**INQUIRY INTO THE RETIREMENT OF THE**
**FORMER COMMISSIONER OF POLICE**

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# SUBMISSIONS ON BEHALF OF IAN MCGRAIL

**Following the First Preliminary Hearing**

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*[T/1/1] = page 1, line 1 of the transcript of the Preliminary Hearing*
*[PB/1] = page 1 of the Public Bundle for the First Preliminary Hearing*

## A. INTRODUCTION

1. These submissions are made on behalf of Mr Ian McGrail, the former Commissioner of the Royal Gibraltar Police, pursuant to the Directions Timetable made following the Preliminary Hearing held on 22nd June 2022 ("**Preliminary Hearing**").

2. These submissions address the following issues which arose during the First Preliminary Hearing :
   (i) The principle of open justice;
   (ii) Whether the Inquiry has a discretion to make recommendations.

## B. THE PRINCIPLE OF OPEN JUSTICE

3. At the First Preliminary Hearing, Peter Caruana Q.C., acting for the Chief Minister, Deputy Governor and Attorney General ("**PCQC**"), submitted that the application of the principle of open justice to Commissions of Inquiry in Gibraltar was "*not clear*" **[T/50/3]**. He went on to submit, citing section 8(9) of the Gibraltar Constitution, that his clients did not concede that the Inquiry is bound by the principles of open justice **[T/84/21] – [T/85/19]**.

4. It is submitted that contrary to the submission made on behalf of the Chief Minister, Deputy Governor and Attorney General, the principle of open justice applies to this Inquiry.

### *(i) The Constitution of Gibraltar and the ECHR*

5. On 14th December 2006 Mer Majesty the Queen made the Gibraltar Constitutional Order. This gave effect to the Constitution of Gibraltar ("**the Constitution**") which was set out at Annex 1 to the Constitutional Order.

6. Section 1 provides:

> It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of any ground referred to in section 14(3), but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely –
>
> (a) the right of the individual to life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression, of assembly, of association and freedom to establish schools; and
>
> (c) the right of the individual to protection for his personal privacy, for the privacy of his home and other property and from deprivation of property without adequate compensation,
>
> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

7. Sections 2-15 set out the particular rights and freedoms.

8. Section 8 is entitled *"Provisions to secure protection of law"*. Section 8(9), cited by PCQC at the Preliminary Hearing provides

> (9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

9. Section 8(9) is qualified by section 8(10), which permits "the *court or other authority*" to exclude from the proceedings persons other than the parties and their legal representatives where the court or other authority may by law be empowered to do so and may consider necessary and expedient for various reasons.

10. Section 10 protects freedom of expression. The text of the section is similar to that of Article 10 of the European Convention on Human Rights ("**ECHR**"). Section 10(1) provides:

> 10.-(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

11. Section 10(2) lists various exceptions which are provided for by law, again in similar terms to Article 10 ECHR.

12. Section 16 provides that any person alleges that the provisions in sections 1 to 15 have been contravened in relation to him then the Supreme Court has jurisdiction to determine whether their rights have been contravened.

13. Section 18(8)(a) provides that

> "(8) (a) A court or tribunal determining a question which has arisen in connection with a right or limitation thereof set out in this Chapter must take into account any –"
>
> "(i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;
> […]

14. A "Court" means "*any court of law having jurisdiction in Gibraltar, including Her Majesty in Council, but excepting, save in sections 2 and 4 and this section, a court, established by a disciplinary law*" (s.18(1))

15. Although the provisions protecting rights in the Constitution are different in some respects from the equivalent articles of the ECHR, the Privy Council has held that they are intended to provide <u>at least</u> a similar level of protection as is provided under the ECHR, and therefore provisions of the Gibraltarian Constitution which are equivalent to provisions of the ECHR should, if possible, be interpreted as giving no less protection than their equivalents in the ECHR: see <u>*Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee*</u> [2009] UKPC 52, at §11 *per* Lady Hale, recently approved by the Privy Council in <u>*Attorney General for Bermuda v Roderick Ferguson and others (Bermuda)*</u> [2022] UKPC 5, *per* Lord Hodge and Lady Arden at §17 (with whom the other three Privy Councillors agreed).

