INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

AMENDED JUDGMENT FOLLOWING FIRST PRELIMINARY HEARING

1. This is a preliminary judgment following the First Preliminary Hearing of the Inquiry on 22 June 2022.[1] Prior to that hearing, Caoilfhionn Gallagher QC and Adam Wagner – who act for Mr McGrail – made written submissions. Following the hearing, I received further written submissions from Ms Gallagher QC and Mr Wagner, as well as from Sir Peter Caruana QC and Chris Allan – who act for the Chief Minister, the former Deputy Governor, the Attorney General and "*HM Government of Gibraltar*" (collectively, "the Government Parties").[2]

2. It is not necessary, at this stage, to give judgment on all matters raised in the submissions. However, it is expedient to address two matters which bear directly upon the conduct of the Inquiry, including the imminent Second Preliminary Hearing. Those are:

    a. the application of the principles of open justice to the Inquiry, including publication of written submissions, redaction of written submissions and/or restriction of oral submissions, livestreaming of Inquiry hearings, remote attendance at hearings and the publication of the Inquiry Report; and

    b. whether the Inquiry is empowered to make recommendations.

3. I can also provide some brief indications on another issue, namely the procedure for questioning of witnesses during the Main Inquiry Hearing.

The principles of open justice

4. I must consider whether the general principles of open justice apply to this Inquiry.

5. At the First Preliminary Hearing, Sir Peter Caruana QC briefly argued that section 8(9) of the Gibraltar Constitution Order meant that the application of open justice principles to the Commissions of Inquiry in Gibraltar was not clear and not the same as in the United Kingdom, and that the Gibraltar Constitution did not require the application of

---

1 This judgment contains amendments to paragraphs 5 and 29 of the judgment issued on 17 August 2022, following clarification received from the Government Parties as to their position.

2 In correspondence, the solicitors to the Inquiry have invited Sir Peter Caruana QC to clarify the precise scope of the parties that his firm represents.

those principles to this Inquiry.[3] He amplified his argument in his first set of written submissions. Section 8(9) provides that:

> "…*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*".

6. Section 8(10) provides that:

> *"(10) Nothing in subsection (9) shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties thereto and their legal representatives to such extent as the court or other authority –*
>
> > *(a) may by law be empowered to do so and may consider necessary or expedient either in circumstances where publicity would prejudice the interest of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors as prescribed by law or the protection of the private lives of persons concerned in the proceedings; or*
> >
> > *(b) may by law be empowered or required to do so in the interests of defence, public safety or public order."*

7. I agree with Sir Peter Caruana QC's submission that section 8(9) does not include inquiries, as an inquiry is neither a court nor an authority determining the existence or extent of any civil right or obligation. Further, section 8(10) also does not extend to public inquiries, as this provision refers back to the "*court or other authority*" identified in section 8(9). However, in my view it does not follow that there is no need or power for inquiries to be held in public. There have been several inquiries in Gibraltar, which have always been held in public.

8. There are other sources which bear upon the issue. In ***Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee*** [2009] UKPC 52, at [11], Lady Hale, giving judgment in the Privy Council, held that provisions in the Gibraltar Constitution gave rights to its citizens which were equivalent to provisions in the European Convention of Human Rights and should, if possible, be interpreted as giving no less protection than under the convention.

---

3 Transcript pp 50.1 – 51.17.

9. Furthermore, by section 2(1) of the English Law (Application) Act 1962, the common law has force and application in Gibraltar as it has in England, "*so far as [it] 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 … 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 …; or (c) any Act* [of the Gibraltar Parliament]".

10. It is well established under the English common law that inquiries should apply the general principles of open justice, although the extent to which a public inquiry should be conducted in public has been held to depend on context.[4] As Lord Mance explained in ***Kennedy v Charity Commission*** [2014] UKSC 20 at [48]:

> "At one end of the spectrum are inquiries aimed at establishing the truth and maintaining or restoring public confidence on matters of great public importance, factors militating in favour of a public inquiry. But many inquiries lie elsewhere on the spectrum."

