Commissions of Inquiry Act

Inquiry into the retirement of the former Commissioner of Police, convened by a Commission issued by Her Majesty's Government of Gibraltar on the 4th February 2022 in Legal Notice No 34 of 2022 ('the Inquiry')

SUBMISSIONS ON BEHALF OF HM GOVERNMENT OF GIBRALTAR, FABIAN PICARDO, NICHOLAS PYLE AND MICHAEL LLAMAS IN RESPONSE TO WRITTEN SUBMISSIONS DATED 6 JULY 2022 OF IAN MCGRAIL

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1. These brief submissions are made on behalf of (i) HM Government of Gibraltar, (ii) Fabian Picardo (Chief Minister), (iii) Nicholas Pyle (at all material times, Governor of Gibraltar) and (iv) Michael Llamas (Attorney General for Gibraltar) (hereafter collectively "**the Government Parties**") in response to written submissions dated 6 July 2022 made on behalf of Ian McGrail ("**McGrail Written 2**").

2. These submissions are limited to the extent and manner of the application of the principle of Open Justice to this Inquiry, and seek to avoid repetition of Written Submissions dated 8 July 2022 on behalf of the Government Parties ("**Government Parties Written 1**").

Application of Article 10 ECHR

3. For the reasons expounded in para 53 of Government Parties Written 1, neither Article 10 ECHR or Section 10 Gibraltar Constitution have any application to the Inquiry. A copy of paras 6.83 to 6.88 of *Beer, Public Inquiries* is attached for the assistance of the Inquiry Team.

4. *Magyar Helsinki Bizottsag v Hungary* [GC] – 18030/11 is <u>not</u> authority for the proposition for which Mr McGrail appears to advance it, and the description in paras

21 and 27 of McGrail Written 2 to what it is said to have established would appear to be unhelpfully incomplete.

5. In so far as is apposite to Mr McGrail's submissions *Magyar* established as follows:

5.1 At paras 155 and 156 (and see Held 12)

"155. The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of art.10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, 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. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of art.10 of the Convention.

156. In short, the time has come to clarify the classic principles. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him". Moreover, "the right to receive information cannot be construed as imposing on a state positive obligations to collect and disseminate information of its own motion". The Court further considers that art.10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right."

5.2 At paras 157-159, 161-164, 166,168 and 170 (see Held 13)

"H13. Recent case-law offered valuable illustrations of the relevant criteria for assessing whether and to what extent a denial of access to information constituted an interference with art.10 in the particular circumstances of an individual case. First, the purpose of the information request must be for a person to exercise their freedom to "receive and impart information and ideas" to others. By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the information sought by the person had to be "necessary". Secondly, the nature of the information sought had generally to meet a public interest test in order to prompt a need for disclosure under art.10 . The privileged position accorded to political speech and debate on questions of public interest was relevant. Thirdly, the particular role of the seeker of the information in "receiving and imparting" it to the public had special importance. An important consideration was whether the person in question was

acting in the capacity of a public "watchdog". Fourthly, whether information requested was ready and available constituted an important criterion. [157]–[159], [161]–[164], [166], [168], [170]"

6. It is thus self-evident that *Magyar* does not avail Mr McGrail in this Inquiry. In fact, in the context of this Inquiry, *Magyar* is against him. None of the requirements for the exceptional application of Article 10 apply. This is precisely the position that had been taken by Dame Janet Smith in the Shipman Inquiry, and Lord Hutton in the Hutton Inquiry.

The Common Law

7. *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* was a case about the principle of open justice in the administration of justice in the courts, which is well settled and not in dispute. Toulson LJ said nothing about the manner and extent of its application to statutory inquiries. Ditto *Cape Intermediate Holdings*.

8. Contrary to para 18 of McGrail Written 2, *Kennedy v The Charity Commissioner* did not hold "that the common law principle of open justice applies to public inquiries".

9. *Kennedy v The Charity Commissioner.* This case involved a statutory Inquiry that had been conducted in private by the Charity Commission into particular charities, and in respect of which it had published a report. The requirement for openness and transparency were baked by the Charities Act into the requirements for the performance by the Charity Commission of its functions (see *Kennedy v The Charity Commissioner* per Lord Mance at [22], [45] and [55]. After the Inquiry had finished and the report had been published, a journalist who wanted the Charity Commission to provide him with copies of documents that it had in its possession for the conduct of the inquiry made a request under the UK Freedom of Information Act for the inquiry to produce those documents to him. The Freedom of Information Act contained an exemption in respect of courts and inquiries obligation to disclose such documents. The issue was whether that exemption lasted only until the inquiry had finished or lasted indefinitely thereafter. The issue before the court in the appeal was: to what extent should the Charity Commission disclose further information concerning inquiries on which it had already published reports (see at [48]). The case was thus

about the alleged clash between Article 10 ECHR and the statutory exemption to the provision of court and inquiry papers in the Freedom of Information Act. The Court of Appeal did not accede to the journalist's request/claim for production of documents.

