

P850/18

IN THE COURT OF SESSION.

September , 2018.

R E C O R D

(As Adjusted to 4th December 2018)

(As further adjusted to 13 December 2018)

on

PETITION and ANSWERS

ALEX SALMOND

against

LESLIE EVANS and OTHERS

for

Judicial Review.

DAC Beachcroft Scotland LLP,
Solicitors for Petitioner.

Scottish Government Legal
Directorate,
Solicitors for Respondents.

R E C O R D

on

PETITION and ANSWERS

ALEX SALMOND, c/o Levy & McRae, Pacific House, 70 Wellington
Street, Glasgow, G2 6UA, -

PETITIONER:

against

(FIRST) LESLIE EVANS, Permanent Secretary to the Scottish Government,
St. Andrews House, Regent Road, Edinburgh, EH1 3DG; and (SECOND)
THE SCOTTISH MINISTERS, St. Andrews House, Regent Road, Edinburgh,
EH1 3DG, -

RESPONDENTS:

for

Judicial Review of a purported decision of LESLIE EVANS, Permanent
 Secretary of the Scottish Government (the first respondent) dated 21st
 August, 2018 under and in terms of A Procedure For Handling
 Complaints Involving Current or Former Ministers.

I N D E X

<u>No.</u>		<u>Page</u>
I.	Statement of Facts for Petitioner and Answers thereto for Respondents	3
II.	Pleas-in-Law for Petitioner ...	116
III.	Pleas-in-Law for Respondents ...	118
IV.	Schedule for Service	119
V.	Interlocutors	120

IN THE COURT OF SESSION.

R E C O R D

I. - STATEMENT of FACTS for PETITIONER No.1
of Pro.

and

ANSWERS thereto for RESPONDENTS No.
of Pro.

STAT. That the petitioner is as designed in the instance.
The respondents are as designed in Part 1 of the Schedule
for Service. The First Minister (designed in Part 2 of the
Schedule for Service) is an interested person in respect that
she has received notice of the decision complained of. The
petitioner has standing. [Redacted]

The purported decision is ultra vires and
unlawful. The reputation and standing of the petitioner are
thereby adversely affected. The recording of the purported
decision as aforesaid constitutes a violation of the
petitioner's rights of privacy and a breach of an obligation
of confidence owed to him by the first respondent. The
first respondent has reported her decision to the First

Minister causing further damage to the petitioner's reputation and standing and further breaches of the petitioner's rights of privacy and of the said obligation of confidentiality.

Ans. 1. Admitted that the Petitioner is designed in the instance. Admitted that the respondents are designed in Part 1 of the Schedule for Service. Admitted that the petitioner has standing. Admitted that the first respondent has reported her decision to the First Minister under explanation that she did so on 22nd August, 2018. Quoad ultra denied. Explained and averred that the first respondent's decision is to the effect that certain complaints of harassment made against the petitioner gave cause for concern and were well founded.

STAT. II. That the date on which the grounds giving rise to the petition first arose was 21st August 2018. **With reference to the respondents' averments in answer section 27A of the Court of Session Act 1988 ("the 1988 Act") is referred to for its terms beyond which no admission is made. Quoad ultra denied. Explained and averred that there was no violation of the petitioner's substantive rights to privacy and reputation or his rights under article 8 of the European Convention on Human Rights ("ECHR") until the decision which is the subject matter of this petition was made.**

A There was no incompetent decision which could be judicially reviewed until 21 August 2018. The illegality which gave rise to the grounds for this application did not occur until that decision was taken. Esto any or all of the grounds giving rise to this petition first arose on 7 March 2018 or some other date which was more than 3 months before the petition was lodged (which is denied) it is equitable that the Court extends the period in which the petition can be brought until 24 August 2018 being the date after the petition was in fact presented. Reference is made to section 27A(1)(b) of the 1988 Act. The equitable considerations favouring that extension are as follows. The petitioner had valid reasons not to make an application to the supervisory jurisdiction unless and until the first respondent purported to make a decision [Redacted]

. An application to the supervisory jurisdiction prior to the date of the decision (21 August 2018) would have resulted in court proceedings which would have compromised the conditions of strict confidentiality under which the procedure giving rise to the decision was being applied. Those proceedings would have attracted widespread publicity containing a great deal of speculation about the nature and content of the complaints against the petitioner, the identities of the complainers and the validity of the complaints. Those proceedings, that publicity and the consequential risks that the complainers and/or the

A petitioner would be exposed to uninformed and unfair comment or criticism would all have been avoided if the first respondent had acceded to the petitioner's offer to mediate or to go to arbitration as hereinafter condescended upon or if the first respondent had in the event made a decision which did not uphold the complaints made against the petitioner. An application prior to the date of the decision would have been vulnerable to a challenge that it was premature. The appointment of the IO was in contravention of the Procedure and that was not disclosed to the petitioner until 5 November 2018. The application was made 2 days after the decision was taken. The respondents have suffered no prejudice arising from the date on which this application was made. The petitioner would suffer great detriment if the petition is not allowed to proceed. The decision of the first respondent is destructive of his reputation. He would lose the opportunity to restore or repair his reputation by showing that the decision was incompetent and unlawful. In correspondence hereinafter referred to (paragraph 9 below) the petitioner informed the first respondent of his intention to bring a Judicial Review in the event that she upheld the complaints against him applying the procedure which had been invoked. Refusing permission for the application to proceed would not be in the interests of good administration. It is in the public interest that the issues raised in this petition be judicially

determined in order to secure public confidence in the procedure or alternatively to ensure that it is not mis-applied in future. This case is the first occasion on which the second respondent has purported to deal with a complaint against a former minister and the first occasion on which the new procedure has been invoked. The violations of the petitioner's rights to have the complaints against him dealt with in accordance with the rules of procedural fairness and the requirements of Article 6 of the ECHR continued right up to the date of the decision. The petitioner made reasonable attempts to resolve the complaints against him by mediation. He made a reasonable offer to resolve the disputes concerning the competency and legality of the procedure by arbitration.

Ans. 2. Denied. Explained and averred that so far as the petitioner complains that (a) the Procedure has no statutory or legal basis (statement 12); (b) the application of the Procedure to the petitioner is incompetent (statement 14); (c) the Procedure was itself unfair (statements 15 to 24); (d) there were limits on the petitioner's ability to share the personal data of the complainers with third parties (statement 18); and (e) there has been a breach of a legitimate expectation, irrationality and oppression by virtue of the application of the Procedure to an incident that was the subject of a previous complaint (statement

A 27) the petition is out of time. In respect of each of A
these complaints, the grounds giving rise to them
first arose (at the latest) on 7 March 2018 when the
first respondent sent a letter by email to the
petitioner notifying him that complaints had been
received, providing a copy of the Procedure and
B narrating the incidents complained of that had been B
identified as giving cause for concern. Proceedings in
respect of these complaints should have been brought
before the end of the period of 3 months beginning on
7 March 2018: Court of Session Act 1988, s27A. The
Court ought not to conclude that there are grounds
C justifying an extension of that 3 month period. The C
time limit “cannot be circumvented simply by
persuading a person to repeat a decision or other act
complained of (Wightman v Advocate General 2018
SIT 356 at §33): in this case by repeated complaints
about the validity of the Procedure and repeated (and
D rejected) offers of alternative, extra-judicial dispute D
resolution mechanisms. The petitioner conflates his
complaints about the lawfulness of the Procedure with
those about the decision made as a result of the
application of the Procedure to him. His failure to
challenge the former timeously has prejudiced the
E respondents: the first respondent has expended time E
and resource in continuing to investigate the

A complaints against the petitioner on the basis that she A
 was entitled to do so. The conduct of that
 investigation was delayed in consequence of the
 petitioner's ongoing refusal to provide a response to
 the complaints. The current proceedings entail vet
 further delay. Those who made complaints were
 B entitled to expect them to be dealt with promptly. B

 STAT. III. That on that date the first respondent
 purported to decide that certain allegations of harassment
 (“causes for concern”) made against the petitioner by two
 persons are “well founded” (“the decision”). The decision
 C was taken under and in terms of a procedure called C
 HANDLING OF HARASSMENT COMPLAINTS INVOLVING
 CURRENT OR FORMER MINISTERS (“The Procedure”). The
 decision is set out in a Decision Report written by the first
 respondent entitled “Formal complaints against Former First
 Minister, Alex Salmond” dated 21st August 2018 (“The
 D decision report”). The decision report is referred to for its D
 terms and is held as incorporated herein for the sake of
 brevity.

Ans. 3. The decision, the Procedure and the decision
 report are referred to for their terms. Quoad ultra
 denied.

E

E

A STAT. III. That the petitioner seeks:-

1) Declarator that the decision is:

- a. ultra vires the first respondent's powers;
- b. incompetent in respect that it involves a retrospective application of the Procedure;

B c. Unlawful in respect that the first defender has purported to apply the Procedure under material errors in law as to jurisdiction and sanctions,

d. Unlawful in respect that it was taken in circumstances which were procedurally unfair to the petitioner and that it was tainted by bias and that it was taken in breach of his Article 6 rights under the European Convention on Human Rights ("the ECHR"),

e. Irrational,

f. In respect of allegation D is in breach of the petitioner's legitimate expectation and is irrational and oppressive,

D 2) Declarator that the recording of the decision in the records of the second respondent and the reporting or communication or publication of the decision or the IO reports which informed it or of any evidence referred to or relied upon in the decision or the IO reports by or on behalf of the respondents to any other person is a violation of the E petitioner's rights to reputation and of privacy at common

A law and under Article 8 of the ECHR and of an obligation of confidentiality owed by the respondents to the petitioner,

3) An order for interdict preventing the respondents or anyone acting on their behalf from reporting or communicating or to any person or publishing the decision or the IO reports which informed it or of any evidence referred to or relied upon in the decision or the IO reports and for interim interdict,

4) Reduction of the decision and of any record of it kept by or on behalf of the respondents,

5) An order allowing the names of the complainers and the contents of the complaints made by them against the petitioner to be withheld from the public in these proceedings,

6) An order in terms of section 11 of the Contempt of Court Act 1981 prohibiting any press or media reporting of this petition and all proceedings in court relating to it which would (either in its own right or if taken together with other information contained in or referred to in that press or media report or which is already in the public domain) identify the complainers or disclose the contents of the complaints made by them against the petitioner,

A The petitioner craves the court to pronounce such further A
orders (including an order for expenses) as may seem to the
court to be just and reasonable in all the circumstances of
the case.

Ans. 4. Admitted that the petitioner seeks certain
orders. Quoad ultra denied. Explained and averred
B that in respect of the orders fifth and sixth sought, by B
interlocutor of 4 October 2018 the Lord Ordinary
made an interim order in terms of Rule of Court
102.2(1) withholding from the public in these
proceedings the names and the designations, past and
present, of the complainers referred to in the decision
C report which is the subject matter of the petition and C
any other information concerning those complainers
which would lead to their identification. He
ordered, in terms of section 11 of the Contempt of
Court Act 1981, that no publication by any means,
including on social media, of any of the
D aforementioned information relating to the D
complainers, be made and further allowed the
complainers to be referred to as “Ms A” and “Ms B”
respectively in the present proceedings. By
interlocutor of 8 October 2018 the Lord Ordinary
made an order in terms of Rule of Court 102.3(5) in
E identical terms to that made on 4 October 2018. E

A STAT. V. That the petitioner challenges the decision of A
the first respondent on the following grounds.

Ans. 5. Admitted.

