainer B sent her formal complaint direct to JM by email on 24 January 2018.

Non-compliance with the Procedure

7 The petitioner now avers that "*the appointment of the IO was in contravention of the Procedure"* (statement 2) and that *"Prior to her appointment the IO (Ms Mackinnon) had involvement and contacts with the complainers"* (statement 19) and, in more detail:

"The IO's appointment was in contravention of paragraph 10 of the Procedure. She was unsuitable for that appointment and was unable to perform her duties as IO as a result of her duty to ensure the wellbeing of staff and of that involvement. The IO acquired knowledge of the subject matter of the complaints and was party to discussions on how the complaints could be handled before her appointment was made. She gave advice to the complainers about how their complaints might be progressed and on how to respond if contacted by the petitioner or his solicitor. She was aware that the complainers were being offered encouragement to pursue formal complaints…The purpose of the relevant provision in paragraph 10 is: to safeguard the fairness of the Procedure; to ensure that the IO's investigation is not tainted or compromised by the exchange of information between the IO and the complainer or other persons such as prospective witnesses and/or the personal relationship formed between the IO and complainers or other persons during the period before a formal complaint is made; to avoid bias or the appearance of bias by the first respondent in the appointment of the IO or by the IO in the performance of her duties. The first respondent and the IO were under a duty to act in good faith and to comply with the requirements of paragraph 10 of the Procedure. The first respondent and/or Ms Richards should not have appointed Ms Mackinnon as IO and Ms Mackinnon should not have accepted that appointment. That appointment was unlawful and unfair – Chhabra v West London Mental Health NHS Trust [2014] ICR 194." (statement 19).

8 Aside from the reference to 'encouragement' to pursue formal complaints (a characterisation with which one might take issue) we consider that these averments set out accurately the nature of the IO's prior contact with the complainers.

9 We also consider that the reasons they give for the inclusion of paragraph 10 in the Procedure are compelling.

10 Senior Counsel's note of 31 October sets out his initial views on the proper interpretation of paragraph 10, namely that the requirement that IO should have no prior involvement in 'any aspect' of the matter is a requirement that goes beyond simply ensuring that the IO was not involved – as a participant or a witness – in any of the events that are the subject of the investigation. We remain of the view that this is the objective meaning of paragraph 10 and

consider that it is highly likely that the Court will take the same view. This arises as a matter of English language. It is underlined by the following sentence, which explains that "the role of the IO will be to undertake an impartial collection of the facts". In order to allow that to happen, it is necessary that she should "have had no prior involvement with ***any aspect*** of the matter being raised". We can only describe what happened here as "prior involvement". Accordingly, the IO did not come to the matter "fresh": rather, her appointment followed discussions with the complainers in which options were discussed; one complainer was told that she would be advised if others came forward; and indeed the terms of the not-yet-in-force procedure were put to the complainers for their views. This is, we regret to advise, a substantial problem.

11 We are conscious that the courts have held, in the employment context, that the prior involvement of a decision-maker (and not 'merely' that of an investigating officer) may be acceptable. We have referred, in the supplementary note of argument, to authorities to that effect including *Sheil v Stena Line Irish Sea Ferries Ltd* [2014] NICA 66, although as can be seen from the decision in that case (especially at [43]), the precise effect of such involvement turns on the precise factual context.

12 The petitioner cites the Supreme Court's decision in *Chhabra v West London Mental Health NHS Trust*. In that case the NHS Trust gave an undertaking to psychiatrist employed by it that a colleague would play no part in the investigation of the psychiatrist's conduct. In the event, the externally appointed investigating officer shared a draft of her report with the colleague and the latter suggested various (damaging) amendments to the report.

13 The Supreme Court determined that the Trust was in breach of its undertaking to the psychiatrist:

"the amendment of the draft report by a member of the employer's management which occurred in this case is not within the agreed procedure. The report had to be the product of the case investigator. It was not. Further, the disregard for the undertaking amounted to a breach of the obligation of good faith in the contract of employment. It was also contrary to paragraph 3.1 of policy D4 as it was behaviour which the objective observer would not consider reasonable: Dr Chhabra had an implied contractual right to a fair process and Mr Wishart's involvement undermined the fairness of the disciplinary process" (§37 per Lord Hodge delivering the judgment of the Court).

14 The Supreme Court acknowledged that it was not the role of the courts to 'micro-manage' disciplinary proceedings between and employer and an employee. It also recognised that its decision that continuing with the disciplinary proceedings would be unlawful was the result of cumulative procedural failings and not simply the breach of undertaking. Nevertheless that breach of undertaking was not a 'minor irregularity'.

15 In *Chhabra* the 'irregularity' was characterised as a breach of contract on the part of the employer and a similar approach has been taken in cases citing *Chhabra* (for example *Hendy v Ministry of Justice* [2014] IRLR 856).

16 That contractual relationship does not exist between the petitioner and Scottish Government. Nevertheless we think it is inevitable that the Court will accept that the petitioner had a legitimate expectation that the Procedure would be followed. The respondents have of course, with regard to other aspects of the petitioner's challenges, relied on the precise terms of the Procedure. We cannot disavow the terms of paragraph 10.