10. I would refer the Inquiry to the statements of the judges that touched on the issue of the manner and extent to which the principles of open justice may (or may not) apply to inquiries, set out in para 43 of Government Parties Written 1.

11. Even Lord Toulson (who came the closest to saying what Mr McGrail asserts and prays in aid) did not say that the principle of open justice applies to inquiries in the same manner and to the same extent as it does to courts of law. At [111] he said: "before discussing the question whether and to what extent the same principle is applicable in relation to statutory inquiries….".

12. What Lord Toulson said (at [124]), which is not in dispute is that "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" (underlining added for emphasis). But he then immediately went on to make clear that the application of the principle was circumscribed by the provisions of the relevant statute.

13. See at [126]: "In each case it is necessary to have close regard to the purpose and provisions of the relevant statute." And at [128]: "To the extent that an enactment contains provisions about disclosure of documents or information, such provisions have the force of law. But to the extent that Parliament has not done so, it must be for the statutory body to decide questions of disclosure, subject to the supervision of the court."

14. The Government Parties' submissions are therefore entirely consonant with Lord Toulson words, properly applied, even though they were not the "*Supreme Court's unambiguous finding in Kennedy*" (para 24 McGrail Written 2). The open justice principle may be applied by the Inquiry absent statutory impediment e.g. on the question of publication and who the Inquiry reports to.

15. It was submitted on behalf of Mr McGrail (at para 19) that Lords Neuberger and Clarke agreed with Lord Toulson. That was about the decision in the appeal and the reasons for it (which did not include the issue we are now concerned with). This is best demonstrated by the fact that those two judges also agreed with Lord Mance (who said something quite different on the subject - para 43(v) of Government Parties Written 1).

The meaning of section 3(2)(e)(e) of the Commissions of Inquiry Act

16. To overcome the insuperable obstacle that, even per Lord Toulson, statutory impediment represents to their submission that as to the extent of the application of the principle of open justice, it is submitted on behalf of Mr McGrail (see para 25 McGrail Written 2) that the Government's power to direct "*whether or not the inquiry is to be held wholly or partly in public*" does not permit the government to direct that the inquiry is held entirely in private. This submission is plainly wrong and unsustainable both in law and semantically. The power to direct that the inquiry is not held wholly in public is precisely the power to direct that it be held "entirely in private". If the interpretation for which Mr McGrail contends were correct, the words "or partly" would serve no purpose in the section.

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(3) Article 10 of the ECHR and pre-2005 Act decisions

6.80 Since the enactment of the Human Rights Act 1998 public inquiries must, in interpreting and applying any statutory provision or rule of law, insofar as it is possible, do so in a manner compatible with the State's obligations under the ECHR.

6.81 Article 10 provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

6.82 The most significant decisions made in previous public inquiries as to the recording or broadcasting of their proceedings were made by Dame Janet Smith in the Shipman Inquiry and by Lord Hutton in the Hutton Inquiry, discussed below.

(a) The Shipman Inquiry

6.83 In the Shipman Inquiry Dame Janet Smith considered applications to broadcast proceedings on two occasions. The first application, determined by a decision on 11 June 2001, was entirely unsuccessful.[51] The second application, determined on 25 October 2001, was partially successful—permission was granted to record and broadcast stages 2, 3, and 4 of Phase 2 of the inquiry (namely those parts focused on good practice, the future, and proposals for change). Permission was refused to record and broadcast Phase 1 (which considered how many patients Shipman killed, the means employed, and the period over which the killings took place), stage 1 of Phase 2 (which considered the police investigations), and Phase 3.[52] The permission granted was given limited to a 'pilot experience' and in accordance with a strict and well-defined protocol.

6.84 It is to be noted that Dame Janet Smith adopted a different approach to the test that she would have applied had she been deciding whether to exclude the public or a portion of it from the hearings.

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[51] See <http://www.shipman-inquiry.org.uk/ruling_20010611.asp>.

[52] See <http://www.shipman-inquiry.org.uk/ruling_20011025.asp>.