The Facts

B STAT. VI. On 7th March 2018 the first respondent wrote B
to the petitioner informing him that “an internal
investigation” was commenced on 17 January 2018 in respect
of “two formal complaints” about his behaviour from civil
servants [Redacted] relating to a period when the petition
er was First Minister. According to that letter the investig
ation was being conducted under The Procedure a copy of
C which forms ANNEX A of the letter. The first respondent C
is the authoress of the Procedure. It was written in about
December 2017. The petitioner ceased to be a Minister in
the Scottish Government in November 2014. With refer
ence to the respondents’ averments in answer the statem
ent to the Scottish Parliament by the Deputy First Mi
D nister and the letter from Sir Jeremy Heywood are ref D
erred to for their terms. Believed to be true that both
complainers were in contact with senior employees of th
e second respondent including Ms Mackinnon
in November and December 2017 concerning events
involving the petitioner in [Redacted] . Quoad ultra not
E known and not admitted. Explained and averred that under E
the Procedure the complaints had reached the stage of being

A formal complaints by 17 January 2018. According to paragraph 6 of the decision report the formal complaints were received on an unspecified date in January 2018. Prior to that date the complaints must have been initiated by one of the methods described in paragraph 1 of the Procedure. The complainers must have received support up to a point that they decided to make formal complaints all in terms of paragraph 2. An Investigating Officer (“IO”) must have been designated in terms of paragraph 10 of the Procedure before the internal investigation began. The petitioner has no knowledge of when or in what circumstances and in what terms either of the complainers became aware of the existence of the Procedure and chose to raise issues in respect of the petitioner in terms of paragraph 1 thereof. On 10 November the second respondent’s Head of Cabinet Mr Hynd emailed the first respondent (copying in Ms Mackinnon and Ms Richards) stating “I attach a draft of the process for taking forward a complaint against a former Minister....Perm Sec is also looking for names of potential candidates to fill the senior nominated officer role set out in the process.” A draft of the Procedure was attached to that email. Ms B had been in touch with a Scottish Government official two days previously on 8 November. The complaint referred to in the email was the complaint made by Ms B. The role referred to is the role which was assigned to the IO in the final version of the Procedure and the one which Ms

Mackinnon took on once a formal complaint had been lodged by Ms B. The Procedure was devised and implemented to provide a vehicle for managing complaints which were made against the petitioner before the Procedure came into being. Through the many draft versions of the Procedure which were circulated up to the point where its terms were finalised on or about 20 December 2017

[Redacted]

[Redacted]

[Redacted]

[Redacted]

I

From 10 November 2017 at the latest the second respondent's senior employees engaged in the policy review were proposing that the new procedure should apply to complaints against former ministers. From 14 November 2017 at the latest a draft of the Procedure containing provisions concerning complaints against former ministers was circulating among senior employees of the second respondent involved in the policy review. Those senior employees included the first respondent and Ms Mackinnon. On 21 November the first respondent met with the First Minister to discuss the proposed process which by then included provision for dealing with complaints against former ministers. The First Minister wrote to the first

A respondent on 22 November 2017 requesting that former ministers be included in the review of procedures for dealing with complaints of sexual harassment (production 7/6). On or before 29 November 2017 Ms Richards and the first respondent had a discussion about “the approach to the staff who have come forward.” Those persons included Ms A and Ms B. As at that date the first respondent was proposing to have a meeting the following day with the First Minister to discuss the possibility of writing to former first ministers and party leaders about the new policy and the intention to apply it to former ministers. During November the senior special adviser to the First Minister (Liz Lloyd) saw and commented on a draft of the Procedure which include provisions concerning complaints against former ministers. In an undated memorandum from the first respondent to the First Minister sent in November 2017 the first respondent said that it was necessary “to confirm with lawyers the balance between the privacy rights of former Ministers with the duty of care to protect others from harm.” The respondents are called upon to aver whether and if so in what terms they obtained legal advice on this matter. In that memorandum the first respondent noted that the second respondent was not aware that the United Kingdom Government were “developing any additional process for past Ministers in the way we are.” The Procedure was not yet in force when the first respondent responded to the First

A Minister's said letter in a Note which bears the date A
"December 2017" (production 7/7). That Note asked the
First Minister to indicate whether she "was content to adopt
the process" set out in what was a draft of the Procedure.
The email sent to the first respondent on behalf of the First
Minister on 20 December 2017 (pr. 7/12) does not indicate
B when or by what means the Procedure was to be brought into B
effect. As at 11 December 2017 it was the expectation of
the second respondent's Head of Cabinet Secretariat Mr
Hynd that the draft Procedure would remain a draft until it
was signed off by the First Minister and until there was a
"formal exchange" between the First Minister and the first
C respondent. The intention to have a formal exchange C
between the first respondent and the First Minister in order
to finalise the Procedure was reiterated in a timeline
prepared by Ms Richards and circulated to senior employees
of the second respondent on 15 December 2017. In that
timeline it was stated that "if formal complaints are made
D these will be investigated in line with our policy. We have D
not [yet] had a formal complaint." The Procedure had not
been finalised as at that date. The First Minister received
the first respondent's note Pr.7/7 and a copy of the final
draft of the Procedure in an email [Redacted] in
the first respondent's office at 15.35 hrs on 20 December
E 2017. The respondents are called upon to aver whether and E
if so when and by what means that formal exchange took

A place. The respondents are called upon to aver when the Procedure was first published on the second respondent's intranet. With reference to the respondent's averments admitted that the Procedure was published on the second respondent's intranet on 8 February 2018. As for the rest they are denied except in so far as they coincide herewith.

B Explained and averred that in a press statement issued on 23 August 2018 by the first respondent and published on the second respondent's website the Procedure was referred to as an "Internal procedure agreed in December 2017 and published at that time on the Scottish Government intranet." The second respondent's weekly blog of 12 February 2018 announced that the Procedure had come into effect. In her

C letter of the 22 November 2017 to the first respondent the First Minister said:- You have kept me closely briefed on the issues." By that date both of the complainers had been in contact with senior employees of the second respondent at director level concerning the petitioner's conduct when he

D was First Minister. Ms Allison's duties include the provision of guidance and support to cabinet secretaries and government ministers and managing internal communications for the second respondent. Miss Richards' and Ms Mackinnon's duties include ensuring the welfare of staff. The first respondent is a line manager of these senior

E employees. The period during which the complainers were left to "reflect on what to do next" included the period of

A time in which the draft Procedure was amended at the A
request of the First Minister to include the conduct of
former ministers before the Procedure came into existence
and included 20 December 2017, being the date on which the
First Minister is said to have approved the Procedure
(pr.7/12). The respondents are called upon to aver whether
B and if so when and in what terms any of the information B
given to senior employees of the second defender by either
or both of the complainers was communicated to the first
respondent in November and/or December 2017 or before
formal complaints were made and whether any or all of that
information was communicated to the First Minister during
C the said periods in the course of the close briefings referred C
to above or otherwise. The respondents are called upon to
aver: when, by what means and in what terms the
complainers first initiated their complaints; whether those
complaints were first made under and in terms of the
Procedure; when those complaints were first deemed to be
D formal complaints in terms of paragraph 10 of the Procedure; D
when and by what means the Procedure was brought into
effect; whether and if so in what terms the First Minister
replied to the Note production 7/7 of process; the relevance
of the Fairness At Work 2018 document referred to in
Answer 6 to the decision; when and by what means the
E Fairness At Work 2018 document came into effect and was E
published on the second respondent's intranet.

A Ans. 6. Admitted, under explanation to follow, that the A
 Procedure was written in about December 2017.
 Admitted that the petitioner ceased to be a Minister
 in the Scottish Government in November 2014.
 Admitted that on 21 November 2017 the first
 respondent met with the interested party. Admitted,
 B under explanation to follow, that Ms Richards and the B
 first respondent had a discussion about the approach
 to be taken to staff who had come forward. The first
 respondent's letter of 7 March 2018, *the internal*
 communications amongst employees of the second
 respondent anent the development of the Procedure
 C and the Procedure are referred to for their terms. C
 Quoad ultra denied. Explained and averred that the
 Procedure was drafted by Scottish Government
 officials following a review of the Scottish
 Government's policies and procedures for handling
 complaints of bullying and harassment made by
 D Scottish civil servants. The review was initiated by D
 the interested party, in October 2017. She asked the
 first respondent to undertake a review of the Scottish
 Government's policies and processes to ensure that
 they were fit for purpose. The existence of that
 review was made known to the Scottish Parliament by
 E the Deputy First Minister, Mr Swinney, at Topical E
 Question Time on 31 October 2017. On 2 November

A 2017 the first respondent issued a Staff Message to A
 all Scottish Government staff entitled “Sexual
 harassment - message from the Permanent Secretary”.
 That message is produced and incorporated herein
 brevitatis causa. It invited anyone who wished to
B “help inform consideration of our approach or share B
 concerns about current cultures or behaviours” to
 make contact. It provided contact details for
 members of staff in the second respondent's HR
 function together with information about sources of
 support. Separately, the first respondent received a
 letter from Sir Jeremy Heywood, Head of the Civil
C Service, of 3 November 2017, addressed to all C
 Permanent Secretaries directing them, inter alia, “to
 work with your HR Directors, staff networks and
 others to satisfy yourselves rapidly that: information
 on conduct and on how to raise a concern is clearly
 and easily accessible for staff; channels for raising a
 concern are well publicised and easy to use, and that D
D staff feel positively encouraged to speak up; and D
 processes for investigating concerns and, where
 relevant, taking follow up action, are working well
 and ensure timely resolution”. The letter narrates
 its context as being "extensive media coverage" of
 “allegations of sexual harassment and inappropriate
E behaviour in several industries and sectors, E

A particularly in respect of those in powerful positions A
over others". Sir Jeremy Heywood's letter of 8
November 2017 is produced and incorporated herein
for the sake of brevity. The first draft of the
Procedure was produced on 3 November 2017. That
 B draft contained provision for dealing with complaints B
against former ministers. On 13 November 2017 the
first respondent issued a further all staff message
which is produced and incorporated herein brevitatis
causa. In that message she advised staff that the
sources of support referred to in the message of 2
 C November remained in place and explained that in C
addition she had asked Gillian Russell to act as a
confidential sounding board for individuals who had
experienced sexual harassment. Ms Russell is the
second respondent's Director of Safer Communities.
On 8 November 2017 Complainer B contacted Barbara
Allison. Ms Allison is the second respondent's
 D Director of Communications, Ministerial Support and D
Facilities. Neither Ms Russell nor Ms Allison is line
managed by the first respondent Complainer B
discussed with Ms Allison events involving the
petitioner [Redacted] .
 E She did not at that time make a formal complaint. E
On 9 November an update was provided to the first
respondent on a range of issues relating to the review

A of the second respondent's policies and the A
development of the Procedure. That update referred
to 'Live issues', it contained no information about
the identity of any person who had raised concerns or
the nature of those concerns. Mr Hynd's email to
the first respondent of 10 November 2017 concerned
B the proposed procedure for handling complaints B
against a former minister and did not concern any
specific complaint. Mr Hynd had no knowledge of
the existence of complaints against the petitioner
until they were reported in the media in August 2018.
On 22 November 2017 Complainer A spoke to Ms
C Russell and Ms Allison to discuss events involving C
the petitioner in [Redacted] _ _ . She did not at that
time make a formal complaint. On 23 November
2017 a third person met with Gillian Russell and
discussed with Ms Russell events involving the
petitioner while he was First Minister. She did not
D at that time, or thereafter, make a formal complaint. D
On 23 November 2017 the first respondent received
an update on issues raised in response to the first
respondent's earlier communication. It included
reference to the fact that reports had been made to Ms
Russell and Ms Allison of allegations against a
E former minister. In addition a number of members of E
staff of the second respondents approached Ms

A Russell to discuss concerns about the behaviour of A
non-ministerial colleagues. Ms Russell, with the
consent of Complainer A, shared the fact of the
approach by Complainer A and the nature of the
information provided by her with the first
respondent's Director of People, Nicola Richards, and
B Deputy Director of People Advice, Judith Mackinnon. B
Neither Ms Richards nor Ms Mackinnon is line
managed by the first respondent. Ms Allison, with
the consent of Complainer B, shared the fact of the
latter's approach and the nature of the information
provided by Complainer B with Ms Richards. Ms
C Richards advised Ms Russell and Ms Allison to ask C
Complainers A and B respectively whether they
wished to speak to the HR team. They did so on 29
November 2017. On the same day Ms Richards met
with the first respondent and, separately, the first
respondent met with the interested party to discuss
development of the proposed procedure. In D
D December 2017 Ms Richards and Ms Mackinnon met D
with Complainer A. Ms Mackinnon [Redacted]
to Complainer B. In each case the
discussions concerned the options available to each
individual and their preference for how their concerns
E should be handled. Reference is made to answer 21. E
Complainers A and B each indicated that they wished

to reflect on what to do next. The Procedure was drafted in consultation with the Council of Scottish Government Unions and a draft of the Procedure was shared with CSGU in December 2017. The Procedure was agreed by the interested party on behalf of the second respondent by email on 20 December 2017 at which time it came into effect. It was published on the second respondent's intranet on 8 February 2018. Complainer A made a formal complaint on 16 January 2018 and an Investigating Officer was appointed the same day. The formal complaint received from Complainer B was received on 24 January 2018. The information provided by Complainers A and B was not communicated to the interested party. She first became aware of the existence of an investigation into the petitioner's conduct in April 2018 when the petitioner made her so aware. The Procedure is one of a number of mechanisms by which the second respondent as an employer discharges its duty of care to staff and by which it fulfils its responsibility to provide a workplace free from harassment and to provide an effective grievance procedure. The review initiated by the interested party was not restricted to consideration of complaints against ministers and former ministers. It also resulted in revisions being made to the second respondents'

Fairness at Work Policy to address sexual harassment complaints more generally. Reference is made to Fairness at Work (2018). The Procedure is also a means by which concerns that a minister or former minister has failed to adhere to the standards of behaviour expected by the Scottish Ministerial Code can be addressed by that minister, the First Minister and/or a former minister's party leader.

STAT. VII. Under a heading "*Formal complaints against former Scottish Government Ministers*" the Procedure contains the following provisions:-

- 10 *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 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.*
- 11 *If the Permanent Secretary considers that the report gives cause for concern over the former Minister's*

behaviour towards current or former civil servants the former Minister should be provided with details of the complaint and given an opportunity to respond. The former Minister will be invited to provide a statement setting out their recollection of events to add to the record. They may also request that statements are taken from other witnesses. If additional statements are collected the senior officer will revise their report to include this information and submit this to the Permanent Secretary and share with the staff member. The Permanent Secretary will consider the revised report and decide whether the complaint is well-founded. The outcome of the investigation will be recorded within the SG. The Permanent Secretary will also determine whether any further action is required; including action to ensure lessons are learnt for the future.