### *(ii) The application of the English common law in Gibraltar*

16. Section 2(1) of The English Law (Application) Act provides:

> Application of common law and equity.
>
> 2.(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by–
>
> (a) any Order of Her Majesty in Council which applies to Gibraltar; or
>
> (b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
>
> (c) any Act.
>
> (2) In all causes or matters in which there is any conflict or variance between the common law and the rules of equity with reference to the same subject, the rules of equity shall prevail.

### *(iii) The principle of open justice*

4. The principle of open justice is of fundamental importance. Toulson LJ (as he then was) said in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] 3 All ER 551[1]:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

[1] Approved unanimously by the UK Supreme Court in *Cape Intermediate Holdings Ltd (Appellant/Cross-Respondent) v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (Respondent/Cross-Appellant)* [2019] UKSC 38.

5. In *Kennedy v The Charity Commission* [2014] UKSC 20 the UK Supreme Court held, in relation to a journalist's request for various documents from the Charity Commission, that (a) Article 10 ECHR did not give rise to a freestanding to information held by public authorities, but (b) the common law principle of open justice applies to public inquiries. As stated by Lord Toulson (with whom Lord Neuberger and Lord Clarke agreed) at §124:

> "The considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?"

17. The Supreme Court was clear that the principle of open justice arises from the common law: see *Kennedy* at §47*, per* Lord Mance (with whom Lord Neuberger and Lord Clarke agreed): "*In the present case, the meaning and significance which I attach to the provisions of the Charities Act is in my view underpinned by a common law presumption in favour of openness in a context such as the present*"; §131 (*per* Lord Touslon with whom Lord Neubeger and Lord Clarke agreed): "*the common law is fully capable of protecting sufficiently whatever rights* [of access to Inquiry documents] *under article 10 Mr Kennedy may have".*

18. The supervision of inquiries by the courts is a also product of the common law, except insofar as there is a relevant statutory provision. Therefore the principles of the common law can be applied to an inquiry which is the "*creature of a modern statute*": *Kennedy* at §131 (*per* Lord Touslon with whom Lord Neuberger and Lord Clarke agreed)

19. In *Magyar Helsinki Bizottság v. Hungary* [2020] 71 E.H.R.R. 2 the Grand Chamber of the European Court of Human Rights recognised for the first time a right to access to information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the ECHR, which applies in certain conditions (§151). In circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right (§155).

### *(iv) Application of the principles to this Inquiry*

20. The principle of open justice applies to this Inquiry, for the following reasons:

21. First, there is clear, binding authority that the common law principle of open justice applies to this Inquiry. The English common law is in force in Gibraltar, subject to it being modified or excluded by an Order of Her Majesty in Council applying to Gibraltar, an Act of the Parliament in Gibraltar, an Act of the Parliament at Westminster: see Section 2 of the English Law (Application) Act. The Supreme Court in *Kennedy* held that the principle of open justice arising from the common law applies to public inquiries: see §§57, §124, §131.

22. There is no Order in Council, or Act of either the Gibraltar or Westminster Parliament which modifies or excludes the Supreme Court's unambiguous finding in *Kennedy*. There is also no reason in principle why the general principles outlined by the Supreme Court would not apply to a Commission of Inquiry made under the Commissions of Inquiry Act, which plainly fall within the category of "*quasi-judicial inquiries and hearings*" identified by Lord Toulson at §124. The supervision of inquiries by the courts is also a common law principle which applies in the present context: *Kennedy* at §131.

23. There is also nothing in the Commission of Inquiry Act which precludes the open justice principle applying. There is, however, a power for the government, when issuing a commission, to direct "*whether or not the inquiry is to be held wholly or partly in public*". It is notable that the Act does not permit the government to direct that the inquiry is held entirely in private. The Act clearly requires that at least some of the inquiry is held in public. This accords with the open justice principle.

