
INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

Ruling on adjournment and potential split of Main Inquiry Hearing

1. This is a ruling concerning whether the Main Inquiry Hearing should be split, with some evidence being heard in September/October 2023, and other evidence being heard at a later date. This follows my decision to adjourn the Main Inquiry Hearing for reasons which are set out in more detail below.
2. On 3 August 2023, the Lead Solicitor to the Inquiry, Mr Charles Simpson of Triay Lawyers, wrote to CPs updating them on developments since the Fourth Preliminary Hearing, held on 19 July 2023 (“PH4”) and advising the CPs of my decision to adjourn the Main Inquiry Hearing. This letter invited submissions from CPs on whether the Main Inquiry Hearing should be split, with some evidence being heard in September/October 2023, and other evidence being heard at a later date.
3. Senior Investigating Officer John McVea (SIO McVea) of the RGP had urgently approached the Inquiry on 18 July 2023, the eve of PH4, with an update concerning an ongoing criminal investigation. The investigation concerns allegations that witnesses may have received incentives for providing evidence to the Inquiry, and remains active. It is not appropriate to give any further detail publicly concerning the investigation.
4. Based on that update, I determined that it was not possible properly and safely to proceed in respect of items 8 and 9 on the Agenda for PH4. Item 8 related to arguments concerning the admissibility of 19 individual witness statements which had been submitted to the Inquiry, and item 9 related to an application by one CP for further information and disclosure to be obtained by the Inquiry regarding the same 19 witness statements. CPs were informed of this development and my decision not to proceed with items 8 and 9 at PH4 on the evening of 18 July (the day before PH4). At PH4, I stated that a further preliminary hearing was “increasingly likely” and I was looking at the possibility of scheduling a further PH remotely in order to deal with items 8 and 9 in advance of the Main Inquiry Hearing, subject to the progression of the criminal investigation. The Inquiry has continued to liaise with SIO McVea concerning the latter.

5. The ongoing criminal investigation raises three significant difficulties in terms of progress of the Inquiry towards the Main Inquiry Hearing in September/October:
 - a. First, SIO McVea has stressed to the Inquiry the risk of prejudicing an active investigation, and any potential future criminal trial, by the Inquiry seeking or obtaining evidence and documents relating to issues currently being investigated, or hearing submissions or evidence on such issues in public. The Inquiry itself is acutely aware of this risk and will not take steps which may prejudice an ongoing criminal investigation or potential prosecution. I consider that while the criminal investigation is ongoing and a criminal prosecution remains a possibility, it is not possible to properly or safely hear submissions (or subsequently request documents or question witnesses) on matters which are the subject of the ongoing criminal investigation and may be the subject of a future criminal trial.
 - b. Second, it appears very unlikely, based on information provided by SIO McVea, that this criminal investigation will be completed before the scheduled start date of the Main Inquiry Hearing on Tuesday 26 September 2023. In the circumstances, I consider that the Inquiry is very unlikely to be in a position properly and safely to hear submissions on and determine Items 8 and 9 on the Agenda for PH4 in good time prior to the Main Inquiry Hearing on 26 September.
 - c. Third, without in any way prejudging the outcome of that investigation or indeed pre-determining items 8 and 9, I do not consider that the Main Inquiry Hearing can safely and fairly proceed while: (i) the criminal investigation into the complaint by Mr McGrail is ongoing, (ii) items 8 and 9 have not been adjudicated on, and (iii) there remain outstanding and unexplored allegations which might be relevant to the matters to be considered at the Main Inquiry Hearing, or which CPs may wish to advance at the Main Inquiry Hearing.
6. Taking all of these matters into account and the content of certain submissions which had been made by CPs confidentially in relation to items 8 and 9, I concluded that the Inquiry had no option but to adjourn the Main Inquiry Hearing. This was not a decision which I made lightly – I am particularly conscious of the pressing public need for this Inquiry to be progressed expeditiously and for a Report to be prepared and published as soon as possible. Were it not for the criminal investigation, this Inquiry would have progressed to a Main Inquiry Hearing in September, which would have been a relatively speedy turnaround for inquiries in recent years. However, based on the

information received from SIO McVea, the risk of prejudicing an ongoing criminal investigation and potential prosecution is too great to ignore.