- 12 For complaints involving a former Minister who is a member of the Party of the current Administration, the Permanent Secretary will inform the First Minister both in this capacity and in their capacity as Party Leader, of the outcome when the investigation is complete. In their capacity as First Minister, they will wish to take steps to review practice to ensure the highest standards of behaviour within their current Administration.*

A 13 *Where the former Minister was a member of an Administration formed by a different Party, the Permanent Secretary will inform the relevant Scottish Party leader of the outcome of the investigation and any action taken.* A

14 *The final report will be provided to the staff member and the former Minister.* B

B 15 *If the former Minister declines to co-operate with the process the matter will be investigated as far as possible without their involvement. They will be advised of the complaint against them and the outcome of any investigation undertaken. This will be recorded within the SG.* B

C 16 *The First Minister will be advised where a current or former Minister who is a member of the Party of the current Administration has declined to cooperate and will be responsible for any further action.* C

Ans. 7. The Procedure is referred to for its whole terms beyond which no admission is made. D

STAT. VIII. The complaints (described as causes for concern) were set out in ANNEX B to the letter of 7 March in eleven paragraphs lettered A to K. The time period covered by the subject matter of complaints A to I is [Redacted] . Complaints J and K give no specification of dates for the alleged conduct described E

A in them however they all relate to the petitioner's period in
office as First Minister. The letter of 7 March and the
Annexes are referred to for their terms and are incorporated
into this petition for the sake of brevity. A

Ans. 8. The first respondent's letter of 7 March 2018
and its annexes are referred to for their whole terms
beyond which no admission is made. Quoad ultra
denied. Explained and averred that in respect of
complaints J and K the first respondent accepted the
petitioner's objections, did not consider those
complaints further and made no findings about them
in terms of the Procedure. B

C **STAT. IX.** The first respondent appointed an
Investigating Officer ("IO"). The IO prepared a report for
the first respondent in terms of paragraph 10 of the
Procedure. The IO also submitted a report to the first
respondent in terms of paragraph 11. **Those reports are
dated 22 February and 18 July 2018 respectively. In letters
from his agents to the first respondent the petitioner set out
a series of objections to the competency and legality of the
Procedure and its application to the causes for concern. He
also reserved his position in relation to future challenges to
any purported decision made by the first respondent about
the complaints. Those letters are dated 23, 26 April, 8
May, 5, 13, 26 June, 9, 11, 13 and 20 July 2018. They are** C
D
E

referred to for their terms. In a letter to his agents dated 18 July 2018 the first respondent offered the petitioner an opportunity to make further representations on the complaints by not later than 3pm on Friday 20 July 2018. On that date the petitioner submitted a limited response to some of the complaints under a continued reservation of his challenges to competency and legality. On Monday 23 July 2018 the IO submitted an updated version of her report to the first respondent. ~~The IO submitted further information to the first respondent before she made the decision.~~ The petitioner has never been given copies of the reports or any other information submitted by the IO to the first respondent. He has never been shown any witness statements or any other evidence collected by the IO in the course of her investigations. [Redacted]

The decision has been recorded within the records of the second respondent. The first respondent has informed the First Minister of the decision in terms of paragraph 12 of the Procedure. ~~With reference to the respondents' averments in answer admitted that the petitioner was informed of the terms of the decision on 22 August 2018. The items of correspondence including the emails mentioned in answer 9 are referred to for their terms. Quoad ultra denied except in so far as coinciding herewith.~~

- A Explained and averred that the copy of the petitioner's diary sent to him on 12 July 2018 was redacted to obscure the names of persons who had been in the petitioner's company on the relevant dates. The un-redacted diary was available to the IO and to the first respondent. The first respondent rejected the offer of mediation in her letter of 24 April 2018 before the complainers were asked whether they were willing to mediate.
- B

[Redacted]

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[Redacted]

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The first respondent requested a response by 21 March 2018. By letter of 16 March 2018 the petitioner's solicitors wrote to the first respondent advising that the petitioner was taking legal advice, would require a reasonable time to engage properly with the process "which he is keen to do" and would respond when he was in a position to do so. By letter of 20 March 2018 the first respondent advised that she would extend the date for a response to 4 April 2018. By letter of 30 March 2018 the petitioner's solicitors advised that further time would be required to consider their approach to witnesses, statements and documents. They asked for the period for formulating a response to be extended by a further 8 weeks within which period the petitioner "might be

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able to respond to some of the allegations in whole or in part". By letter of 4 April 2018 the first respondent agreed to extend the deadline for a response to Wednesday 25 April 2018. By letter of 23 April 2018 the petitioner's solicitors wrote to the first respondent (i) stating that they considered that "in the circumstances of this case" it would not be possible to apply the Procedure in a manner consistent with the principles of procedural fairness; (ii) nevertheless reserving the petitioner's right to offer a response; (iii) offering mediation involving the petitioner, Scottish Government and Complainers A and B; and (iv) identifying a number of 'procedural difficulties'. By letter of 24 April 2018 the first respondent replied that mediation would not be appropriate at that time and inviting the petitioner to provide a substantive response by close of business on 25 April. By letter of 26 April 2018 the petitioner's solicitors, inter alia, repeated the offer of mediation and their objections to the Procedure. They identified five witnesses that they wished to be interviewed in relation to complaints J and K. They provided, in an appendix, the petitioner's response to complaints J and K. By letter of 30 April 2018 the first respondent, inter alia, advised the petitioner's solicitors

A (i) that Complainers A and had declined the
petitioner's offer of mediation; A

(ii) that the IO would arrange to interview the
individuals identified by the petitioner; and

B (iii) that the IO would decide whether to share copies
of any statements given in consultation with the B
witnesses. By letter of 8 May 2018 the petitioner's
solicitors complained about the investigation of
complaints J and K; the competency of the Procedure;
the investigation of complaint D; and the fairness of
investigating complaints A to I. They specifically

C requested confirmation that the witnesses identified C
by them would be interviewed only in relation to
complaints J and K. They also advised that one of
the five witnesses previously identified by them was
not willing to be interviewed but that a statement
from her would be provided under separate cover.

D Four witnesses were interviewed by the IO and a D
written statement was received from the fifth. By
letter of 5 June 2018 the petitioner's solicitors wrote
to "consolidate our objections to the proceedings as a
whole". By email of 6 June 2018 from the
petitioner's solicitors, the petitioner provided a
statement in relation to complaints J and K together E

A with [Redacted] dated 28 May 2018. By letter
of 26 June 2018 the petitioner's solicitors proposed
arbitration for the purposes of resolving the
petitioner's objections to the Procedure. By letter of
4 July 2018 the first respondent declined the proposal
for arbitration and advised the petitioner's solicitors
B that Scottish Government had received a freedom of
information request for details of complaints that may
have been received about the petitioner relating to the
period during which he was First Minister. By letter
of 9 July 2018 the petitioner's solicitors made
observations about the freedom of information request
C and repeated the proposal for arbitration. The
petitioner's solicitors' letter of 11 July 2018 repeated
the proposal for arbitration and asked for access to
the petitioner's private office diary for the period
[Redacted]. On 12 July 2018 the first respondent's p
rivate secretary wrote to the petitioner's solicitors pr
D oviding them with a copy
of the petitioner's diaries for the period [Redacted].
Those diaries were not redacted by the first respond
ent or by any person on her behalf as part of or
for the purpose of the investigation into the com
plaints raised against the petitioner: ministerial diar
E ies are redacted to protect personal data as a routi
ne part of the process to

A prepare them for archive in the public record. This A
 process had already been undertaken in relation to the
 petitioner's diaries in the course of 2017 and before
 receipt of the petitioner's solicitors' letter of 11 July
 2018. The IQ did not have sight of the petitioner's
B diaries. The same letter included a link to that part B
 of second respondents' website that listed the
 petitioner's public engagements. On the same date
 the first respondent wrote to the petitioner's
 solicitors and advised them, inter alia, that she
 expected to receive the IO's final report by close of
 business on 16 July 2018. Following receipt of a
C further letter from the petitioner's solicitors about C
 proposed arbitration, the first respondent wrote to
 them on 18 July 2018 offering the petitioner a
 further, final, opportunity to provide representations
 about the complaints made by Complainer A and
 Complainer B. She asked for those representations
D by no later than 3pm on 20 July 2018. Under cover D
 of a letter from his solicitors of 20 July 2018 the
 petitioner provided responses to the complaints made
 by Complainers A and B. On 22 August 2018 the
 petitioner was informed of the terms of the decision.

E STAT. X. In her letter of 7 March the first respondent E
 said:-

- A *"... ..You may also request that statements be taken by the Investigating Officer from witnesses other than the complainers. If you wish to request that such statements are taken please supply their names to the Investigating Officer. The Investigating Officer will speak to any such witnesses you nominate, provided*
- B *they are relevant to the causes for concern and agree to speak to her.*
- You will appreciate that it would be inappropriate to contact Scottish Government staff directly. All contact and correspondence should be directed to the Investigating Officer.*
- C *The complainers have consented to their personal data as set out in Annex B being shared on a confidential basis within Scottish Government, and with you, but only for the strictly limited purpose of this investigation. You may share the personal data with your legal advisors for the purposes of responding to*
- D *the complaints, but it should not be shared further without the express consent of the witnesses or complainers.*
- Let me assure you that we are handling this process with the utmost care and commitment to confidentiality. This is an internal process, and in line*
- E *with our usual practice, we will not make public comment on the investigation."*

The text of the complaints include sensitive personal data of the complainants and the petitioner.

In a letter to the petitioner's agents dated 4 April 2018 the first respondent said "It is not my intention to allow access to Scottish Government staff or documents – nor that you or your client should contact members of staff directly."

In a letter to the first respondent dated 13 June agents for the petitioner said:-

"As you know this whole matter has been dealt with under conditions of strict confidentiality. We refer in that regard to the assurances given by you on confidentiality in the previous correspondence.

Our position remains that you have no jurisdiction to apply the 2017 Procedure to complaints against our client and that any purported application of those rules is incompetent and unlawful on the ground of procedural unfairness. That being so the purported investigation by the IO and your involvement in the procedure involve a contravention of our client's right to privacy. The purpose of this letter is to seek an assurance from you that the strict confidentiality which has governed this process will be preserved whatever the outcome of this matter.

For the avoidance of doubt, any communication or publication by you of; -

A *(1) the existence of these proceedings,*
 (2) any purported determination by you,
 (3) any report from the IO,
 (4) any of the evidence she has purportedly collected,
 would be a breach of confidence and a violation of our
 client's right to privacy.

B *In the event that you do communicate any of these*
 matters to any person (including the First Minister) in
 a purported application of the 2017 Procedure, you
 will be doing so in breach of confidence. If
 notwithstanding the above you still take that step, we
 would separately insist that you impose strict
C *conditions of confidentiality. We also insist that you*
 give proper notice to the persons receiving your
 communication that the matters are subject to a strict
 duty of confidence and specifically of our client's
 position as set out above and in the previous
 correspondence."

D The first respondent replied on 21 June saying:-
 " I can confirm that the Scottish Government continues
 to take all reasonable steps to maintain the
 confidentiality of this investigation. However, you
 will appreciate that I cannot provide an absolute
 guarantee of confidentiality at any stage given the
E *Scottish Government's statutory obligations, including*

those in relation to Parliament and Freedom of Information legislation.”

Ans. 10. The correspondence between the first respondent and the petitioner’s solicitors is referred to for its whole terms beyond which no admission is made. The petitioner did not seek access to any specific documents other than witness statements. The first respondent was concerned that the petitioner should not contact individual civil servants direct because (a) the Procedure quite properly does not provide for the reinterview or questioning of complainers or witnesses by a former minister against whom a complaint is made and (b) the nature of the complaints being investigated were such that direct contact by the petitioner had the potential to cause anxiety and distress to complainers and witnesses.

STAT. XI. [Redacted]

It is and will be destructive of his reputation and standing in the eyes of all persons (including Ministers and civil servants) who have or will have access to the second respondent’s records. It will cause the petitioner enormous loss and damage. Any information about the decision which is given out by the first respondent or anyone in or connected with the second

A respondent in terms of paragraphs 11 and 12 of the Procedure and any such information which enters the public domain through the respondents' performance of their statutory obligations or otherwise will have the same harmful consequences for the petitioner. Any further action taken by the first respondent and any steps taken by the First Minister in terms of paragraphs 11 and 12 of the Procedure respectively will or might constitute further sanctions against the petitioner. With reference to the respondents' averments in answer the Procedure and the Decision Report are referred to for their terms beyond which no admission is made. As for the rest explained and averred that on [Redacted] the first respondent informed the petitioner's agents that she was going to issue a press release at 5pm that day stating that the Scottish Government had received two complaints against the petitioner under the Procedure. That day the petitioner was informed by a journalist from the tabloid press that his newspaper was about to publish details of some of the allegations which feature in the decision. Those allegations together with other information concerning the decision have been extensively reported in the press and media from [Redacted] onwards. It must have been obvious to the respondents from prior to that date that the decision would result in details of the allegations entering the public domain where they would attract enormous public interest.