Dame Janet Smith held that Article 10(1) was not engaged, stating her reasoning as follows:[53] **6.85**

> 45. In my opinion, subject to restrictions which may be imposed if they satisfy Article 10(2), Article 10(1) guarantees freedom to disseminate information which is already in the possession or control of or accessible to the person or body whose rights are under consideration. It also guarantees that person's right to express his opinions in any way and through any medium, even if they are shocking and unacceptable to most members of society. It guarantees the right to receive information from those who are willing to impart it. However, in my view Article 10(1) does not bear upon the right of access to information that another holds but has not made accessible and does not wish to impart. . . .
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> 46. . . . I note first the title of the Article, 'Freedom of Expression'. At first sight, that does not seem to indicate that the Article will have anything to do with a right of access to information. The first sentence states the principle: 'Everyone has the right of freedom of expression'. That is what this Article is all about. It seems to me that the second sentence must be read subject to the first. The second sentence says that the right (that is the right to freedom of expression) is to include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority. Read as a whole, that sentence, referring back to the first sentence, as I have suggested, says nothing about a right of access to material not yet available to the person concerned. Mr Lissack read the second sentence as follows: 'This right shall include freedom to . . . receive . . . information . . . without interference by a public authority . . . .' Read in that way, without reference back to the first sentence, it is possible to mount an argument that Article 10 guarantees a free standing right to receive all information. But in my view, such is not the ordinary natural meaning of the words of the first two sentences taken together. On their ordinary natural meaning, the words of the Article provide a guarantee to disseminate freely all information and ideas the person has and opinions he holds and a corresponding right to receive from others the information ideas and opinions which they have made accessible or wish to disseminate. In my view therefore, the expression of principle by the Court in *Leander* properly conveyed the meaning of the words of the Article. It was wider than necessary for the facts of the case but I am satisfied that the Court did intend and was entitled to propound the wider principle.
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> 47. I note that in the Lockerbie case, both Lord Kirkwood and Lord Marnoch expressed the view that Article 10 had no application to information which was not already available to the petitioners and which the person in possession or control did not wish to impart.
>
> 48. I am also fortified in the view that I have taken by the submission of Mr Anderson that it is Article 6 which provides such guarantees as are available for the rights of access to public proceedings. The Convention does not provide for freedom of access to information. The only provision to guarantee some rights to freedom of information is Article 6, which guarantees a right of access to some, but not all, types of court proceedings. It seems to me that if Article 6 does not apply, (as it does not here) then the Convention is silent on the right of access to information

[53] Ibid.

emanating from legal proceedings. This confirms my view that Article 10 deals only with information to which the person concerned already has access.

49. For those reasons, I am satisfied that Article 10 does not guarantee the right to receive information which is in the possession or control of one who is not willing to impart it. In so far as the Inquiry is in possession or control of the information under discussion, (to which question I will next turn) CNN must seek permission to receive it rather than assert a right to receive it.

6.86 In exercising her discretion to permit the proceedings to be broadcast and deciding what restrictions to impose on the use of cameras, Dame Janet Smith had regard to both the proper conduct of the inquiry and the legitimate interests and expectations of the witnesses. As regard witnesses, she stated as follows:[54]

> Until now, it has been the expectation of any citizen who has to give evidence in a court of law that they will do so in public but not on television. I do not think it has been the general expectation that more will be required of one called to give evidence at a public inquiry. If and when Parliament decides, as it could, that the hearings of a public inquiry will normally be televised, (subject to . . . discretionary limitation . . . for good reason) then the expectation of witnesses will be that they will have to submit to being filmed. But we are not in that situation now.

(b) The Hutton Inquiry

6.87 The Hutton Inquiry was a non-statutory inquiry. Lord Hutton gave permission to record and broadcast the opening and closing statements of counsel for the participants in the inquiry. He refused, however, an application by a group of media organizations to broadcast the entirety of the inquiry's proceedings:[55]

> I have decided not to accede to [counsel for the media organizations'] submission for two principal reasons. The first reason relates to the additional strain which would be placed on a witness giving evidence to the Inquiry if his or her evidence were televised. The Inquiry relates to matters of very great public interest and will be attended with very widespread publicity and comment. Those who give evidence will be placed under strain even if their evidence is not filmed and broadcast on television. But the strain will be all the greater if they know that their evidence is being filmed and broadcast and that every answer, every qualification or correction of an answer, every hesitation, every facial expression and every alteration of their posture will be watched by hundreds of thousands of people on their television screens and will be liable to be replayed on television on a number of occasions. That this is a very real consideration is demonstrated by [counsel for the media organizations'] submission that it is desirable that members of the public should be able to see the demeanour and body language of witnesses to make their own assessment if they are being truthful. I think that this knowledge might well inhibit some witnesses from speaking as

[54] See <http://shipman-inquiry.org.uk/ruling_20011025.asp>.

