PE1729/D
Petitioner submission of 2 December 2019

PE1729A – I noted the Scottish Government submission and make the following comments in response:

As stated in this submission, the National Assistance (Assessment of Resources) Regulations 1992 and relevant Crofting law provide the primary legislation that requires interpretation to determine policy. My understanding is that the Charging for Residential Accommodation Guidance ("CRAG"), the framework for local authorities, is underpinned by that primary legislation. There is no definition for capital assets in the 1992 regulations. Land and property is mentioned in general terms but far as I understand that means land and property which is owned rather than crofting tenancy of which no reference is made. I submit that a crofting tenancy is not a capital asset and that the crofter is protected in crofting law by security of tenure.

The submission suggests that if there are any disagreements following CRAG guidance the next step is for the matter to be raised in a Scottish Court of law. I would argue that in most of these cases this would be completely impractical. In some instances, the house and croft has been in the family for several generations going back as far as the 1700's. With that kind of heritage, the elderly person has a huge emotional connection to that croft and its history. Informing someone that they may lose their house and croft house in these circumstances, brings heartbreak and psychological trauma which can accelerate their mental and physical decline. I would point out that many of the people who are affected by these decisions are elderly and infirm, occasionally without family support, and sometimes without the mental capacity to understand the implications of the situation. They do not have a voice and are vulnerable in cases like this. We were in the fortunate position to have had legal guardianship in place for our late mother, who was in the late stages of dementia when this situation arose.

I also strongly disagree with the statement on page 2 of the submission where it states that the sale of a croft tenancy, for whatever reason, does not adversely impact upon the system of crofting. I would argue that it has a massive impact on the crofting system when you break the natural order of succession leading to a change in the way the land is managed. Historically, crofters were very much in tune with nature and passed on their experience down the generations. I can only assume that this statement was made by someone who has never lived in a crofting community or lacks understanding of crofting heritage. My submission in this regard is that many of the people affected do not have the means to take the disputed matter to a Scottish Court of Law for all the reasons I have outlined above.

The government submission includes a table of local authorities and the process that they follow in considering crofts as capital assets. Apparently this information was provided to them by Comhairle nan Eilean Siar (CnES) and confirms what I was told by CnES in my early correspondence with them. According to the CnES information,

the house and croft is considered by the local authorities of Argyll & Bute, Highland, Orkney, Shetland and CNES. This information is slightly contradicted in the submission from Argyll & Bute (PE1729/B) where it is clearly stated that they make a distinction between owner occupied crofts (where the property has been decrofted) and a tenanted croft. Their general practice has been to include owner occupied crofts as capital assets and disregard tenanted crofts. I would argue that this is the correct action to take and that this glaring inconsistency in local authority actions highlights the unfairness of the current practices.

In my original submission, I highlighted a case on the Isle of Skye that I was made aware of, where the debt against a tenanted croft property was waived when the family disputed Highland Council's claim against it. I am disappointed that there has been no submission from Highland Council which could have reflected this. In the last paragraph of the submission, it states that that it would be very difficult to explain and justify why croft properties, owner occupied crofts and croft tenancies – which are capital assets – would be treated differently from the capital assets of land and buildings of that of non-crofters. I disagree with that conclusion, but only in relation to croft tenancies. In the circumstances where a person decides to decroft the land they do so knowing they will lose the protection that crofting legislation provides to crofting tenure. They then own the land in exactly the same way as non-crofters do. The tenant crofter does not own the land and should therefore be exempt from consideration. I would submit therefore that there is an urgent need for consistency in the judgement of these matters and that the Argyll & Bute position is the logical one to adopt.

1729C – I noted the CnES submission with particular interest. Reference is made to a statement made by a civil servant at the Scottish Parliament Cross Party Group on 31st October 2012 indicating a view that croft tenancies are assets. I have seen the minutes of that meeting and that is one of a few conflicting views expressed during discussion by the eminent people present. Another view expressed was that owner occupied crofts could be viewed as an asset but there is a question over whether a tenancy should. There was mention that providing guidance allowing local authority's discretion could lead to inconsistency which is exactly what is happening now. The one point I took from those minutes is that nobody present was really sure what the correct action was for crofting tenancies.

I now refer to another section of the submission which takes issue with the implication in the Petition Briefing that the Comhairle's view that croft property is "likely" to be classed as a capital asset suggests some ambiguity in the law or uncertainty on the part of the Comhairle. An explanation is then offered as to "likely" only relating as to whether the personal circumstances of the resident would lead to a croft being disregarded. Early last year MSP Donald Cameron wrote to the Chief Executive of CnES on my behalf and asked the question 'Would you provide me with the reasons for deeming croft and croft property as 'likely' to be classed as capital and therefore could be taken into account for financial assessments by CnES to care costs?

In his reply the Chief Executive of CnES refers to the 1992 regulations and then stated “The Charging for Residential Accommodation Guidance (2017), also states at section 6.001, that a resident’s resources are either capital or income. Buildings and land are classed as capital at section 6.002 of said guidance. Crofts and croft tenancies are viewed as assets to be placed on the open market where a monetary consideration is exchanged. Where a croft tenancy is assigned for consideration, the consideration is known as ‘compensation’ for the tenancy and permanent improvements. It is the croft tenant who receives the compensation.” Please note that the Chief Executive makes no reference to the explanation now given in their submission for the use of the word ‘likely’. In earlier correspondence with the Council, I raised the use of the word ‘likely’ and asked for a further explanation by way of supporting legislation. The reply from the Council’s legal department offered no explanation of ‘likely’ stating that they did not provide legal advice and suggesting that I should consult a legal representative.

In the final paragraphs of their submission it is evident that there is real concern among their elected members that the Comhairle is not applying the Regulations correctly in relation to croft tenancies in particular. In our own case, it seems to me grossly unjust that our crofting tenancy is considered a capital asset by CNES, when it would apparently be disregarded as such if we lived in Argyll and Bute. In fairness to CnES, they are also now seeking further guidance and clarification of the law on this matter.