- A The respondents knew or ought to have known that the petitioner's reputation would be severely damaged by this. Reference is made to the "Sexual Harassment: Routemap" annexed to the Fairness at Work document (respondents' production number 7/8 of process). The "Potential Outcomes" column illustrates that paragraph 12 of the
- B Procedure leads to possible sanctions against the former minister additional to the recording of the decision, contrast the position with complaints against former employees of the second respondent. The types of sanction which are available in the disciplinary codes of most employers, professional bodies and other regulatory organisations
- C include inter alia reprimand, caution, censure and admonition. Those forms of sanction are the equivalent or near equivalent of a recorded finding of misconduct under the Procedure. They are no more harmful to the standing and reputation of a person who is sanctioned in that way than is the decision in this case harmful to the petitioner's
- D standing and reputation.

Ans. 11. Admitted that on [Redacted] the first respondent informed the petitioner's solicitors that she was going to issue a press release under explanation that she also provided a copy of the text of the proposed press release. The consequences for the petitioner of the decision are not known and not

admitted. The petitioner's averments anent

A approaches made to him by the tabloid press are not
known and not admitted. The “Sexual Harassment
Routemap' is referred to for its terms. Quoad ultra
 denied. [Redacted]

B

In considering whether a complaint was well founded
 the first respondent considered whether, in her view,
 as a matter of fact the events complained of took
 place and whether the events complained of amounted
 C to harassment: cf. decision report, paragraph 26. The
 Procedure requires the first respondent to inform the
 First Minister (in her capacity as First Minister and
 in her capacity as the leader of the party of which the
 petitioner was a member) of the outcome of her
 investigation. The Procedure does not empower the
 D respondents, or any of them, to impose any sanction
 on the petitioner. The first respondent explained in
her letter of 23 August 2018 to the petitioner’s
solicitors that she had been giving consideration to
the public interest in determining the appropriate
response to the outstanding freedom of information
 E request about complaints concerning the petitioner.
She explained that she had concluded that the public

A interest lay in limited public disclosure of the fact of
the complaints. She explained that the response that
would be made to the FOI request would refer to that
statement. In the event, and following the lodging of
this petition and intimation of the petitioner's
intention to seek interim interdict, the press release
 B was not issued and the first and second respondents
and interested party did not confirm the existence of
the complaints until after the petitioner did so
himself in a media statement issued on 23rd August.
The petitioner made extensive public statements on
and after 23 August, via social and broadcast media,
 C about the existence of the complaints and their
investigation. Those statements went far beyond the
very limited publication proposed to be made by the
first respondent. The response to the FOI request
was issued on 20 September 2018.

D **Legal Arguments**

D **STAT. XII. Ultra Vires.** The Procedure has no
 statutory or other legal basis. **Its application to these**
complaints against the petitioner is ultra vires the powers of
 the first respondent. The petitioner was not a Minister
 when the Procedure was brought into being. He did not
 E agree to it being brought in or to be bound by it or to it
 being applied to these complaints. **The petitioner is not a**

A party to the agreements referred to in paragraphs 2 and 3 of the decision report. He was not subject to the doctrine of collective Ministerial responsibility when it was brought in. With reference to paragraph 3 of the decision report there are no “similar actions across UK government departments” which purport to retrospectively apply rules comparable to those in the Procedure to complaints against former ministers or other persons. The first respondent has no legal right or authority to subject the petitioner to the Procedure or to purport to make a decision which includes a finding that he has been guilty of misconduct. Esto the Procedure forms part of the terms and conditions of service of the complainers (which is not known and not admitted) it is not binding on the petitioner. With reference to the respondents’ averments in answer admitted that the second respondent has a duty of care, as employer, to civil servants in the Scottish Administration. Admitted that the second respondent is entitled to put in place procedures to protect its staff, both prospectively and by learning from past issues. Admitted that the grounds giving rise to part of the application for judicial review relate in part to the existence and content of the Procedure. Admitted that the petitioner was aware of the existence and content of the Procedure, and that it was being applied to him, by 7 March 2018. Admitted that he had engaged solicitors by 16 March 2018. Admitted that he received advice about the vires of the Procedure at

A an early stage. As for the rest the respondents' averments
 are denied except in so far as they coincide herewith.
 Reference is made to the petitioner's averments in paragraph
 2 of the petition anent section 27A of the Court of Session
 Act 1988. [Redacted]

B According to its terms the Procedure
 purported to be binding on the petitioner whether he co-
 operated in the IO's investigation or not. He had no power
 to prevent the IO concluding that investigation or to prevent
 the first respondent purporting to make decisions under and
 in terms of paragraph 11 of the Procedure or to prevent her
 C from recording those decisions within the Scottish
 Government or to prevent her from taking further action if
 she saw fit in terms of paragraph 11 or to prevent her
 informing the First Minister of the outcome in terms of
 paragraph 12. The duties incumbent on the second
 respondent and the powers available to them to put in place
 D staff protection procedures did not require or permit the
 first respondent make an incompetent decision by unlawful
 means.

Ans. 12. **Ultra vires.** Admitted that the petitioner was
 not a Minister when the Procedure was brought into
 being. Admitted under explanation to follow that the
 petitioner did not agree to the Procedure being
 E brought in or to be bound by it. Admitted that he

was not subject to the doctrine of collective ministerial responsibility when it was brought in.
[Redacted]

The Procedure is referred to
for its terms. Quoad ultra denied. Explained and averred that the second respondent has a duty of care, as employer, to civil servants in the Scottish Administration. It has a responsibility to ensure the effective investigation of complaints of harassment, bullying and other inappropriate conduct in the workplace. The Procedure is one of a number of mechanisms by which the second respondent discharges its responsibilities as an employer. The discharge by the second respondent of those responsibilities does not require, and is not conditional upon, the consent of the petitioner. As with any employer, the second respondent is entitled to put in place procedures to protect its staff, both prospectively and by learning from past issues. The petitioner is not 'bound' by the terms of the Procedure: it was open to the petitioner to decline to respond to the complaints made against him or to otherwise engage with the Procedure. The Procedure

(paragraph 15) makes express provision for the possibility that a former minister may decline to co-operate with the investigation process. Separately, and in any event, the “grounds giving rise to [this part of] the application” for judicial review relate to the existence and content of the Procedure. The petitioner was aware of the existence and content of the Procedure, and that it was being applied to him, by, at the latest, 7 March 2018. He had engaged solicitors by, at the latest, 16 March 2018 and can be expected to have sought and received advice about the vires of the Procedure at an early stage. Any challenge to the vires of the Procedure should have been brought, at the latest, by 6 June 2018: Court of Session Act 1988, S.27A.

STAT. XIII. **Error of Law.** The first respondent said in her letter of 21 June that:-

“The Scottish Government is not asserting any jurisdiction nor can it impose any sanction on [the petitioner].” In making that assertion the first respondent has erred in law. The Procedure does involve her asserting jurisdiction over the petitioner on behalf of the second respondent in respect that she has taken it upon herself to apply the Procedure to the complaints against him and has purported to decide

A that some of the complaints are well-founded and has imposed the sanctions set out in the Procedure at paragraphs 11 and 12. **The respondents' averments in answer are denied save in so far as they coincide herewith.** A

Ans. 13. **Error of law.** Denied. Reference is made to Answer 12. Explained and averred that the reference to jurisdiction in the first respondent's letter of 21 June was in the context of an assertion by the petitioner's solicitors in their letter of 13 June 2018 that the use of the Procedure to investigate complaints made against the petitioner was incompetent and unlawful. The first respondent in her letter of 21 June reiterated, correctly, that the petitioner was free to choose whether or not to participate in the investigation but that "the Scottish Government cannot, as a consequence of any non-participation be prevented from taking steps to investigate complaints". B

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STAT. XIV. Incompetency. The Proceedings against the petitioner are incompetent in respect that the complaints are of alleged misconduct which occurred long before the Procedure was written or came into effect. The Procedure does not bear to have retrospective effect and does not have that effect. At the time the alleged misconduct occurred E

A complaints of this kind were dealt with using a different
procedure called “*Fairness at Work Policy and Procedures*”
 (“Fairness at Work”). Fairness at Work does not purport to
apply to the conduct of former ministers. **Separately,**
Fairness at Work does not contain the procedural constraints
referred to in paragraphs 17 to 23 of this Petition.

B Applying the Procedure to complaints which could have been
brought against the petitioner while he was a Minister under
Fairness at Work would remove or substantially impair the
petitioner’s right to have those complaints dealt with in
accordance with the rules of procedural fairness and his
rights under Article 6 of the ECHR. With reference to the

C respondent’s averments in answer admitted that the
Procedure according to its terms expressly applies to
complaints against former Ministers under explanation that
it applies to former Ministers who held Ministerial posts
when and after the Procedure came into effect. Admitted
that the grounds giving rise to part of the application for

D judicial review relate in part to the existence and content of
the Procedure. Admitted that the petitioner was aware of
the existence and content of the Procedure, and that it was
being applied to him, by 7 March 2018. Admitted that he
had engaged solicitors by 16 March 2018. Admitted that he
received advice about the vires of the Procedure at an early

E stage. As for the rest the respondents’ averments are
denied except in so far as they coincide herewith.

Reference is made to the petitioner's averments in paragraph 2 of the petition anent section 27A of the Court of Session Act 1988. The petitioner does not know whether these complaints were made after the Procedure came into force. The complainers were both in contact with senior employees of the second defender in connection with the conduct of the petitioner when he was First Minister. In respect that those contacts included "*discussions concerned (sic) the options available to each complainer...and their preference for how their concerns should be handled*" (Answer 6) it is believed and averred that those contacts included communication and discussion of the complaints which are the subject matter of this petition and the procedural options open to the complainers. Reference is made to the averments in paragraph 6 above about the events leading up to finalisation of the Procedure and in paragraph 19 below about the complainers' dealings with senior employees of the second respondent including Judith Mackinnon during that period. ~~Those complaints were made~~ Both complainers had made their complaints about the conduct of the petitioner to the second respondent before the Procedure came into effect. Ms A's formal complaint was emailed by her to Ms Russell on 16 January 2018. It comprised a document which was a copy of the "first note" emailed by Ms Russell to Ms Richards and Ms Mackinnon as hereinbefore condescended upon. It was in substance and in form a repetition of the

A complaint she made against the petitioner in November 2017 before the Procedure came into effect. Reference is made to the calls contained in paragraph 6 of this petition.

Ans. 14. **Incompetency.** Admitted that Complainers A and B were in contact with senior employees of the second respondent in connection with the conduct of the petitioner when he was First Minister and that those contacts included communication and discussion of the procedural options open to the complainers. The Procedure and Complainer A's email of 16 January 2018 are referred to for their terms under explanation that Complainer A's email was sent to Ms Richards and not to Ms Russell, Quoad ultra denied. Explained and averred that the Procedure expressly provides for the investigation of complaints against former ministers. Separately, and in any event, as a procedural mechanism, the Procedure would be expected to apply, and to be applied, for any complaints made after its coming into force, regardless of when the conduct complained of is said to have occurred. *Complainers A and B made formal complaints after the Procedure came into force.* The Fairness at Work policy in place at the time the petitioner was First Minister did not provide for a minister who was the subject of a complaint to have access to witnesses, witness

A statements, documents or opportunities to question A
 complainers or witnesses. Further, the “grounds
 giving rise to [this part of] the application” for
 judicial review relate to the application of the
 Procedure to complaints of conduct occurring whilst
 the petitioner was First Minister. The petitioner was
 B aware that the Procedure was being so applied by, at
 the latest, 7 March 2018. He had engaged solicitors
 by, at the latest, 16 March 2018 and can be expected
 to have sought and received advice about the
 competency of the application of the Procedure to him
 C at any early stage. Any challenge to the application
 of the Procedure to him should have been brought, at
 the latest, by 6 June 2018: Court of Session Act 1988,
 S.27A. C

 STAT. XV. **Procedural Unfairness.** The purported
 application of the Procedure to these complaints is
 procedurally unfair and thus unlawful. The IO is required
 D to “*undertake an impartial collection of the facts*” and to
 prepare an initial report for the first respondent (2017
 Procedure paragraph 10). Thereafter, if the first respondent
 finds cause for concern over the former Minister’s
 behaviour, she must provide him or her with “*details of the*
 E *complaint.*” The former Minister is allowed to submit a
 statement responding to the allegations and to “*request that* E

statements are taken from other witnesses” (paragraph 11). The IO then prepares a revised report for consideration by the first respondent. She must then “*decide whether the complaint is well founded*” (paragraph 11 again). This is a quasi-judicial procedure which involves evaluation of contentious evidence and the making of findings in fact. In terms of paragraph 10 of the Procedure it is the responsibility of the IO to “*undertake an impartial collection of facts.*” It is then for the first respondent to decide whether any conduct which is found to have occurred amounts to harassment of civil servant complainers. With reference to the respondent’s averments in answer admitted that the grounds giving rise to part of the application for judicial review relate in part to the existence and content of the Procedure. Admitted that the petitioner was aware of the existence and content of the Procedure, and that it was being applied to him, by 7 March 2018. Admitted that he had engaged solicitors by 16 March 2018. Admitted that he received advice about the vires of the Procedure at an early stage. As for the rest the respondents’ averments are denied except in so far as they coincide herewith. Reference is made to the petitioner’s averments in paragraph 2 of the petition anent section 27A of the Court of Session Act 1988. The respondents could achieve their stated aim of protecting staff by allowing investigation of complaints of harassment so that lessons can be learned and protection

A put in place without a formal decision to the effect that a
former minister has been guilty of misconduct. That
decision did impose punishment on the petitioner as
hereinbefore condescended upon. In any event the pursuit of
the stated aim did not require that the Procedure should
operate in such a way as to exclude or infringe the rules of
B procedural fairness. A decision taken in circumstances
where those rules are ignored or infringed is likely to be
flawed. In those circumstances the stated aim is badly
served.