[55] Ruling on applications to broadcast the inquiry (5 August 2003); see <http://www.the-hutton-inquiry.org.uk/content/rulings/ruling01.htm.>.

frankly as they would otherwise do, and that filming them would not assist me in my task of trying to determine as precisely as is possible what happened during the period which preceded Dr Kelly's death. It is relevant to observe that this is one of the reasons which influenced the decision of Sir Richard Scott (as he then was) that witnesses in his inquiry on Arms to Iraq would not be filmed. In paragraph B 2.33 of Vol 1 of his Report, he stated:

> 'I had particularly in mind the possible effect on witnesses. It was foreseeable that there would be considerable media interest in the evidence to be given to the inquiry by Ministers, ex-Ministers and senior officials. There seemed to be a danger that the presence of television cameras might unfairly increase the inevitable pressure on witnesses resulting from the public character of the hearings.'

[Counsel for the media organizations'] acceptance that it would be reasonable that some witnesses, such as members of Dr Kelly's family and police officers who discovered his body, should not be filmed, constitutes a recognition that being filmed does place witnesses under additional strain, but [counsel for the media organizations] submitted that this concern does not relate to Government Ministers or to BBC reporters who are well accustomed to appearing on television in combative discussions. Mr Robertson also submitted that it would not be unreasonable to view senior civil servants as being in the same position as Government Ministers and that they should be prepared to accept that questioning of them at a public inquiry as to how they carried out their work should be broadcast on television, although he accepted that I might ask some civil servants if they objected to their evidence being filmed, and if they did I might decide that their evidence should not be filmed.

I recognise that there is some force in the argument that Government Ministers and BBC reporters would not be subject to the same strain if their evidence were filmed as would other witnesses. But I think there is nevertheless a difference between taking part in Question Time in the House of Commons or in a political debate or in a political discussion where the individual's political views are being expounded or defended, and being questioned by counsel in a public inquiry as to particular decisions in relation to an individual.

I am also not persuaded that a civil servant, no matter how senior, will not be placed under considerable additional strain if his evidence were filmed. I further consider that it would be most unsatisfactory to engage in a process of asking certain witnesses if they are willing for their evidence to be televised, and if they are unwilling, deciding whether they should be filmed notwithstanding their withholding permission. Obvious problems could arise if there was a significant difference on a particular issue between the evidence of a witness who was filmed and a witness who was not. Indeed the procedure of filming some witnesses at a public inquiry, but not others, depending on their public prominence or their willingness to be filmed, appears to me to be an undesirable one. Moreover, in an Inquiry which requires to be conducted urgently, the need to ask some witnesses if they were willing to be filmed, and then to consider what should be done in the light of their replies, would add a time consuming burden to the work of the tribunal and its secretariat.

The second main reason why I do not accede to [counsel for the media organizations'] application is that I am satisfied that the absence of television filming of the witnesses giving evidence would not mean that the Inquiry would not be a public one as required by the fundamental concept of open justice. A number of major Inquiries, open to the

public and the press, have been held in this country in recent years when television filming has not been permitted, but that has not meant that the Inquiry has not been a public Inquiry.

6.88 In relation to the arguments of the media organizations based on Article 10 of the ECHR, Lord Hutton set out the passages from Dame Janet Smith's ruling in the Shipman Inquiry (and referred to above) and held as follows:[56]

> I consider, with respect, that Dame Janet's reasoning is correct and I would wish to adopt it as my own. [Counsel for the media organizations] relied in his written submissions on the decision of the European Court of Human Rights in *Jersild v. Denmark* [1994] 19 EHRR, and *Castells v. Spain* [1992] 14 EHRR 445. I consider that these decisions do not assist his argument. It is clear that *Jersild* related to the dissemination by a journalist of statements made by another person in an interview with him, and *Castells* related to the publication in a magazine of an article criticising the government written by a politician. Therefore I rule that the applicants have no right under Article 10 and the Human Rights Act 1998 to film the proceedings, although as I have stated, I have given permission before the commencement of the Inquiry for filming of my opening statement and the filming of statements which will be made by counsel.

(4) Section 9 of the Contempt of Court Act 1981

6.89 Section 9 of the Contempt of Court Act 1981 provides as follows:

> **Use of tape recorders**
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> (1) Subject to subsection (4) below, it is a contempt of court—
>
> (a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;
>
> (b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;
>
> (c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).
>
> (2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.
>
> (3) . . .
>
> (4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings.

[56] See <http://www.the-hutton-inquiry.org./content/rulings/ruling01.htm> para 10.