

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

**SUBMISSIONS IN REPLY
ON BEHALF OF FORMER COMMISSIONER MR IAN McGRAIL**

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15th September 2022

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, and in response to the submissions by the Government Parties (“**Government Parties’ Submissions**”) and by the Gibraltar Police Authority (“**GPA Submissions**”) dated 9th September 2022. These submissions supplement our submissions in advance of the Second Preliminary Hearing also dated 9th September (“**IM Submissions**”)

B. REPLY SUBMISSIONS

- (i) *Section 10 of the Commissions of Inquiry Act*
2. As set out in IM Submissions we share the Government Parties’ concerns in relation to Section 10. It is unclear, however, whether the Commissioner could go as far as disapplying the offending parts of section 10 entirely pursuant to section 2(2) of Annex 2 to the Gibraltar Constitutional Order (“**GCO**”), as suggested at §7.12 of the Government Parties’ Submissions.
3. We note that section 16 of the GCO grants original jurisdiction to the Gibraltar Supreme Court to hear and determine any application of a person alleging a contravention of the GCO’s protective provisions. Whilst section 2(2) of the Annex 2 is widely drafted, it is unclear that a statutory body such as a Commission of Inquiry, which is not a court or the Supreme Court, could act to disapply a statutory provision without a reference being made first to the Supreme Court. The Government Parties have not cited any authority for this proposition. In the circumstances, we submit that the more prudent course would be to take the pragmatic steps to mitigate the effect of section 10 outlined in IM Submissions §§47 and 51-52.

(ii) Applications for public interest immunity.

4. In reply to §9.2 of the Government Parties' Submissions, we agree that the Inquiry procedure should permit applications for public interest immunity to be made initially without notice to the other Core Participants and there should also be a presumption that where practicable the other Core Participants should be given an opportunity to make submissions on the application. The same would apply to an application made prior to the main hearing relating to cross examination. We are concerned that private *ex parte* discussions between the Government Parties and the Inquiry do not become the norm prior to the main hearing or during it.
5. At the First Preliminary Hearing Counsel for the Government Parties indicated that the Attorney General would be making a "*very special application*" with regards to his decision to discontinue the prosecution of the "*Delhi Defendants*" pursuant to section 59(2)(c) of the Gibraltar Constitution. Since the Government Parties have raised the issue of potential *ex parte* public interest immunity applications, we wish to make clear at this stage that the implication that that decision is not subject to judicial scrutiny under Gibraltar Law is not accepted and without prejudice to the generality of the submissions made in paragraph 4. above, Mr. McGrail would like to be heard if any such application is made.
6. In relation to §9.2(iii), the wording "*such other persons as the Commissioner may consider appropriate in discharging his Commission*" is in our submission too vague.

(iii) Core Participants Policy.

7. In relation to §11.2 of the Government Parties' Submissions, we agree with (i)(b) and (c), however (a) would in our submission unnecessarily constrain the Inquiry. It may be that in order to set out the potential criticism in sufficient detail for it to comply with Maxwellisation requirements, a finding or findings of fact may have to be set out. There is no need at this stage for the Inquiry to constrain itself in the manner sought by the Government Parties.

(iv) Privacy Notice

8. In reply to §13.2, we mean no disrespect to the Government of Gibraltar in suggesting that the Inquiry should obtain IT services independently of it. We note that Caruana & Co. has now confirmed that it is acting for “*all branches of HM Government of Gibraltar*” which “*includes, but is not limited to, the Office of Governor (i.e. the current Governor), Sir David Steel, the Interim Governor at the relevant time, Nick Pyle, the Chief Minister, Fabian Picardo [KC], the Attorney General, Michael Llamas [KC]*” and that “*this therefore includes the Government as a whole, including the Council of Ministers and the Governor*” (correspondence from the Inquiry dated 13th September 2022). Given that Mr Caruana KC therefore acts for the entire Gibraltar Government, including parts of it such as the Council of Ministers which played no substantive role in the matters being investigated (as far as we are aware), and he has not clarified the extent of his instruction (indicated by the words “*but is not limited to*”) we consider it is fair to raise that it would be preferable – for independence and the perception of independence – that the Inquiry does not contract its IT services from those who are very closely connected to the events under investigation, for reasons further articulated in our previous submissions.