Ans. 15. **Procedural Unfairness.** The Procedure is
referred to for its whole terms. *Quoad ultra* denied.
C Explained and averred that paragraph 10 of the
Procedure concerns the preparation by the
Investigating Officer of an initial report. Paragraph
11 of the Procedure provides that the first respondent
must consider whether that initial report gives cause
for concern over the behaviour of a former minister
D towards current or former civil servants. If that
decision is in the affirmative, further procedure
follows, which procedure involves the former
minister being given details of the complaint, an
opportunity to respond and an invitation to provide a
statement setting out their recollection of events to
E add to the record. The former minister is entitled to
request that statements are taken from other

witnesses. The procedure concludes with the first respondent considering any revised report and deciding whether the complaint is well- founded and (if it is well-founded) determining whether any further action is required. The outcome of the investigation is recorded within the Scottish Government. The Procedure does not bear to set out, and is not in fact, a “quasi-judicial” procedure. The aim thereof is not to punish an alleged wrongdoer or to compensate an alleged victim. The aim is rather to protect staff by allowing investigation of complaints of harassment in order that lessons may be learned therefrom and protections put in place accordingly. Further, the “grounds giving rise to [this part of] the application” for judicial review relate to the terms of the Procedure. The petitioner was aware of the terms of the Procedure by, at the latest, 7 March 2018. He had engaged solicitors by, at the latest, 16 March 2018 and can be expected to have sought and received advice about the terms of the Procedure at any early stage. Any challenge to the application of the Procedure to him should have been brought, at the latest, by 6 June 2018: Court of Session Act 1988, s.27A.

STAT. XVI. In this case it is apparent that the first respondent has assumed the role of fact finder. Reference is made to paragraphs 24 to 26 of the decision report. In so doing she acted ultra vires the powers conferred upon her by the Procedure.

Ans. 16. Denied. Explained and averred that a judgment about whether a complaint is well- founded involves an assessment as to whether the matters complained of took place and an assessment as to whether those factual matters amount to harassment. The assessment of those matters is properly a matter for the first respondent under the Procedure.

STAT. XVII. Separately, the documents which the first respondent purported to take account of in reaching her decision was a report from The IO which included [Redacted]

Neither the IO nor the first respondent gave the petitioner any of the material presented to the first respondent by the IO. The petitioner has never seen that material. The petitioner was prevented from giving a full and fair response to the allegations against him because of this. With reference to the

respondent's averments in answer admitted that the grounds giving rise to part of the application for judicial review relate in part to the existence and content of the Procedure. Admitted that the petitioner was aware of the existence and content of the Procedure, and that it was being applied to him, by 7 March 2018. Admitted that he had engaged solicitors by 16 March 2018. Admitted that he received advice about the vires of the Procedure at an early stage. The Procedure and the first respondent's letter of 7 March 2018 are referred to for their terms beyond which no admission is made. As for the rest the respondents' averments are denied except in so far as they coincide herewith. Reference is made to the petitioner's averments in paragraph 2 of the petition anent section 27A of the Court of Session Act 1988. The petitioner was unable to give a proper or full response to the allegations. His ability to respond to the factual content of the allegations by submitting a statement of his own or by submitting statements from witnesses or suggesting witnesses to be interviewed by the IO or by presenting or identifying documentary evidence was severely constrained by the first respondent's refusal to provide him with the evidential material gathered by the IO including the IO's reports. So was his ability to make representations on that material and on the merits of the complaints. [Redacted]

A [Redacted]

Ans. 17. Admitted that neither the IO nor the first respondent gave the petitioner any of the material presented to the first respondent by the IO. Quoad
 B ultra denied. Explained and averred that the
 Procedure requires that where a report gives cause for
 concern over the behaviour of a former minister, that
 former minister should be provided with details of the
 complaint and given an opportunity to respond. The
 Procedure does not provide for the sharing with the
 C former minister of any further material relating to the
 investigation into the complaints. The petitioner was
 given details of the complaints made against him
 under cover of the first respondent's letter of 7
 March 2018. [Redacted]

, the petitioner was in
 D each case provided with sufficient information about
 each complaint to enable him to respond (as is
 apparent from the responses ultimately provided by
 him). The petitioner has not made relevant or specific
 averments as to the manner in which he was prevented
 from giving a 'proper or full response' to those
 E allegations. Further, the "grounds giving rise to [this
 part of] the application" for judicial review relate to

A the terms of the Procedure (which does not provide A
for the sharing of witness statements or other
documents). The petitioner was aware of the terms of
the Procedure by, at the latest, 7 March 2018. He had
engaged solicitors by, at the latest, 16 March 2018
and can be expected to have sought and received
B advice about the terms of the Procedure at any early B
stage. Any challenge to the application of the
Procedure to him should have been brought, at the
latest, by 6 June 2018: Court of Session Act 1988,
S.27A.

C STAT. XVIII. The principles of procedural fairness C
include the right of a person in circumstances like these
*“effectively to prepare their own case and to answer the
case (if any) they have to meet” –De Smith, Judicial Review
paragraph 7-044.* The 2017 Procedure does not safeguard
this right. On the contrary the person accused of misconduct
D is deprived of the right to prepare and present their case D
because they are denied access to potential witnesses and
documents. **The petitioner was denied access to Scottish
Government staff and documents.** The petitioner was not
permitted to share the complainer’s personal data with
E 7 March). That personal data was the subject matter of the E
complaints. The petitioner was thereby prevented from

A putting any part of the allegations to persons who might
 have been able to act as witnesses giving evidence in
 support of his denial of the allegations. This is unfair and is
 an inequality of arms. With reference to the respondent's
 averments in answer admitted that the grounds giving rise to
 part of the application for judicial review relate in part to
 B the existence and content of the Procedure. Admitted that
 the petitioner was aware of the existence and content of the
 Procedure, and that it was being applied to him, by 7 March
 2018. Admitted that he had engaged solicitors by 16 March
 2018. Admitted that he received advice about the *vires* of
 C the Procedure at an early stage. The first respondent's
 letter of 7 March 2018 and the subsequent correspondence
 are referred to for their terms beyond which no admission is
 made. As for the rest the respondents' averments are
 denied except in so far as they coincide herewith.
 Reference is made to the petitioner's averments in paragraph
 2 of the petition anent section 27A of the Court of Session
 D Act 1988.

Ans. 18. Denied. Explained and averred that in her
 letter of 7 March 2018 the first respondent advised
 the petitioner that the complainers had consented to
 their personal data being shared within Scottish
 Government and with the petitioner for the purpose of
 E the investigation into their complaints. The first
 respondent indicated that the personal data could be

shared by the petitioner with his legal advisors but should not be shared further without the express consent of the witnesses or complainers. The first respondent could not bind the petitioner not to use the complainers' personal data. The petitioner did not at any time seek the consent of the witnesses or complainers to the further sharing of the personal data of the witnesses or complainers. To the extent that the petitioner offered additional witnesses for interview his solicitors objected to those witnesses being asked about any of the complaints that were ultimately found by the first respondent to be well-founded. Those witnesses were, at the petitioner's request, asked only about causes for concern K and J, which causes for concern were not the subject of any finding by the first respondent. So far as the limiting of direct access by the petitioner to civil servants is concerned, reference is made to answer 10. The petitioner did not seek access to any specific documents beyond witness statements and his diaries. The latter were made available to him. Separately and in any event the "grounds giving rise to [this part of] the application" for judicial review relate to the fact that the Procedure does not provide for access on the part of the person complained about to documents. The petitioner was aware of the content of the

A Procedure in that regard, and of first respondent's
 position in relation to the sharing of personal data,
 by, at the latest, 7 March 2018. He had engaged
 solicitors by, at the latest, 16 March 2018 and can be
 expected to have sought and received advice about
 this issue at any early stage. Any challenge should
 B have been brought, at the latest, by 6 June 2018;
 Court of Session Act 1988, s.27A.

STAT. XIX. Prior to her appointment the IO (Ms
 Mackinnon) had involvement and contacts with the
 complainers. Reference is made to the averments in
 Paragraph 6 of the petition and to the averments adjusted
 C into Answer 6 on 5 November 2018. In respect that those
 contacts included *"discussions concerned (sic) the options
 available to each complainer...and their preference for how
 their concerns should be handled"* it is believed and averred
 that the IO's said involvement included discussion of the
 complaints which are the subject matter of this petition and
 D the procedural options open to the complainers. Prior to that
 date the petitioner had no knowledge of that involvement.
 From 8 November 2017 at the latest Ms Mackinnon was
 copied into emails to which various drafts of the Procedure
 were attached and which contained comments on those
 drafts. In an email sent on behalf of the first respondent to
 E Ms Allison on 10 November 2017 (7/54 of process) Ms
 Mackinnon was named as a person who would play a leading

A role in the management of complaints of sexual harassment. Ms Allison had spoken to Ms B on 8 November 2017. Believed and averred that the first respondent was aware as of 10 November 2017 of complaints against former ministers including the complaint by Ms B against the petitioner. The first respondent wrote “[Ms Mackinnon] and team will work with you to provided the details for sources of support....They will also arrange legal advice around the limits to confidentiality and when you would need to pass information directly to Police/People Directorate. It would be helpful if you could give regular updates to [Ms Richards/Ms Mackinnon] if issues are raised with you -and to review any emerging themes. They will then collate and provide me with updates as required.” On 14 November 2017 Ms Mackinnon emailed to Ms Russell a “checklist” of questions for use in interviewing persons making complaints of the kind made about the petitioner (7/56 of process). On or before 22 November 2017 Ms Russell interviewed Ms A about her complaint against the petitioner. On 22 November 2017 Ms Russell emailed Ms Richards and Ms Mackinnon (7/29 of process) attaching a “first note” of a meeting with Ms A saying “Ms A would like to be kept fully informed and able to influence any subsequent decisions....” The note contained details of and pertaining to the complaint by Ms A about the petitioner. By 24 November 2017 at the latest both the first respondent

A and Ms Mackinnon were fully familiar with the draft
Procedure as it then was and with the policy review which
gave rise to it. By that date both of them had seen reports
to Ms Russell and Ms Allison on the allegations against the
petitioner and of statements obtained from the complainers.
Both the first respondent and Ms Mackinnon were aware of
discussions between senior employees of the second
respondent and the complainers about how the complaints
might be progressed. Reference is made to an email dated 23
November 2017 at 18.26 from Ms Richards to the first
respondent copied to Ms Mackinnon (7/80 of process).
Attached to that email were an update of cases which had
already been reported to the second respondent's HR team
and to Ms Russell, reports made to Ms Russell and Ms
Allison of allegations against a former minister and two
statements taken by Ms Russell and Ms Allison from
members of staff of the second respondent. By 23
November 2017 Ms Mackinnon had taken legal advice on
how to manage these complaints. In an email to Ms Russell
and Ms Richards on that date (7/79 of process) Ms
Mackinnon said that *"we are now in a "state of knowledge"
and so we have to ensure that we have a paper trail that
demonstrates we are taking action.... We cannot take the
claims on face value as fact – but the difficulty for us is
testing those claims, given who they are against, however,
other witnesses who come forward with similar issues would*

A *be helpful corroboration...* "The complaints being referred to
by Ms Mackinnon were the complaints made about the
petitioner. By 29 November 2017 at the latest Ms Mackinnon
had seen a "*narrative*" of one or both of the complainers Ms
A and Ms B. Reference is made to an email from Ms
Allison to Ms Richards, Ms Russell and Ms Mackinnon dated
B 29 November 2017 (7/36 of process). Ms Richards and Ms
Mackinnon met with Ms A on [Redacted] and
discussed with her her complaint against the petitioner and
the then current draft of the Procedure. Ms A provided
them with the names of three witnesses who she said could
corroborate her account. Reference is made to an email
C from Ms Richards to Ms Mackinnon dated 15 December 2017
and to the timeline attached (7/39 of process). The timeline
contains references to the complaints by Ms A and Ms B.
That email and the timeline were sent to [Redacted] in the
first respondent's office. Ms Mackinnon spoke to the
complainer Ms B on or about [Redacted]. They
D discussed her complaint against the petitioner and how it
might be progressed. [Redacted] Ms Mackinnon
emailed Ms B (7/38 of process) saying "*I have set out a
couple of options in terms of next steps for you to consider.
These draw upon our policy for dealing with this kind of
complaint...*" Those options included the submission of a
E formal complaint which would according to Ms Mackinnon
be dealt with under the Procedure (then in draft form) with

her as IO. The email also states “...*there may be other individuals who are also prepared to submit a complaint. I will confirm to you if this is the case.*” As at [Redacted]

the second respondent did not have a policy in place for dealing with complaints made by former employees against former ministers. ~~By 14 December 2017 Ms~~

~~Mackinnon had met with one of the complainers to discuss the content of her complaint against the petitioner and the options open to her to pursue that complaint. That complainer had been given a copy of the draft of the Procedure as it then was and she had been informed that it was likely that Ms Mackinnon would be appointed as the IO.~~

~~By that date Ms Mackinnon had had a similar discussion with the other complainer.~~ The first respondent and Ms

Richards were aware of the complainers’ knowledge of these matters by ~~that date~~ 14 December 2017 at the latest.