24. Further, there is nothing in the Gibraltar Constitution which calls into doubt the above proposition. Counsel for the Chief Minister, Deputy Governor and Attorney General ("**CM/DG/AG**") intimated at the Preliminary Hearing that Section 8(9) is in some way precludes the open justice principle applying to commissions of inquiry. This is misconceived. Section 8(9) provides: "*all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall*

*be held in public*". The provision does not apply to commissions of inquiry, which are fact finding bodies and do not determine the existence of any civil right or obligation. There is in fact no mention of commissions of inquiry in the Constitution. The Constitution therefore has no impact on the common law position as set out above, or indeed the position under the ECHR as set out below.

25. Second, the right to "receive and impart ideas" provided for in section 10 of the Constitution must be interpreted to give no less protection to the equivalent right (Article 10) of the ECHR: *Rodriguez* §11 and *Ferguson* §17 (see above). The Grand Chamber has held, in a case which post-dates the Supreme Court's decision in *Kennedy*, that Article 10 imparts a right to access information: *Magyar* §151, which is a foundation of the open justice principle. The open justice principle therefore arises from both the common law and the ECHR, both of which are applicable to this Inquiry.

26. In conclusion, the principle of open justice applies to this Inquiry, both because of the common law and the ECHR. There is nothing in any applicable statute, Order of Council or the Constitution which precludes the open justice principle applying.

***(v) Proposed practices to comply with the open justice principle***

27. In accordance with the principle of open justice, it is submitted that the following practices should apply to this Inquiry (repeating Mr McGrail's submissions made in advance of the Preliminary Hearing):

    a. All Inquiry hearings should be open to the public and press, in terms of physical attendance at the venue in Gibraltar itself;
    b. All Inquiry hearings should also be open to the public and press remotely, via online attendance;
    c. All Inquiry hearings should be live-streamed (we make this submission in respect of both the Second Preliminary Hearing and the Final Hearing);
    d. The timetable for hearings should be published in good time in advance, on the Inquiry's website, to enable press and public to consider and plan their attendance;
    e. All submissions should be published on the Inquiry website in advance of hearings, subject to redactions which should be made if strictly necessary. A redaction policy

should be formulated and published and a procedure should be put in place so that Core Participants can apply for such redactions to be made;

f. All witness statements, documentary evidence and exhibits should be published on the Inquiry website in good time, for example, on the day that they are considered at the Main Hearing. Again, this process can be subject to redactions where strictly necessary, and there should be a process to enable Core Participants and/ or witnesses to apply for such redactions prior to publication;

g. All Inquiry hearings should be transcribed and the transcripts made available on the Inquiry website as soon as is practicable after hearings, subject to any redactions which are strictly necessary, as happened with the Preliminary Hearing.

h. All Inquiry rulings and the final report should be published on the Inquiry website.

## C. WHETHER THE INQUIRY HAS A POWER TO MAKE RECOMMENDATIONS

28. Section 3 of the Commissions of Inquiry Act (as amended, most recently in 2007) ("**CoIA**") relevantly provides:

> 3. (1) The Government may, whenever he shall deem it advisable so to do, issue a commission under his hand and the public seal appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the Government, be for the public welfare.
>
> (2) Every commission shall specify the subject, nature and extent of the inquiry and may contain directions generally for the carrying out of the inquiry, and in particular, as to the following matters–
> (a) the manner in which the commission is to be executed;
> (b) the appointment of a chairman, where there is more than one commissioner appointed;
> (c) the constitution of a quorum;
> (d) the place and time where and within which the inquiry is to be made and the report thereof rendered; and
> (e) whether or not the inquiry is to be held wholly or partly in public.
>
> (3) […]

29. Section 6 provides:

> Meetings of commissioners.
> 6. The commissioners shall hold meetings when, where and as often as they shall think fit, and shall by all such lawful means as to them appear best, with a view to the discovery of the truth, inquire into the matters submitted

> to them, and shall report to the Government the evidence taken by them and their judgment thereon, and may make such recommendations as they may think fit.
>
> [emphasis added]

30. The Issue of Commission (LN. 2022/034) which established the Inquiry relevantly provides that in exercise of the powers conferred on it by section 3 of the Commissions of Inquiry Act, appoints the Chair on the following terms:

> "to inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement.
>
> The Commissioner is to ascertain the facts and report to the Government on the above matters."