11. The facts of the present Inquiry fall squarely within the "*end of the spectrum*" identified by Lord Mance: the former Commissioner of Police complains that he was required to resign following improper and undue pressure put upon him by the Chief Minister and by the Attorney General. I must balance the public interest in the Inquiry being open to public scrutiny against any countervailing factors.[5] It is, in my judgment, plainly in the public interest that the evidence is disclosed, heard, and challenged, in public. However, there may be some exceptions to this general principle, which the Inquiry has sought to identify in the protocols which it shall shortly publish, and which I will deal with if and when they arise.

12. I have considered whether any Order in Council applying to Gibraltar, Act of Parliament at Westminster or Act of the Gibraltar Parliament has the effect of modifying or excluding the principles of open justice from public inquiries in Gibraltar. The only provision that I have identified as potentially doing so is section 3(2)(e) of the Commissions of Inquiry Act 1888 (as amended), which establishes 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*". This provision contemplates that the Government could direct that an inquiry be held wholly or partly in private, and therefore arguably modifies

---

4 See ***Kennedy v Charity Commission*** [2014] UKSC 20 at [47]-[48] (Lord Mance); [125] (Lord Toulson).

5 ***Kennedy v Charity Commission*** [2014] UKSC 20 at [123] (Lord Toulson).

or excludes the English common law's recognition that the principles of open justice apply to inquiries. However, crucially, the Government's Commission of this Inquiry (Legal Notice No. 34 of 2022) does not direct that this Inquiry should be held wholly or partly in private. Indeed, the Commission expressly states that:

> "*Save as the Commissioner may in his discretion determine, the Inquiry is to be held in public at a venue, and to commence on a date, to be specified by the Government by notice in the Gazette.*" (Emphasis added)

13. Therefore, I have arrived at the conclusion that the Inquiry should be held in public and that open justice principles should apply to this Inquiry as they do to inquiries in England, either (a) by virtue of English common law principles applying in Gibraltar, or (b) by virtue of the Government's express direction that the Inquiry be held "*in public*" in Legal Notice No. 34 of 2022. It is not necessary for me to determine which of those alternative routes to my conclusion is the correct one, because they both arrive at the same result.

Application of the principles to this Inquiry

14. The application of the principles of open justice to any particular inquiry depends on the particular circumstances of that inquiry, including any statutory schemes within which the inquiry operates.[6] There are, therefore, no rules of practice or procedure which must always be applied to every inquiry. This is particularly the case in Gibraltar, where there is no equivalent of the UK's Inquiry Rules 2006.

15. In order to ensure that the preliminary hearings and the substantive Main Hearing in March 2023 proceed in a fair, orderly and cost-effective manner, it is necessary to lay down proper procedures. To that the end, the Inquiry has circulated various draft policies and protocols to the Statutory Participants (namely the Chief Minister, the former Deputy Governor, the Chairman of the Gibraltar Police Authority and Mr McGrail) and the Attorney General which will be finalised as soon as possible following their submissions.

16. I must decide how best to apply the general principles of public justice to this Inquiry. Some of the guidance is uncontroversial, as I set out in the three sub-paragraphs below:

    a. Except when I order otherwise, all the hearing of this Inquiry, including the preliminary hearings, will be held in public, open to the public and press.

---

6 ***Kennedy v Charity Commission*** [2014] UKSC 20 at [126] (Lord Toulson).

b. The timetable and agenda for the hearings will be published in advance, and posted on the Inquiry's website,[7] so that the press and public can consider and plan their attendance.

c. All the Inquiry's 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 I direct, in accordance with the issued policy.

17. Other points are more controversial; these I must consider in more depth. I set out my judgment on these points below.

Publication of submissions

18. Mr McGrail submits that all submissions and witness statements (plus documentary evidence and exhibits) should be published on the Inquiry website in advance of hearings, subject to redactions.