Reference is made to an email from Ms Richards to one of the complainers (Ms A) dated 14 December 2017 at 13.42

(7/33 of process) copied to Ms Mackinnon informing the complainer that “*we have now spoken to two other people who are also considering their position.*” The email

suggests that the complainer should consider her position on whether to make a formal complaint and then “*reconvene on decisions in the new year.*” Ms Richards offers to fix a

date for a meeting for that purpose. The email set out options for “*the next steps*” which the complainer might

A take. Those options included the making of a formal
complaint applying the provisions of the (as then) draft
Procedure. The email states *inter alia* “Thanks for your
engagement with this so far and for stepping forward – this
is a moment when we can take action to reset the culture and
expectations of behaviour in the workplace and we’re
grateful to you for helping inform and shape that response.”
B ~~One of the complainers~~ The complainer was invited to
contact Ms Mackinnon in Ms Richards’ absence between 14
December 2017 and 9 January 2018. Ms B received a
message in the same terms as this email to Ms A on 14
December 2017 on or about the same date. As at 15
C December 2017 the decision had already been taken by Ms
Richards to appoint Ms Mackinnon as the IO in respect of
future formal complaints made by Ms A and Ms B against the
petitioner even though the Procedure was not in force as at
that date. One of the complainers (Ms A) emailed Ms
D Mackinnon on 19 December 2017 (7/34 of process) informing
her that she was minded to pursue a formal complaint
against the petitioner. The complainer requested a meeting
to discuss the practicalities of this. The respondents are
called upon to aver whether and if so when that meeting took
place and if it did what was discussed and/or agreed. On 19
December 2017 Ms Mackinnon emailed one of the
E complainers (Ms A) with whom she had previously been in
touch (7/32 of process). In that email Ms Mackinnon

A offered advice about the future conduct of a formal complaint against the petitioner. That advice included that she should not engage directly with the petitioner or his solicitor and that if those persons contacted her she should notify the second respondent *“and allow us to contact them to request that they do not make further contact with you.”*

B Ms B’s formal complaint was sent to and seen by Ms Mackinnon on 24 January 2018 (7/21 of process). At that point in time Ms Mackinnon had not been (and could not have been) appointed as IO in respect of Ms B’s complaint. She was fully appraised of the content of the complaint before that appointment was made. The IO’s appointment

C 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

D 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 respondents are called upon to aver

E the full extent of the IO’s involvement prior to her appointment and whether and if so when and in what terms

A that involvement was made known to the first respondent
prior to 5 November 2018. The purpose of the relevant
provision in paragraph 10 is: to safeguard the fairness of the
B 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
C 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*
D *Trust [2014] I.C.R. 194*. 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
E to the petitioner that appointment would cause a fair minded
and informed observer to conclude that there was a real

A 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. Separately the first respondent played a leading role in the development and introduction of the Procedure including its application to complaints against former ministers. By about 10 November 2017 the first respondent had determined that Ms Mackinnon would play a lead role in the management of complaints of sexual harassment against former ministers. She was aware from about 22 November 2017 that complaints had been made against the petitioner. By that date she was aware of all or some of the details of those complaints. On or about 14 December 2017 she received an update on the management of those complaints and on the prospect of formal complaints after the Procedure was introduced. By that date she was aware of the extent of Ms Mackinnon's involvement in the management of the complaints and the intention to appoint her as IO. In terms of the Procedure the first respondent

A should have no involvement in any complaint until after a formal complaint is made and a report has been submitted by the IO (paragraph 10). The purpose of this feature of the Procedure is to: safeguard the fairness of the Procedure; to ensure that the first respondent's decisions under paragraphs 10 and 11 are not tainted or compromised by information about the complaints obtained by her from any person before formal complaints are reported to her by the IO or by her own prior involvement in the management of the complaints before that stage; to avoid bias or the appearance of bias by her in taking her decisions. Having regard to the first respondent's involvement in the development and introduction of the Procedure, her knowledge of Ms Mackinnon's prior involvement in these complaints before her appointment as IO and the first respondents knowledge of and involvement in the management of these complaints against the petitioner from an early stage before formal complaints were made a fair minded and informed observer would conclude that there was a real possibility of conscious or unconscious bias in the decisions made by the first respondent about those complaints. Separately for the same reasons those decisions were in all the circumstances procedurally unfair. Separately, it is manifestly unfair to expect the former minister to exercise their right to prepare their own case through the offices of an IO who can exercise her own choice as to which witnesses to speak to and what to

ask them. It is manifestly unfair to allow the IO, who is responsible for gathering evidence on which the complaints are based, who (in this case) obtained supplementary evidence from the complainers and from witnesses after she had submitted her revised report in terms of paragraph 11 of the Procedure and who makes (or is supposed to make) findings in fact which are reported to the decision maker (the first respondent), to have access to witness statements and documents which the petitioner was not allowed to see. This is inequality of arms and hence a denial of natural justice. The IO had two conflicts of interest. First, as the person who gathered and presented the evidence on which the complaints are based and as the person who is supposed to have prepared and presented evidence for and on behalf of the petitioner. Second, as the person who was responsible for investigating the complaints and as the person who was responsible for making purported findings in fact. **With reference to the respondents' averments in answer admitted under reference to paragraph 23 k and l of this petition that following the submission of the IO's revised report the IO was asked to consider further representations made on behalf of the petitioner. The Procedure and the Decision Report are referred to for their terms beyond which no admission is made. As for the rest these are denied except in so far as coinciding herewith.**

A Ans. 19. Admitted that prior to her appointment as **10**
Ms Mackinnon had involvement and contact with the
complainers. Admitted that as at 5 December 2017 the
second respondent did not have a policy in place for dealing
with complaints made by former employees against former
ministers under explanation that the absence of such a policy
B would not prevent the investigation of such complaints if
received and would not justify a failure to so investigate.
Admitted that the first respondent played a leading role in the development and
introduction of the Procedure. Admitted that the first respondent was aware by late
November 2017 that concerns had been raised concerning the petitioner's conduct
C while First Minister under explanation that she did not know the identities of
persons who had raised concerns or the details of their allegations. C

The internal communications amongst employees of the
second respondent anent the development of the
Procedure and the communications with Complainers
D A and B are referred to for their terms under
explanation that the email of 14 December 2017 at
13:42 was sent to the third individual who had raised
concerns but did not ultimately make a complaint
Quoad ultra denied. Reference is made to Answer 6.
Explained and averred that the emails of 10 and 14
E November 2017 were concerned with complaints in E

A general and not with the petitioner specifically. Ms A
Mackinnon and Nicola Richards received a note from
Gillian Russell describing her meeting with
Complainer A. That note is *produced*. Ms
Mackinnon and Ms Richards met *Complainer A* on .
[Redacted] — During that *meeting* the details of
B Complainer A's concerns were not discussed. Ms B
Richards *sent an email to* Complainer A on 14
December 2017 which was copied *to* Ms Mackinnon
describing the options available to Complainer A. Ms
Mackinnon emailed *Complainer A* on 19 December
C 2017 in response to queries raised by her about the C
implications of making a complaint That email is
produced. There was no further meeting with
Complainer A prior to 16 January 2018 when she
made her formal *complaint*. By agreement with Ms
Richards, Ms Mackinnon spoke to Complainer B
[Redacted] on [Redacted]. Ms *Mackinnon* di
D d *not have* any details of the nature of *Complainer B*' D
s *concerns* and [Redacted] Complainer B did *not* di
sclose what *had happened* to her. Complainer B s
aid *that she wanted* to consider whether to make a f
ormal complaint. Ms Mackinnon *followed* the
conversation with an email on [Redacted] —
E setting out *options*. That *email* is produced. She *did* E
not know the subject matter of Complainer B's

complaints until Complainer B's formal complaint was received. Ms Mackinnon had no prior involvement in the events that formed the subject matter of the complaints made by Complainers A and B. She became an employee of the second respondent in August 2017 and before then had no prior role within the second respondent. She had no connection with or involvement in events that took place in [Redacted] involving the complainers or the petitioner. She is an experienced HR professional. The Procedure does not demand that the first respondent has no information about the existence or nature of potential complaints against former ministers prior to formal complaints being made. The Procedure requires the IO to collate factual material. It does not require the IO to make findings of fact. The IO is not expected to, and did not, make recommendations intended to influence the first respondent's decision. The Procedure requires the first respondent to decide whether the complaints are well-founded. The first respondent was aware that reports had been made to Ms Allison and Ms Russell and that discussions were taking place with complainers about their options. She did not have sight of notes of meetings or witness statements until she received the IO's report in February 2018. A

A decision whether a complaint is well founded—That A
 involves an assessment as to whether the matters
 complained of occurred as a matter of fact.
 Following submission of the revised report, the IO
 was asked to consider further representations made on
 behalf of the petitioner. Reference is made to the
 B decision report, paragraphs 18 to 20. The IO no B
 more had a conflict of interest than does any person
 investigating any complaints. *The first respondent's*
decision was not affected by apparent bias.

STAT. XX. The principles of procedural fairness include
 C access to evidence on which the case against the person C
 accused of misconduct is based – *De Smith paragraph 7-044,*
cases cited in footnote 211 and paragraph 7-060. Under the
 Procedure the only information disclosed to the petitioner
 was the bare allegations. He could not formulate a proper
 response without seeing the detail of the allegations as set
 D out in statements from the complainers and any other D
 witnesses, in the IO's initial report (paragraph 10), in her
 revised report and in the information subsequently submitted
 by her to the first respondent. It is apparent from the
 decision **report** that the decision was influenced by
 statements obtained from numerous unidentified witnesses.
 E This is another denial of natural justice. **With reference to** E
the respondents' averments in answer the first respondents'

A letter of 7 March 2018 and the decision report are referred to for their terms beyond which no admission is made. As for the rest these are denied except in so far as coinciding herewith. The responses which the petitioner offered to the allegations were severely constrained by the effects of the procedural unfairness described in this petition. The first respondent did not accept the petitioner's specific objections in relation to allegations J and K until she issued the decision report.

Ans. 20. Denied. Explained and averred that in relation to the causes of concern that the first respondent decided were well founded the petitioner was given sufficiently detailed information under cover of the first respondent's letter of 7 March 2018 to enable him to respond to them (and he did so respond). In relation to causes for concern J and K, in her letter of 21 June 2018 to the petitioner's solicitors the first respondent referred to the petitioner's objections to those causes for concern and explained that she would consider them further when she received the IQ's report. [Redacted]

STAT. XXI. It is manifestly unfair that the petitioner was denied access to copies of the IO's initial and revised reports for possible use in formulating a response to the allegations. This is another example of inequality of arms. The IO gave the first respondent a factual narrative upon which she based her final decision in whole or in part. That narrative includes assessments of the credibility and reliability of evidence from witnesses including the complainers. The petitioner was denied the opportunity to make submissions in response to that narrative. With reference to the respondents' averments in answer admitted that the petitioner was given details of each complaint by reference to a specific date or date range, location and the alleged behaviour which was the subject of the complaint. As for the rest these are denied except in so far as they coincide herewith. The ambit of the proceedings brought against the petitioner included a formal finding of serious misconduct and the adverse consequences for him as hereinbefore condescended upon. The rules of procedural fairness were not satisfied by merely giving the petitioner the gist of the allegations. The provisions of the Procedure which deal with complaints against current Ministers do not impose the procedural constraints summarised in paragraphs 18 to 21 of this petition. In particular, the current Minister is included in the class of persons from whom the IO is

A required to obtain “*an impartial collection of facts*” – A
 paragraph 6 of the Procedure. Under paragraph 10 a former
 Minister is excluded from that class. It is recognised
 practice in dealing with work related disciplinary complaints
 and grievances to apply the rules of procedural fairness by
 giving the person against whom a complaint is made copies
 B of the documentary evidence including witness statements B
 and an opportunity to present their own evidence.
 Reference is made to the ACAS Code of Practice on
 Disciplinary and Grievance Procedures CoP 1 March 2015
 paragraphs 9 and 12.

Ans. 21. Denied. Given the limited ambit and purpose
 C of the investigation and the absence of any power to C
 sanction, it was sufficient that the Petitioner be given
 the “gist” of the complaints and the ability to respond
 thereto: ex p Doody [1994] 1 AC 531. He was, in the
 event, provided with details of each complaint by
 reference to a specific date or date range, location
 D and the behaviour that was the subject of complaint. D
The ACAS Code of Practice referred to by the
petitioner concerns the conduct of disciplinary
proceedings against employees. The situation
complained of by the Petitioner was not one which
meets that description. The Petitioner was not an
 E “employee”, nor was there any possibility of E
disciplinary sanction being imposed. In any event, the

ACAS Code does not preclude the adoption of alternative procedures such as that set out by the Procedure.