17 In light of the foregoing, there are two bases on which we consider that this aspect of the case is likely to see the petitioner prevailing, notwithstanding arguments that might be advanced based on cases such as *Sheil*.

18 The first is that, unlike the situation in *Shiel* where the previous involvement did not contravene any express prohibition, here the appointment was in clear breach of paragraph 10 of the Procedure. That gives rise to a significant risk that the appointment itself will be held to be *ultra vires*. The stipulation in the procedure can be equiparated to the undertaking given in *Chhabra.*

19 The second is that, in any event, the prior involvement here cannot be described as fleeting or *de minimis.* It was sufficient, in our view, to vitiate the appointment itself.

Apparent bias

20 The petitioner also now pleads that the Permanent Secretary's decision was 'tainted by bias' (statement 4).

21 In relation to the IO he pleads that:

"Having regard to Ms Mackinnon's duty to ensure the wellbeing of staff and her prior involvement with the complainers at a critical stage prior to the lodging of formal complaints and the terms of paragraph 10 of the Procedure and the duties which she was expected to perform as IO and the failure to disclose that involvement to the petitioner that appointment would cause a fair minded and informed observer to conclude that there was a real possibility of conscious or unconscious bias in and by virtue of that appointment. Having regard to the same considerations and to the fact that her reports were calculated to and did influence the first respondent's decision as hereinafter condescended upon the said observer would reach the same conclusion in respect of the performance of the IO's duties and the content of her reports. Having regard to all these considerations the said observer would reach the same conclusion in relation to the decision and the content of the decision report Porter v McGill 2012 2 AC 357."

22 The IO was not a decision-maker. She was responsible for preparing a report for the Permanent Secretary who then applied her mind to the contents of that report. The question of apparent bias on the part of the Permanent Secretary is discussed below.

23 There are conflicting authorities on the question whether the requirements of procedural fairness – including the rule against bias – apply to those conducting investigations but who are not themselves decision-makers. Such an investigator *"may be placed under such an obligation if the investigation is an integral and necessary part of a process which may terminate in action adverse*

to the interests of a person claiming to be heard before him" (De Smith, Judicial Review, 8th ed, 8-055). In the present case, however, we consider that there is little doubt that the requirement of independence will be found to exist, standing the express stipulation in the procedure that "the role of the IO will be to undertake an ***impartial*** collection of the facts". In any event, we do not anticipate that clients would wish us to suggest that the IO need not be impartial, but rather would wish to advance the case that the IO was not affected by apparent bias.

24 If the Court is persuaded that the appropriate test is whether a fair minded and informed observer would conclude that there was a real possibility of bias on the part of the IO, we think it is likely that the Court would reach the view that the test had been met. We say that as a result of the full extent of the previous involvement as pled by the petitioner and as evidenced by the documents now disclosed. We place particular stress in this regard on (i) previous discussions and meetings with the complainers; (ii) the fact that the complainers were told in advance that it would be likely to be JM who would be the IO; (iii) the fact that one complainer was told by JM that she would advise if further complainers came forward; and (iv) the fact that JM wished to discuss the nascent procedure with the complainers before either the procedure was promulgated or the formal complaints were made.

25 We stress that we do not suggest, in any way, actual bias on the part of JM. On the contrary, we have no doubt that in actuality she performed her duties diligently, professionally and impartially. But that is, of course, nothing to the point. If, as we think to be the case, ***objective*** impartiality needs to be demonstrated, then we do not consider that this can be said to be the case here.

Apparent bias on the part of the Permanent Secretary

26 The petitioner's adjustments intimated yesterday now include a direct attack on the Permanent Secretary's independence and impartiality. This had been foreshadowed in the pleadings, which attempted to 'tie' the IO to the Permanent Secretary, for example averments that JM and the Permanent Secretary were both involved in the development of the Procedure, that the Permanent Secretary is JM's line manager (which she is not), and that both the Permanent Secretary and JM were aware prior to Christmas that approaches had been made by the complainers and support was being offered.

27 The petitioner now avers in terms that the Permanent Secretary's prior knowledge about the existence of complaints, her involvement in the development of the Procedure and her knowledge of the potential appointment of JM as IO are such as to leave her decision tainted by apparent bias.

28 On the basis of the information we have we consider that this is a weaker line of attack than that which relates to the IO.

Conclusions

29 The question that will justifiably now be asked is where this takes us. There are only two options.

30 One is to concede the Petition and, if so advised, return to square one. We have no doubt whatsoever that this is not an attractive option: it would require the conceding of (doubtless substantial) expenses, and would be trumpeted everywhere by the petitioner.

31 The other is simply to press on regardless. That is, in many ways, even less attractive: the expenses will be far higher, and the trumpeting far louder, if the case proceeds to a written judgment. Moreover, and potentially of more concern, is the real prospect of damaging criticism from Lord Pentland. He is not a judge known to pull his punches, and we are both concerned at the possibility of criticism, both from the bench in the course of the hearing and in any written judgment, which would not reflect well on the respondents.

32 Ultimately, our own view is that the "least worst" option would be to concede the Petition. We understand how unpalatable that advice will be, and we do not tender it lightly. But we cannot let the respondents sail forth into January's hearing without the now very real risks of doing so being crystal clear to all concerned.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

6 December 2018