19. The general procedure adopted in inquiries in England, and indeed in courts, is that submissions and witness statements are not published in advance of the evidence being given. There are a number of sound reasons why this is so: first, the evidence that witnesses give at a hearing may differ in content or tone from what they have previously written or said; secondly, it gives rise to the risk that comment or even criticism might be made of the witness or their evidence before they have testified, which might tempt them to alter or trim their evidence.

20. I can see no good reason from departing from the general principle: witness statements, documentary evidence and exhibits will be published on the Inquiry website (with authorised redactions) as soon as possible after the witness has given evidence; the target is to do so by the next sitting day. Similarly, submissions will be published online on or as soon as possible after the first day that they are deployed in an open hearing.

21. A draft policy for the redaction of documents has already been circulated to the same participants, and will facilitate a procedure whereby parties can apply for redactions of evidence before it is published online. This will need to be done in good time before each hearing, so that documents can be published efficiently during the hearing, and the hearing does not become unduly focused on arguments about redaction.

Redaction of written submissions and/or restrictions on oral submissions

---

7 https://coircomp.gi/

22. The terms of reference require me to "*inquire… into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police*" and "*to ascertain the facts*". Therefore, an important matter to be resolved is a refinement of the list of issues. This is essential so that relevant disclosure can be sought and made; that evidence bearing on those issues can filed before the Main Inquiry Hearing in March 2023; and the questions asked at that hearing can be properly focused on the issues which I have to decide. The benefits of producing a list of issues are well set out in *Public Inquiries* by Jason Beer QC, at para 5.22.

23. The First Preliminary Hearing was held on 22 June 2022. The former Deputy Governor (Nicholas Pyle OBE), the Chairman of the Gibraltar Police Authority (Dr Joseph Britto) and the Chief Minister (Fabian Picardo QC) served their affidavits on 12, 13 and 26 May 2022, respectively. Mr McGrail did not file his 45-page affidavit until 20 June 2022, only a couple of days before the First Preliminary Hearing. I made clear that I did not criticise Mr McGrail, or those who represented him, for that delay, which was essentially caused by delays in arranging proper funding for the work done. But the result of the late service was, as Sir Peter Caruana QC forcefully pointed out, that it would have been unfair, at that stage, to permit Mr McGrail's detailed allegations to be aired and published, when he had not had time to consider, still less to challenge and refute, the allegations by taking instructions from those whose conduct was impugned. Further, one particular section of Mr McGrail's submissions set out a detailed factual case which may have been appropriate as part of an opening statement for the Main Inquiry Hearing, but was unnecessary for the purposes of the matters which were before me at the First Preliminary Hearing. Therefore, after some debate, a compromise was reached by which each side gave a very short summary of their case, that was all that was necessary to deal with the preliminary procedural issues which were then to be decided.

24. At the Second Preliminary Hearing in September 2022, the parties will be invited to make submissions on the policies which the Inquiry Team has circulated and the provisional list of issues. Ms Gallagher QC argues that such a list of issues does not exist in the abstract - it must arise in the context of the allegations made, and indeed in the context of the answers or responses given to those allegations. Without that, she submits, it is not possible to identify what is alleged, what is admitted, what is challenged, and matters that need to be inquired into. So, she argues, she should be allowed at least briefly to set out the factual background of Mr McGrail's claims. She proposes a summary only, something quite different in length and purpose from the

opening statement, which will have to wait until the substantive Main Inquiry Hearing in March 2023.

25. Sir Peter Caruana QC resists this; he argues that it is unfair that these allegations will be aired and published when untried, untested and effectively unchallenged until the full hearing in March 2023. But in my judgment, he is not now taken by surprise, by the time of the September hearing. He will have had the best part of three months to consider Mr McGrail's allegations, and fairness can be maintained by allowing him the opportunity to produce a summary of his response, which he must now be in a position to make.