STAT. XXII. In this case the effects of these flaws in the 2017 Procedure are that the petitioner's rights were violated in a number of ways:

- a. He has not been told what the complainers said when they first raised issues about his conduct in terms of paragraph 1 of the Procedure or how those issues evolved into the allegations ("*causes for concern*") set out in Annex B of the first respondent's letter of 7 March 2018.
- b. He was unaware of the first respondent's or the IO's prior involvement in the matters giving rise to the complaints,
- c. He had no access to the statements of the complainers or of any other witnesses;
- d. He was not given the IO's preliminary report or any other documents connected to the allegations;
- e. He was denied the opportunity to consult official records and full diary entries thereby preventing him from identifying as possible witnesses persons who were in his company when the alleged events occurred;
- f. He was not been provided with a witness list;

- A g. He was prohibited from contacting witnesses who are civil servants; A
- h. He was prevented from putting the content of the allegations to prospective witnesses;
- i. He was not allowed to present his own evidence but instead was expected to rely on the IO to select and present his evidence as she saw fit; B
- B j. The IO had clear conflict of interests –reference is made to paragraph 19 of this petition; B
- k. The petitioner was not allowed to see the evidence for or against him or the IO’s revised report or the information the IO subsequently submitted to the first respondent before the first respondent purported to make a decision. In particular, the petitioner was not aware that the IO was making assessments of the credibility and reliability of the two complainers (decision report paragraphs 36 and 79). He was unable to make submissions on those assessments; C
- C l. He was denied the opportunity to make submissions to the first respondent on the content and quality of the evidence presented by the IO including the evidence of the two complainers and the many anonymous witnesses mentioned in the IO’s reports before she purported to make the decision; D
- D E E

A m. Both the complainers were given copies of the IO's
reports in accordance with paragraphs 10 and 14 of
the Procedure. Both of them saw the content of the
evidence from the anonymous witnesses from whom
the IO took statements in respect of the individual
causes for complaint. Both of the complainers saw
B the limited representations made by the petitioner
and responded to those representations (decision
report paragraph 39). The petitioner was not given
the opportunity to see or respond to any of the
evidence collected by the IO;

C n. The petitioner was not given an opportunity to
challenge the evidence of the complainers or any of
the other witnesses put forward by the IO in a
hearing on the evidence;

o. In all the circumstances the petitioner did not
receive a fair hearing of the allegations against him.

D With reference to the respondents' averments in answer
admitted that the petitioner's solicitors asked on 11 July
2018 for access to his diaries for the period [Redacted]. Ad
mitted that on 12 July 2018 the first respondent's Private S
ecretary provided the petitioner's diaries for the period
[Redacted]. As for the rest these are denied except in so fa
r as they coincide herewith. The diaries were provided in
E a redacted

A form in response to a data subject request by the petitioner which was made independently of the Procedure. If the diaries had been redacted before the petitioner's request they could have been un-redacted before they were given to him thereby restoring the information which the petitioner was seeking to obtain from them. Current ministers who are the subject of complaints which are dealt with under the Procedure would have access to all of the documents they need to obtain in order to answer the allegations against them. The first respondent had previously stated in her letter of 4 April 2018 that the petitioner would not be allowed access to Scottish Government documents.

Ans. 22. Denied, under reference to the foregoing Answers. Explained and averred that the petitioner's solicitors asked on 11 July 2018 for access to his diaries for the period [Redacted]. On 12 July 2018 the first respondent's Private Secretary provided the petitioner's diaries for the period [Redacted]. Complainer A and Complainer B were not provided with copies of the IQ's interim report. Like the petitioner, they were provided only with the 'causes for concern' that had been identified by the IQ. Reference is made to Answer 9.

STAT. XXIII. The following are examples of some of the ways in which these rules operated in a manner which was unfair to the petitioner and which prevented him from obtaining a fair hearing or a fair disposal of the complaints:-

- a. The first respondent's determination in relation to each of the causes for concern in the decision was based in whole or in part on ~~the undisclosed witness statements from the two complainers (including additional or supplementary statements taken in response to the petitioner's limited representations),~~ anonymous undisclosed witness statement and undisclosed information submitted by the IO to the first respondent in her reports. [Redacted]

~~He was not given a gist of the evidence. and in an undisclosed format after her revised report was submitted –~~ [Redacted]

A

[Redacted]

A

B

- b. He was unable to object to the appointment of the IO or to make observations or representations to the first respondent as to the fairness of that appointment or the fairness of her reports or of unfairness arising from the first respondent's prior knowledge of and involvement in the complaints or the possibility that the appointment of the IO and/or the first respondent's own prior knowledge and involvement would lead to bias in the content of the reports and the decisions which the first respondent required to take,

B

C

- c. The first respondent's determination in relation to each of the causes for concern in the decision was based in whole or in part on the undisclosed contents of the IO reports [Redacted]

C

D

The petitioner had no opportunity to challenge that or any other contention or submission contained in those reports.

D

E

- d. For each of these causes for concern the petitioner was effectively prevented from answering them fairly and properly as a result of the violation of his rights as set out in paragraphs 17 to 22 above.

E

A e. In the period after 7 March 2018 up to about 20 A
 July 2018 the petitioner's agents set out his
 procedural objections to the way these complaints
 were being handled in detail in correspondence to
 the first respondent. That correspondence is
 referred to for its terms and is held incorporated
 B here for the sake of brevity. B

f. The petitioner was prevented from investigating how
 or why these complaints came to be made by two
 individual complainers each of whom complained
 about events which occurred [Redacted]

. The
 C petitioner was prevented from investigating how the C
 complainers came to be making complaint against
 him at or about the time that the new unpublished
 Procedure was ~~she came to be making a complaint~~
~~within a few weeks of the Procedure being~~ written
 and implemented.

D g. In respect of allegation A the first respondent D
 observed that the petitioner's [Redacted]

– decision
 report paragraph 39. This is inaccurate because the
 petitioner denied that the incident occurred
 (decision report paragraph 38). In any event the
 E petitioner's response was as full as it could be E

A without sight of the IO reports or the witness statements. A

h. In respect of Allegation B the complainer's position on [Redacted]

is unsupported by the anonymous witness statement quoted by the first respondent – see paragraphs 46 and 47 of [Redacted]

B The petitioner was prevented from making submissions on this and from exploring the extent to which there were other material differences between the evidence offered by the complainers and other witnesses. B

C i. In respect of Allegation D the first respondent's decision was heavily influenced by the evidence of several anonymous witnesses (decision report paragraph 61). Separately there are apparent contradictions between the terms of the allegation (presumably attributable to the complainer) and the content of witness statements from the complainer on [Redacted] C

D The petitioner was denied the opportunity to investigate this further by scrutinising the statements of other witnesses or by asking for witnesses to be interviewed on this. He was denied E

A the opportunity to make submissions about these discrepancies. A

j. In allegations G the dates specified is wrong. It is a matter of public record that the petitioner was [Redacted] when allegation G is said to have occurred.

B The unfair prejudice arose from the fact that the Procedure denied the petitioner the opportunity to follow up on the significance of these errors. He had no access to the complainer's statement or any means open to him to investigate how these errors arose in the allegations. B

k. Allegation I describes an incident which is said to involve [Redacted] C

This description must have come from the complainer. [Redacted] C

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D

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The petitioner was deprived of the opportunity to investigate this change of position or to make submissions about it. The IO should have E

A noticed this change in the complainer's position. A
 The IO should have investigated the reason for that
 change and should have interviewed persons
 [Redacted]

B Had she done so she
 would have obtained evidence which supports the
 petitioner's denial of this allegation. Had the
 petitioner been given the IO reports and/or the
 witness statements of the complainer he would have
 noticed these changes in her position. He could
 have submitted evidence which would have
 highlighted these changes in the complainer's
 position and which would have contradicted her
 final version. C

1. On the same allegation the same prejudice arose in
 another way. The petitioner obtained a copy of an
 email exchange between the two complainers and
 others about [Redacted]

D This exchange D
 occurred shortly after the event. [Redacted]

E This email exchange was raised E
 by the petitioner in his limited response to the

A allegations on Friday 20 July 2018. The only A
further investigations carried out by the IO before
she submitted her final report to the first respondent
on 23 July was to obtain a further statement from
the complainer – [Redacted]

B The petitioner was not shown this further statement
and was not told what it contained. The IO did not B
obtain statements [Redacted]

C [Redacted] C
[Redacted]

D The petitioner was prevented from
developing his response to this important point and
the first respondent accepted the complainer's
response at face value. D

E m. The petitioner's limited representations on
Allegations A to I generally were set out in a letter
from his agents to the first respondent which was
sent by email about 3pm on Friday 20 July 2018.
The IO asked the complainers for their responses to
the petitioner's limited representations. The E
petitioner was not given an opportunity to comment

A on the complainers' responses. Separately to the A
best of the petitioner's knowledge the IO took no
steps to investigate those representations by
contacting additional witnesses who were present
when most of the alleged incidents are said to have
occurred and who could shed light on the events. For
B example she did not contact [Redacted] B

The IO submitted her final report to
the first respondent on Monday 23 July 2018.

C With reference to the respondents' averments in answer C
admitted that the petitioner did not seek to have contact
with either of the complainers under explanation that he was
told by the first respondent not to contact Scottish
Government staff and in any event he had no reasonable
expectation that the complainers would respond to any
D request from him to provide a statement or any other D
information. The Procedure only permitted him to suggest
possible witnesses and he had no knowledge of the content
of the statements given by the complainers to the IO. As
for the rest these are denied except in so far as they
E coincide herewith. In all cases of alleged harassment E
involving two or more complainers and in all cases

involving historical allegations the circumstances in which the complaints first came to be made are obvious and legitimate lines of inquiry.

Ans. 23. The correspondence between the petitioner's solicitors and the first respondent is referred to for its whole terms. The content of the email exchange between Complainer A and Complainer B referred to by the petitioner is not known and not admitted. Quoad ultra denied, under reference to the foregoing Answers. Explained and averred that the petitioner and his solicitors did not at any time seek to have contact with either Complainer A or Complainer B. The petitioner is not entitled in terms of the Procedure (or otherwise) to investigate "how or why" complaints come to be made. [Redacted]

A [Redacted]

The petitioner's complaints about the conclusions reached in the decision report are irrelevant to the question of the lawfulness of the Procedure and its application to the petitioner.

B STAT. XXIV. These are merely examples based upon the limited information which the petitioner has at his disposal. The contents of the allegations may have been susceptible to challenge in countless other ways which were undiscoverable to the petitioner because he was denied access to the means of investigating the origins of these allegations and the evidence which is said to support them. **The petitioner was severely prejudiced by the violations of his right to a fair hearing.** C [Redacted]

D Ans. 24. Denied, under reference to the foregoing answers. D

STAT. XXV. **General Irrationality.** In making the decision the first respondent purported to take account of the very limited response which the petitioner was able to offer to the allegations due to the first respondent's failure E

A to respect the principles of natural justice and the
petitioner's rights to a fair hearing as hereinbefore
condescended upon. That response was of necessity
confined to formal denials of the allegations. The
petitioner did provide the names of witnesses in respect of
allegations J and K. He did so under protest and under
B reservation of his challenges to the competency and the
legality of the Procedure and its application to this case.
In any event allegations J and K do not form part of the
decision. The first respondent knew that the petitioner was
only offering a very limited response to the allegations and
she knew the reasons for that. Reference is made to the
C correspondence from the petitioner's agents from 7 March
2018 onwards. In the decision report the first respondent
does not acknowledge the nature or reasons for this very
limited response. [Redacted]

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This was
purely a paper exercise and was, to the first respondent's

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A knowledge, one in which the petitioner could not give a
 A complete response to the allegations or counter the evidence
 relied on in support of them. Furthermore, the first
 respondent purported to carry out that exercise of weighing
 the evidence in the knowledge that the petitioner did not and
 could not know what evidence was being put forward or
 B considered as supportive of the complainers' allegations. B
 The first respondent purported to carry out this exercise
 without any means of assessing the petitioner's credibility
 or reliability. In these circumstances there was no
 reasonable or rational basis upon which the first respondent
 could make findings of fact on these disputed allegations on
 C the basis of these documents alone which included C
 unequivocal denials of the causes for concern which are the
 subject matter of the decision. The respondents' averments
 are denied except in so far as they coincide herewith. The
 petitioner was not given the gist of the evidence. The
 complainers in cases involving alleged harassment routinely
 D give evidence and are cross-examined in court proceedings, D
 tribunals, disciplinary hearings and the like.

Ans. 25. **General irrationality.** Admitted that
 complaints J and K do not form part of the decision
 under explanation that the first respondent accepted
 the objections to those complaints advanced by the
 E petitioner's solicitors. Quoad ultra denied. E

[Redacted]

[Redacted]

STAT. XXVI. **Article 6 of the ECHR.** Article 6.1 states:-

“In the determination of his civil rights and obligations... .., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial... .., wherethe protection of the private life of the parties so require,”

The decision is a determination of the civil rights of the petitioner within the meaning of this article. The first respondent is a public authority for the purposes of section 6 of the Human Rights Act 1998. It is unlawful for her to act in a way which is incompatible with the petitioner’s convention rights under article 6. The decision was taken in circumstances which contravened those rights. Reference is made to paragraphs 15 to 25 of this petition. **The respondents’ averments are denied except in so far as they**

A coincide herewith. The decision is a determination of the
petitioner's right to reputation at common law and under
Article 8 of the ECHR. It is a determination of his
obligations including delictual duties owed by him to the
complainers.