31. The Chair stated at the Preliminary Hearing that he is "*not required or indeed even permitted by the terms of reference to make recommendations, for example, as to any legal or political reform or indeed for anything else for that matter*" **[T/10/5-10]**.

32. It is respectfully submitted that although the Issue of Commission does not expressly mention recommendations, the CoIA gives statutory authority for the Inquiry to make recommendations should it consider it appropriate to do so. This is made clear by section 6, which relevantly provides that the Commissioners (in this case, the Commissioner[2]) "*may make such recommendations as they may think fit*".

33. It would not be open for the government, in setting terms of reference, to limit or exclude the power to make recommendations which is clearly provided for in section 6. The general power in section 3 to issue a commission does not include in the lists of examples for general directions contained in section 3(2) the power to direct that a commission many not make recommendations. Read together with section 6, which gives commissioners a power to make recommendations, section 3 would not permit the government to preclude the making of recommendations.

[2] Section 2 of the CoIA provides that "commissioners" can also mean "commissioner", singular: "*"the commissioners" mean any person or persons from time to time appointed by the Government to act as commissioners for any purpose under the provisions of this Act."* (emphasis added).

34. In any event, the Issue of Commission does not mention recommendations, and certainly does not attempt to preclude the Commissioner from making them if he thinks fit to do so. The Issue of Commission does provide a discretion "*to inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement*". This is a broad discretion.

35. It is respectfully submitted that this wording does not, as suggested by the Commissioner at the Preliminary Hearing **[T/10/5]** limit the Inquiry to "*simply to ascertain the facts*". The Issue of Commission requires that the Commissioner "*ascertain the facts and report to the Government on the above matters*" (emphasis added). Therefore the Commissioner must, in addition to ascertaining the facts, report on the "*above matters"*, which refers to the text quoted at the outset of this paragraph, and particularly "*to inquire, as he shall in his absolute discretion consider appropriate*". Even if there was no statutory authority under section 6 of CoIA, the language of the Commission of Inquiry is sufficiently broad as to permit the Commissioner to make recommendations, because "*to inquire"* has a wider meaning than "*ascertain the facts*". Making recommendations is a standard feature of modern inquiries – for example, Jason Beer QC, the author of the leading textbook on public inquiries, has said that the third main function of an inquiry is to ascertain "*what can be done to prevent this happening again*".[3] This is an aspect of the requirement to "*inquire*" which goes beyond simply ascertaining the facts.

36. Sir Jonathan Parker, overseeing the Dr Giraldi Home Inquiry, concluded that its Terms of Reference did not extend to the making of recommendations and it was therefore limited to finding the relevant facts and reporting those findings. It is respectfully submitted that this conclusion was reached in error as it disregarded section 6 of the CoIA (which is not referred to in the Commission of Inquiry's Report).[4]

37. In summary:

[3] Public Inquiries, Institute for Government: <https://www.instituteforgovernment.org.uk/explainers/public-inquiries>

[4] See Dr Giraldi Home Inquiry, Volume 4, page 643 <http://www.drgiraldihomeinquiry.gi/wp-content/uploads/2015/02/DGHI-REPORT-Vol-4.pdf>

a. Section 6 of the CoIA provides statutory authority for the Commissioner to make recommendations if he thinks fit to do so;

b. The government through the Issue of Commission could not lawfully prevent the Commissioner from exercising his power under section 6 CoIA;

c. In any event, the Issue of Commission does not attempt to prevent the Commissioner making recommendations, and indeed provides a wide direction for the Commissioner to "*inquire, as he shall in his absolute discretion consider appropriate*".

6. We hope that these submissions are of assistance.

**CAOILFHIONN GALLAGHER Q.C.**

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6th July 2022