26. There are, in my judgment, other compelling reasons to permit Ms Gallagher QC at least briefly to set out the factual background of Mr McGrail's position. This is a public inquiry and the principles of open justice give the public a right to know what is being alleged, and indeed what answer the Government makes to the allegations made against it. If all this is left unsaid and unpublished until March 2023, there will be speculation as to the matters being complained about and – worse than that – suspicions of a cover up, something that the Government itself will surely be anxious to avoid.

27. Moreover, it is only if there is some publicity of the matters being alleged that others, including potential witnesses, will be able to recognise that they might know of something that may be relevant to the issues that I must decide.

28. So, for all these reasons, I broadly accept Ms Gallagher QC's submissions on this point. In my judgment, Ms Gallagher QC should now be permitted at least briefly to set out the factual background of Mr McGrail's claims at the Second Preliminary Hearing, to the extent that it is relevant to the issues before me at that hearing. I will allow Sir Peter the same amount of time briefly to set out his answer and response to these allegations.

29. It is Mr McGrail's case that he was placed under improper pressure at the highest levels of Government in respect of a criminal investigation, and subsequently put under pressure by the same individuals to request early retirement against his will, pressure to which he ultimately succumbed. It is the Government's case that Mr McGrail was not put under improper or any pressure in the conduct of his job or the conduct of any criminal investigation, and that he chose to retire because the Acting Governor and the Chief Minister had lost confidence in him and his position therefore became untenable. As Sir Peter Caruana QC puts it in his latest submission, the Government argues that there is no causal link between the criminal investigation referred to by Mr McGrail and

his decision to retire. Whether that is right or wrong is one of the critical issues for me to decide but I can only decide the issue having heard all the evidence, and submissions on the point, at the substantive hearing; any suggestion that the Inquiry must now proceed on the presumption that the investigation raised by Mr McGrail had nothing to do with Mr McGrail's retirement would seem to me to be quite wrong (and the Government has made clear that it does not submit that I should proceed on that basis). I will listen to representations as to precisely how that issue is to be framed, but it is one of the issues which I must consider.

30. In my judgment, this allegation must be investigated by the Inquiry. I now invite the parties to submit suitable short draft statements, in accordance with the guidelines I have just issued, which I will consider and adjudicate upon (providing reasons if required) in advance of the Second Preliminary Hearing.

31. Since I am going to permit short statements of their position, but no more, it seems to me that, for the time being (and subject to revision in the future), the parts redacted from Mr McGrail's submissions at the First Preliminary Hearing should remain redacted. For consistency, I also consider that the following sections of the parties' submissions following the First Preliminary Hearing should be redacted:

    a. Part B (paragraphs 6-23) of Sir Peter Caruana QC's submissions dated 8 July 2022; and

    b. Paragraphs 18-32 of Ms Gallagher QC's submissions dated 22 July 2022.

Live streaming

32. Mr McGrail submits that I direct that the proceedings to be live streamed. Ms Gallagher QC argues that such serious allegations against such high public officers should be given the widest publicity; she argues that only in that way can the principles of open justice be served.

33. Section 18(2) of the UK Inquiries Act 2005 prohibits broadcasting, except at the request or with the permission of the Chairman. I accept that the usual procedure in the UK is now that inquiries are live streamed. I accept that live streaming can, as the House of Commons website puts it, provide: "*transparency, public accountability and catharsis*".[8] I even accept that there is in the UK now effectively a presumption of live streaming. However, even in the UK, open justice principles do not *require* or even

[8] https://commonslibrary.parliament.uk/covid-19-the-public-inquiries/.

expect broadcasting of all court proceedings (given that it is only done in limited circumstances in courts the UK, and remains largely confined to the Supreme Court and Court of Appeal[9]), let alone Inquiry proceedings.

34. Sir Peter Caruana QC opposes this application. His first submission is that it is a criminal offence to broadcast court proceedings in Gibraltar (section 477 of the Crimes Act 2011), and the Court has no power to authorise broadcasting. He therefore submits that the broadcasting of legal proceedings is not required by principles of open justice, and that in those circumstances it would not be appropriate for Inquiry proceedings to be broadcast.