(v) Representation for Core Participants

9. We raise at this stage a related concern that a large number of government Core Participants and the entirety of the Government are being represented by the same firm of solicitors. We also understand, though stand to be corrected, that the Royal Gibraltar Police (“RGP”) is also to be represented by Caruana & Co, and that pressure was put on the RGP to select the same legal representation as the Government. In light of the serious issues of potential corruption which are being investigated by this Inquiry, we are concerned that the representation of a large selection of potential witnesses is with one legal firm. Whilst it is for the parties to decide who represents them, we are concerned in particular that individual government employees or police officers may feel inhibited by this arrangement, which may ultimately hamper the work of the Inquiry. For the sake of completeness we would remind that Caruana & Co. also represented the complainants in the Op Delhi investigation, Bland Limited and its Chairman Mr. James Gaggero.
10. One possible solution to this would be for the Inquiry to appoint a firm of solicitors, in Gibraltar or the UK, which is not currently acting for any Core Participants, and offer

government or RGP individuals the opportunity to be separately represented, funded by the Inquiry. This arrangement was put in place in the Baha Mousa Inquiry for soldiers whose interests conflicted with the large group of soldiers represented by the Treasury Solicitors.

(vi) Preliminary List of Issues

11. The submissions at §14.1 of the Government Parties' Submissions are noted and are fully addressed in our previous submissions. We were clear in our submissions on the Preliminary List of Issues that none of the proposed issues should be removed from the issues list at this stage, however some of the issues, such as the assault on the helicopter pilot and the separate airport incident which took place before Mr McGrail was Commissioner, are obviously peripheral to the decision making in May and June 2020. We raised a legitimate concern that there is a risk if the Inquiry investigates all of the issues in the same detail then it could lose focus.
12. The summary of the factual background at §14.1 (v) (a)-(g) of the Government Parties' Submissions is noted and we take no issue with this summary being read out at the Second Preliminary Hearing. We do not make submissions in substantive rebuttal at this stage as the Inquiry's intention, as we understand it, is to permit the Core Participants an opportunity to present, in short, their summaries of the factual position at the hearing – our proposed factual summary has already been set out in IM's Submissions.

(vii) Judgmental vs evaluative findings

13. In relation to the submissions made by the Government Parties at §14.3, we have made detailed submissions on these points at §§15-25 of our 23 August 2022 submissions. The Government Parties have agreed that the Inquiry may use the word "*inappropriate*" to describe behaviour by the Chief Minister and/or Attorney General in relation to Op Delhi. This language may be described as 'evaluative' or 'judgmental' – this seems a distinction without a difference.
14. We do not submit that the Inquiry is a court which can (or should) reach a 'judgment' on any kind of criminal or civil liability. However, the Commissioner has wide terms of reference (to "*inquire, as he shall in his absolute discretion consider appropriate*"), has a

power to make recommendations if he sees fit to do so, and – more fundamentally – is in a position to ensure accountability in relation to a scandal, a central role of the modern public inquiry as set out in *Beer* §106. The Chief Minister himself promised in Parliament that the Inquiry would be “*as broad and as wide as possible*” (Public Bundle for First Preliminary Hearing, page 174), a statement which we do not understand him to have resiled from.

(viii) Mr Pyle’s stated intention to invoke section 13 of the Police Act

15. In reply to §14.4 of the Government Parties’ Submissions, we propose the text of issue 9 is amended to read more neutrally, as follows: “*Mr Pyle’s statement, made to Mr McGrail on 5 June 2020, that he was considering exercising his powers under Section 13 of the Police Act and therefore requiring him to resign*”.

(ix) The Gibraltar Police Authority (“GPA”) and the section 34 process

16. We oppose the submissions made at §1 of the GPA Submissions. The facts relating to the GPA process are not “*well established*” simply because Mr Britto has made a witness statement, and it is wrong to state that because the GPA accepted the section 34 process was flawed it was “*inconsequential*” to the outcome. The aborted GPA process played a central role in “*the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police*” because (for example) (a) it placed a huge amount of pressure on Mr McGrail, and (b) the fact that it was aborted led Mr Pyle to suggest he was going to exercise his section 13 powers.

17. The section 13 powers are not available to the Governor unless the GPA has “*failed to discharge or perform a responsibility imposed on the [GPA]*”. It was clearly Mr Pyle’s view that the power was available to him, and therefore the GPA had indeed failed to discharge or perform a responsibility imposed upon it. The GPA’s actions are therefore important to the factual matrix.

18. There were also a number of fundamental flaws in the process, not just the ones which have been (very generally) accepted by the GPA, and which the Inquiry should – in our submission – investigate, and this will require a detailed factual consideration of the events between the first contact between Mr Britto and the Chief Minister and the ultimate

withdrawal of the section 34 process. The Commissioner may also wish to make recommendations relating to the GPA and/or the statutory regime. To stop investigating the issue now, as the GPA submit, would be to lose this opportunity.

C. CONCLUSION

19. We hope that these submissions are of assistance.

ADAM WAGNER

Doughty Street Chambers, London

15th September 2022