

ANNEX

SUMMARY OF LORD ADVOCATE EVIDENCE ON 17 NOVEMBER 2020 ABOUT THE PROGRESS OF THE JUDICIAL REVIEW

Date	Legal Position – Lord Advocate Evidence to Committee on 17 November
August – October 2018	<p>The petition that was served by the former First Minister at the end of August 2018 contained a wide-ranging attack on the procedure and its application. The grounds included attacks on the lawfulness of the procedure itself.</p> <p>The Government instructed senior and junior counsel who were involved in providing advice throughout the process.</p> <p>The Government addressed each of the grounds and was satisfied that all of them could, and should, be resisted. The Government’s position on those grounds was set out in its pleadings.</p> <p>The petition said nothing about the role of the investigating officer and contact with the complainers - that was not one of the grounds on which the petition was raised.</p> <p>Consideration was given, in light of the on-going criminal investigation, whether it would be appropriate for the petition to be sisted. It was agreed that the public interest could be adequately protected by reporting restrictions.</p>
31 October – 19 December 2018	<p>At the end of October, the Government identified the issue relating to prior contact between the investigating officer and the complainer.</p> <p>The Government reviewed its legal position and made factual averments on 5 November about that contact, and voluntarily disclosed documents to the petitioner, because the Government recognised that it had an obligation and responsibility to be candid about the position.</p> <p>In mid-November, the petitioner added that as a new ground of challenge in the judicial review. The process of adjustment of the pleadings continued into December.</p> <p>When that process of adjustment of proceedings had been completed, the Government reviewed its legal position in early December.</p>

	<p>At that stage, the Government was satisfied that it continued to be proper to defend the judicial review on the new ground that had been stated, and that the issue could and should be put before the court for determination.</p> <p>That decision was fully informed by consideration of the legal position. The Government's position was that paragraph 10 of the procedure was directed at prior involvement of the investigating officer with the matters being complained about – a natural reading of the words - such that the contact between the investigating officer and the complainers in the case was not a breach of the procedure. In the context of an employment grievance procedure, it is not unusual for there to have been contact between a manager who is involved in investigating the matter and a complainer.</p> <p>The Government recognised that paragraph 10 of the procedure was open to an alternative reading. This is not unusual in the context of a litigation. The Government considered that the arguments could properly be advanced in favour of its interpretation, and that the issue should be put before the court for determination.</p> <p>In deciding whether to continue to defend a case, it is a legitimate factor for Government to take into account that there is a substantial benefit in having the clarity that a judicial decision gives—as long as the case is properly and responsibly defensible. Courts exist to determine, among other things, the meaning of documents that are disputable. The fact that an argument arises in a litigation does not mean that the litigation will be lost on that ground. It would not serve the public interest if Government sought to avoid every difficult argument that was raised in a litigation.</p> <p>Based on the factual information that was available at that stage, the Government concluded that it could properly defend the allegation of apparent bias.</p> <p>The voluntary production of documents by the Government led to calls for more documents. On 14 December 2018, the court granted a motion for a Commission for recovery of documents.</p>
<p>19 December- 21 December 2018</p>	<p>On 19 December, during the Commission, two documents were produced that appeared to disclose further information about the nature of the contacts between the IO and the complainers.</p>

	<p>The reference to an apparent meeting between the IO and one of the complainers on the day before the complaint was formalised contradicted a statement that the Government had made in its pleadings.</p> <p>The emergence of the documents at that late stage also contradicted assurances that counsel had given to the court and their counterparts about disclosure of documents. The process of investigation and identification of documents had not been as robust as it should have been.</p>
21 December 2018 – 2 January 2019	<p>A review was prompted to factor in the additional facts to the whole factual picture and the Government concluded that it was no longer proper to defend the apparent bias allegation. This led to the conclusion being reached on 2 January 2019 that the petition should be conceded on the ground of a perception of apparent bias.</p>