35. Although there is no specific statutory authority in Gibraltar permitting the live streaming of inquiry proceedings; there is no specific statutory authority preventing it either. In my judgment, the common law powers of case management (plus my wide discretion in section 6 of the Commissions of Inquiry Act) permit me to authorise live streaming, if I thought that it would be in the public interest to do so. But there is no absolute requirement of open justice that inquiries should be live streamed.

36. Gibraltar is a small community. There are only 34,000 permanent residents. All live within a couple of miles of the hearing; there is adequate public transport. Anyone who wants to hear the evidence can easily do so. There is no evidence – or even suggestion – that anyone who wishes to attend would be unable to do so.

37. The situation here facing me in this Inquiry is, therefore, quite different to other inquiries in the UK, where such live streaming has been permitted. There, typically, victims of those directly affected by the events being investigated – and often there are many of them – and their even more numerous families, are widely scattered throughout the country (and indeed abroad), and large numbers of those who want to attend cannot conveniently be accommodated in the hearing room (or go to some other building more accessible for them to which the proceedings can be live streamed).

38. Furthermore, these proceedings are fully covered by the attentive, thriving and well-informed Gibraltar press, which sends reporters every day. Accurate and detailed reports of the proceedings are contemporaneously printed and broadcast, and are widely read.

---

9 Cameras were also very recently permitted to show the handing down of a sentence in a Crown Court trial, for the first time: https://www.barcouncil.org.uk/resource/broadcasting-crown-court-sentencing-will-shine-a-light-on-the-system-says-bar-council.html?dm_i=4CGD,1DEOU,71WT80,6CH57,1.

39. The Inquiry proceedings are transcribed and transcripts will be uploaded onto the Inquiry website the same evening or at least before the Inquiry sits the following day. The Inquiry website is accessible to any member of the public.

40. In my judgment, the requirements of open justice are fulfilled without the need for live streaming.

41. Furthermore, live streaming is not without drawbacks. The publicity resulting puts an additional strain on witnesses: Ms Gallagher QC has already told me that some witnesses might require some protection or special measures. I should make clear that I am not impressed with the point which weighed twenty years ago with Lord Hutton, chairing the Inquiry into the death of Doctor Kelly, that even Ministers and senior public officials might face additional stresses and strains if their evidence was live streamed. Public scrutiny of their actions and decisions is part of the democratic principle.

42. Moreover, since it is unlikely that any broadcaster will want to show the whole of the proceedings, there is a risk that only unrepresentative tit-bits of the Inquiry's hearings would be broadcast on television; that would not further the aims of open justice, indeed it may serve to damage confidence in the process rather than enhance it.

43. There may also be some practical problems, relating to cost of streaming and the control of the camera. We have established that the cost of live-streaming the Inquiry hearings is likely to be in the region of £22,000. It is difficult to see that a commensurate advantage is gained, for the reasons given above. Therefore, although I do not consider this to be determinative it is another factor, it weighs in the balance.

44. Therefore, although I accept that I have the power to authorise live streaming, in my judgment, the public interest here does not require live streaming. Furthermore, live streaming has a number of attendant problems. I will not therefore permit live streaming.

Online attendance

45. A different point is made, as to whether it is appropriate to authorise some persons – not yet identified – to attend hearings remotely, presumably by Zoom or Microsoft Teams. No doubt, in a suitable case, I have the power to authorise remote attendance, to which I could attach suitable conditions (as commonly happens when allowing remote attendance in criminal trials, typically by families of the deceased in murder trials).

46. Remote attendance to a hearing otherwise open to the public is not required by the principles of open justice but I am prepared to consider any such application on its merits. Among the relevant considerations would be the reason why the individual cannot attend in person (including having regard to their location and to any relevant condition, relating to mobility, illness or disability); whether they have a particular or specific interest in the hearing (or any particular part of it); why reliance on published reports is inadequate; and, the costs and practicalities of complying with the request in the time available.

47. No such application has been made by, or on behalf, of any particular individual and, having laid down general guidelines, I need not at this stage do any more.