Ans. 26. **Article 6 ECHR.** Articles 6 and 8 ECHR is
referred to for its terms. Quoad ultra denied.
Explained and averred that the decision does not
constitute the determination of any civil rights or
obligations for the purposes of article 6. Esto the
decision does involve the determination of the
petitioner's civil rights, which is denied, the
availability of judicial review is sufficient to ensure
compatibility with article 6: cf. **R (Alconbury
Developments Ltd) v Secretary of State for the
Environment, Transport and the Regions** [2003] 2
AC 295.

STAT XXVII. **Allegation D – Breach of Legitimate
Expectation, Irrationality and Oppression.** [Redacted]

A [Redacted]

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A [Redacted]

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B

C

D

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A [Redacted]

Ans. 25. *Allegation D - Breach of Legitimate
Expectation, Irrationality and Oppression. Admitted
that this complaint concerns an incident which took
place in [Redacted] **Quoad ultra** denied.* [Redacted]

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[Redacted]

A**B****B****C****C****D****D****E****E**

A

[Redacted]

A

B

B

C

C

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D

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Section 6.1 of Fairness at Work (2013) does not apply to complaints about Ministers. In any event the process for informal resolution of complaints set out in section 6.1 was not followed. Complainer

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Fairness at Work policy does not appear to have been invoked at the time” (para 77). [Redacted]

~~Reference is made to Fairness at Work (2013). There is no question of res judicata arising: there has been no prior determination by a court (or tribunal) of competent jurisdiction: Regina (Coke-Wallis) v Institute of Chartered Accountants [2011] 2 AC 146.~~ Separately and in any event the "grounds giving rise to [this part of] the application” for judicial review relate to the fact that complaint D was to form part of the investigation. The petitioner was aware that the Procedure was being used to investigate complaint D by, at the latest, 7 March 2018. He had engaged solicitors by, at the latest, 16 March 2018 and can be expected to have sought and received advice about complaint D at any early stage. Objection was taken to the investigation of complaint D in a letter from the petitioner’s solicitors to the first respondent on 23 April 2018. Any challenge to the investigation of complaint D should have been brought, at the latest,

A by 6 June 2018: Court of Session Act 1988, s.27A.
 A The petitioner's remedy, if any. was to seek to
prevent any determination on complaint D by interim
interdict (cf. the case of *Mandic-Bozic* [2016] EWHC
3134 (Admin), cited by the petitioner), not to await
that determination and then to complain thereof.

B STAT. XXVIII. [Redacted] B

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This is another violation of the
 petitioner's right to a fair determination in accordance with
 the principles of natural justice and his article 6 rights.

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[Redacted]

D

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A [Redacted]

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The petitioner was prevented from making submissions about this. Separately that determination is irrational in respect that it is acknowledged that [Redacted]

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These reasons are perverse because Fairness at Work does not require or suggest that a formal record is appropriate and any such record would be contrary to the spirit of an informal resolution. Also, Fairness at Work does not suggest HR involvement save in specific circumstances

which did not arise in this case. The respondents' averments in answer are denied. The timeline circulated on 15 December 2017 states *Note: under our current F@W policy informal issues are not recorded; as a matter of practice we do not record – or comment – on informal complaints.*" In an answer to a Freedom of Information ("FOI") request dated 21 September 2018 concerning harassment and/or bullying claims received by the second respondent in the last five years the second respondent said: *"Managers in the Scottish Government are encouraged to deal with concerns about internal harassment and/or bullying at an early stage, on an informal basis under the Fairness at Work policy, where appropriate. There is no requirement to report informal action to HR and no information is held centrally about cases that have been dealt with informally."* This is an accurate statement of the policy and practice of the second respondent [Redacted] The first respondent was or ought to have been aware of that policy and that practice when she made the decision and issued the Decision Report. [Redacted]

It was taken in contravention of a legitimate expectation that the first respondent would recognise and respect that policy and practice. The FOI answer incorporated an answer to a Parliamentary Question which contained part of the

Information requested in the FOI request. The FOI answer also stated that the second respondent could not provide a breakdown of the numbers of these claims in the last five years “*Due to small numbers and to avoid possible disclosure of personal data under section 38(1)(b) of FOISA.*” The second respondent was prepared to publish in the press release referred to in paragraph 11 above the fact that they had received the two complaints which are the subject matter of this petition.

Ans. 28. Denied, under reference to the foregoing Answers. Explained and averred that any informal resolution was not such as to give rise to **res judicata** or equivalent, or otherwise to prevent the investigation of complaints made regarding the petitioner.

STAT. XXIX. **Privacy and Confidentiality.** In respect that the decision is *ultra vires*, incompetent and unlawful (and on allegation D, irrational, oppressive and in breach of the petitioner’s legitimate expectations) the **recording of the decision (in the second respondent’s records or otherwise) and/or the** communication or publication by the respondents of the decision, the IO reports which informed it or of any evidence referred to or relied on in them is an unlawful infringement of the petitioner’s **right to reputation and his** rights of privacy and of the obligation of confidentiality

A owed to him by the respondents. Likewise a contravention of Article 8 of the ECHR which states:-

“Everyone has the right to respect for his private and family life, his home and his correspondence.” ~~Separately, the~~

~~recording of the decision under and in terms of the Procedure is contrary to the Data Protection Act 2018. The recording of the decision has no lawful purpose. It has no~~

~~lawful basis. The petitioner has not consented to it. The recording of the decision within the Scottish Government of an adverse finding against the petitioner is not necessary, whether for the exercise of any function of the Scottish Government or otherwise. The petitioner has no contractual~~

~~or other relationship with the second respondents such as justifies the recording of the decision, nor has he had since September 2014. The respondents are called upon to state the lawful purpose of recording the decision within the Scottish Government. They are also called upon to state the basis of the necessity in doing so. Further, the procedure~~

~~fails to comply with the requirements of lawful, fair and transparent processing. The Procedure does not include an appropriate policy document in relation to the processing of personal data. Reference is made to Sections 8 & 10, Schedule 1 Part 2 and Schedule 1 Part 4 of the Data Protection Act 2018. Reference is also made to Articles 5, 6~~

~~& 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of~~

A ~~natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).~~ A

Ans. 29. **Privacy and Confidentiality.** Article 8 ECHR, the Data Protection Act 2018 and the General Data Protection Regulation are referred to for their terms.

B **Quoad ultra** denied. Explained and averred that the fact that complaints have been made against the petitioner and that they were investigated in terms of the Procedure is information that is already in the public domain. The petitioner has made statements on social media and given interviews to broadcast media B

C referring to the complaints. Reference is made to statement 11 and answer 11. The petitioner has not obtained permission to proceed in respect of any ground of complaint anent data protection law: of MIAB v Secretary of State for the Home Department 2016 SC 871. Permission should be refused as having C

D no reasonable prospect of success. The maintenance of a record of the first respondent's decision is necessary for the performance by the second respondents of tasks carried out in the public interest: namely the protection of employees from harassment and other inappropriate behaviour in the workplace and the maintenance of the integrity of the Ministerial Code. D

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STAT. XXX. **Interdict.** The balance of convenience favours the petitioner. In the correspondence the petitioner and the first respondent have both acknowledged the importance of confidentiality. The subject matter of the allegations includes sensitive personal data of the complainers and the petitioner. [Redacted]

B

is information

B

which falls within the scope of the complainers' and the petitioner's rights of privacy at common law and under Article 8 of the ECHR. In the correspondence the petitioner set out in detail his position on the matters raised in this petition. He offered to submit the disputes between the parties on those matters (*ultra vires*, competency, legality, legitimate expectation etc.) to arbitration. The reason for that offer was to enable those disputes to be resolved confidentially in a manner which protected those rights of privacy. The first respondent rejected that offer.

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Any reporting, communication or publication of the decision or the IO reports or of evidence referred to or relied on in the decision and reports before the disposal of this petition will infringe or negate those rights of privacy. It will also cause the petitioner loss and damage of the sort described in paragraph 11 of this petition. It may also infringe the complainers' rights of privacy. Interim interdict is necessary in order to preserve the *status quo* in relation to

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A confidentiality and privacy pending a judicial resolution of the issues raised in this petition. **A**

Ans. 30. **Interdict.** Denied that interdict is necessary.

PERMISSION TO PROCEED

B STAT. XXXI. That the petitioner satisfies section 27B(2) (requirement for permission) of the Court of Session Act 1988. **B**

Ans. 31. Admitted.

C STAT. XXXII. The petitioner has sufficient interest to proceed in respect of the following. He is the subject matter of a purported decision taken by the Head of the Civil Service of the Scottish Government following on from an investigation initiated by her using a procedure which applies to the conduct of former Ministers of the Scottish Government. [Redacted] **C**

D That decision is a matter of official record and will, if the challenges raised in this petition are unsuccessful, be destructive of the petitioner's reputation and standing and will cause him enormous loss and harm. **D**

Ans. 32. Admitted that the petitioner has sufficient

E interest to proceed under explanation that permission **E**

to proceed was granted by the Lord Ordinary on 27 September 2018.

STAT. XXXIII. The petitioner has a real prospect of success for the reasons set out in detail in this petition. He is a private citizen and there is no legal basis in statute, contract or otherwise for the first respondent's claim of jurisdiction over him in respect of the Procedure. The Procedure was not promulgated until December 2017 which is more than [Redacted] the last alleged incident mentioned in the complaint and more than [Redacted] the petitioner ceased to be a Minister. The Procedure does not expressly or by implication have retrospective effect. The Procedure is inherently unfair at common law and under article 6 of the ECHR because it prevented the petitioner from investigating or presenting his own defence to the allegations and denied him access to the evidence against him and evidence which might support his defence. The Investigating Officer has the conflicted roles of prosecutor, representative of the accused former minister (in relation to preparation and presentation of his case) and fact finder. The resurrection of the complaint set out in allegation D is in breach of the petitioner's legitimate expectation and is irrational and oppressive because that complaint was resolved [Redacted] under a procedure then in place. The decision also involves existing and prospective breaches of

the petitioner's rights of privacy and of an obligation of confidentiality owed to him by the respondents. Article 8 of ECHR is also engaged.

Ans. 33. The Respondents concede the grant of permission to the petitioner.

TRANSFERS TO THE UPPER TRIBUNAL

STAT. XXXIV. That the petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal.

Ans. 34. Admitted.

II. - PLEAS - IN - LAW for PETITIONER. No.1 of Pro.

1. Esto the petition was made out of time (which is denied) it is equitable that the period in which this application to the supervisory jurisdiction can be made is extended to the 24 August 2018 being the date after this petition was lodged all in terms of section 27A(1)(b) of the Court of Session Act 1988.

2. The decision being *ultra vires* the powers of the second respondent decrees of declarator and reduction should be pronounced.

3. The decision being incompetent in respect that it is a retrospective application of the Procedure decrees of declarator and reduction should be pronounced.

4. The decision having proceeded on an error of law by the first respondent decrees of declarator and reduction should be pronounced.

5. The decision being irrational and separately unlawful as a result of the application of unfair procedures and being tainted with bias and being in breach of the petitioner's article 6 of ECHR rights decrees of declarator and reduction should be pronounced.

6. The decision in respect of allegation D being in breach of the petitioner's legitimate expectations and being irrational and oppressive decrees of declarator and partial reduction should be pronounced.

7. Any reporting, communication or publication of the decision or the IO reports or the evidence referred to or relied upon being in breach of the petitioner's privacy rights and a breach of a duty of confidence owed to him and separately a breach of article 8 of the ECHR decree of declaratory should be pronounced

A 8. The petitioner having reasonable grounds to apprehend
that the respondents will report or communicate or publish
the decision or the IO reports or the evidence as aforesaid
decree of interdict should be pronounced. A

B 9. The balance of convenience being in favour of the
petitioner interim interdict should be granted. B

ACCORDING TO JUSTICE, Etc.

C III. - PLEAS - IN - LAW for RESPONDENTS. No.
of Pro. C

1. The petition, in so far as founded on complaints which
are time-barred in terms of s27A of the Court of Session Act
1988, should be dismissed.

D 2. The petitioner's averments being irrelevant et
separatism lacking in specification, the petition should be
dismissed. D

3. The petitioner's averments, so far as material, being
unfounded in fact, the petition should be refused.

E 4. There being no circumstances to justify interdict, the
order as sought therefor should be refused. E

A 5. The balance of convenience not favouring the
petitioner, interdict ad interim should be refused. A

IN RESPECT WHEREOF,

B

IV. - SCHEDULE FOR SERVICE .

No. 1
of Pro. B

**SCHEDULE FOR SERVICE PART 1: RESPONDENTS upon
whom service is sought in common form:-**

C Leslie Evans, Permanent Secretary to the Scottish
Government, St Andrews House, Regent Road, Edinburgh C
EH1 3DG

The Scottish Ministers, St. Andrews House, Regent Road,
Edinburgh EH1 3DG

D **PART 2: AN INTERESTED PERSON upon whom service is** D
sought in common form:

Nicola Sturgeon, St Andrews House, Regent Road, Edinburgh
EH1 3DG

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V. - INTERLOCUTORS.

No.
of Pro.

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