Questioning of witnesses

48. This matter was raised at the First Preliminary Hearing, and I consider that it may be helpful for me to give an early indication of my proposed approach to questioning of witnesses at the Main Inquiry Hearing. I provide this indication to assist the parties in their planning and preparation, but stress that I am not deciding the exact format of questioning (including if and how I limit and control that questioning) at this early stage.

49. The general practice and procedure in public inquiries, which I shall follow, is that witnesses are first examined by Counsel to the Inquiry. The nature and tone of that examination will depend on the particular circumstances of each witness, but, when appropriate – as it often will be – that examination will be challenging.

50. I have been referred to a number of authorities which stress that, whenever a person is accused at an Inquiry of such serious misconduct that his good name and reputation is imperilled, he should generally have the right to cross-examine his accuser.

51. Here, Mr McGrail accuses the Government of very serious misconduct; it is only fair that the Government Parties be allowed to cross-examine him (and maybe his corroborative witnesses). Similarly, if and when Mr Picardo QC, Mr Llamas QC, Mr Pyle (and maybe others) give evidence; they will be examined by Counsel to the Inquiry, but – in my judgment – it is only right that Mr McGrail by his counsel has the right to cross-examine them.

52. These rights are not absolute; they are subject always to the overriding objective of fairness. Furthermore, prudent case management may make it necessary for me to lay down limits (including time limits) within which that right might be exercised.

53. It is not possible to lay down any more general rules; the position of each witness will be considered on a case-by-case basis. The appropriate time to determine the format for cross-examination of each witness is at the Final Preliminary Hearing to take place in late January or early February 2023, prior to the Main Inquiry Hearing, after disclosure and the exchange of responsive witness statements.

The power of the Inquiry to make recommendations

54. At the First Preliminary Hearing, I said that the Inquiry had no power to make recommendations. What I said was based on comments by Sir Jonathan Parker at the First Preliminary Hearing of the Dr. Giraldi Home Inquiry, but I had not yet been referred to section 6 of the Commissions of Inquiry Act, to which Ms Gallagher QC and Sir Peter Caruana QC have helpfully drawn my attention. It reads as follows:

> "*The commissioners 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)

55. The passage underlined makes clear that – contrary to what I originally said – in my Report, I can make such recommendations as I think fit.

Publication of the Inquiry's report

56. Ms Gallagher QC submits that the principles of open justice require that the Inquiry publishes its Report, in full (subject only to the redactions that I authorise). Although publication of the Report is a long way off, because Ms Gallagher QC has raised it as a facet of open justice, it is perhaps convenient if I address the topic at this stage.

57. Sir Peter Caruana QC points out that the Commission, by which this Inquiry was established and I was appointed, requires me to "*ascertain the facts and report to the Government*" (his emphasis, which I note).

58. He observes that this accurately reflects section 6 of the Commissions of Inquiry Act, by which the Commissioner shall inquire into the matters submitted to him "*and shall report to the Government*" (again, his emphasis, which I also note).

59. In my judgment, therefore, it is a requirement of law that I report to the Government and the Government publishes the Report. I accept the submissions on behalf of the Government that neither I nor the Inquiry Team have the right to do so ourselves.

60. This apparent derogation from the principles of open justice is not as significant as might at first appear, because the Government has politically committed itself to publishing the report; by its Press Release No. 84 of 2022, of 4 February 2022, the Government stated that "*The full report will be published by the Government, subject only to such redactions as [the Commissioner] may himself consider appropriate*".

61. It is, no doubt, an implied term of that undertaking that the Report will be published promptly, without undue delay. I will invite the Government to give an express undertaking to that effect before or at the Second Preliminary Hearing.

Order

62. I invite the parties to try and agree a draft order for my approval dealing with the matters I have addressed in this Ruling, and failing such agreement within 7 days will resolve any disputes over the terms of the order in writing.

Sir Peter Openshaw, DL

Original version: 17 August 2022

Amended version: 25 August 2022