7. I considered that it was preferable to provide as much notice as possible to CPs, rather than tolerate the real risk, and in my view high likelihood, of having to direct a late adjournment, with less notice to CPs, increased costs and expense to all concerned, if the Inquiry simply continued and awaited an update concerning the progress of the criminal investigation. This was particularly so in circumstances where it appeared unlikely that the investigation would be concluded in advance of the start date of the Main Inquiry Hearing.
8. At the same time, I gave some preliminary consideration to whether the Main Inquiry Hearing can be split, with evidence being heard in September/October from witnesses not touching directly on or being concerned with the matters which are the subject of the criminal investigation, and a second hearing being listed at a later date. I indicated to CPs on 3 August 2023 that my preliminary view (subject to due consideration of submissions which I invited from each of them) was that it would not be desirable to take this course, given the following:
 - a. Items 8 and 9 on the Agenda for PH4 have not yet been adjudicated on and could not safely and properly be, given the ongoing criminal investigation.
 - b. There will be great difficulty in trying to divide evidence between matters unrelated to and matters touching upon those being investigated by SIO McVea. They are not as easily severable as may initially appear. In particular, potential issues of credibility may arise from those matters, which would make witness evidence even trickier to hear in isolation.
 - c. The potential time lag between hearings will likely result in inefficiencies including in relation to cost given additional and duplicative preparatory work.
 - d. The likelihood that any splitting up of the Main Inquiry Hearing will result in greater public expense.
9. I invited submissions from CPs as to the viability of a “split” Main Inquiry Hearing approach by Wednesday 9 August 2023.
10. I am grateful to CPs for having provided submissions and have now had an opportunity to consider these. Subject to submissions on the adjournment itself from two CPs, which I address below, the CPs appear to agree that it would not be appropriate or beneficial to adopt a “split” approach to the Main Inquiry Hearing. In the circumstances,

I conclude, for the reasons given above, that a “split” approach to the Main Inquiry Hearing should not be adopted.

11. Although I did not invite submissions on the question of the adjournment itself, I received submissions from 2 CPs that the Main Inquiry Hearing should not be adjourned, and instead that it should proceed, with the matters relating to the criminal investigation being effectively ring-fenced and saved for investigation as necessary at a subsequent hearing.
12. As I have said above, I do not believe that such an approach is advisable or safe, because of the potential importance of those matters to the Main Inquiry Hearing, as has been highlighted in representations made by certain CPs. Indeed, in closed submissions for PH4 one CP emphasised the importance of those matters and the necessity for the Inquiry to investigate them further (including the necessary pursuit of disclosure which overlaps with the criminal investigation) in order for properly informed questions to be asked at the Main Inquiry Hearing, stating that if such a course was not taken then it would have a serious and potentially irresolvable impact on the fairness of the final hearings. That same CP subsequently stated that item 9 is of ongoing deep concern and has ramifications which are important to, but also wider than, the admissibility of the evidence.
13. As noted above, I am aware of the importance of this Inquiry and the need for expeditious progress and for a Report to be prepared and published as quickly as possible, and therefore did not take the decision to adjourn lightly. The arguments raised by the two CPs concerned do not persuade me to re-visit that decision. My firm view is that it is currently unsafe to proceed in September/October 2023. Necessarily, items 8 and 9 must be determined in good time before any final Main Inquiry Hearing and I do not consider it is possible to safely and properly adjudicate on those issues given the ongoing criminal investigation.
14. It is not yet possible to list a new date for the Main Inquiry Hearing, as this will be informed by the progress of the criminal investigation. In the interim, the Inquiry team is continuing to progress Inquiry matters. As soon as the Inquiry receives an update on the investigation it will inform CPs as far as possible, and will seek to list a new date if it is then possible.
15. I am eager to make productive use of part of the window which was identified for the Main Inquiry Hearing, given that all CPs made themselves available for those dates. I therefore directed that a further hearing be listed for 25-26 October 2023, to consider:

- a. The extent to which, if at all, the Attorney General can and should be asked about the discontinuance of the prosecution of the three Defendants as per paragraph 1(f) of my Ruling dated 26 July 2023. The questions to be answered are as follows:

“a. Questions for the Attorney General and Messrs Perez, Cornelio and Sanchez:

What was the legal basis on which the prosecution was discontinued:

(i) section 59 of the Gibraltar Constitution; (ii) section 223 of the Criminal Procedure and Evidence Act; (iii) both; or (iv) some other basis?

b. Questions for all Core Participants (with the exception of the GPF):

(i) In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?

(ii) If so, is it within the Terms of Reference of the Commission to ask the question?

(iii) If so, can the Attorney General properly be asked why he discontinued the prosecution?

(iv) If so, is he entitled – or even required – by law to decline to answer the question.

b. Any applications for restriction orders.

c. Further directions for the Main Inquiry Hearing (dependent on the current status of the ongoing criminal investigation).

16. Following notification of CPs of that direction, the Inquiry Team has been informed by Mr McGrail’s solicitors that Mr McGrail’s Counsel is unavailable on those dates. I have asked the Inquiry Team to explore this further with Mr McGrail’s team to determine whether a workable solution can be found so that the hearing can be heard on those dates or, if that is not possible, on other dates within the window originally set down for the Main Inquiry Hearing. I understand that all other CPs are available on the current dates directed.

17. I have further directed that:

a. CPs should make any applications for restriction orders and/or redaction in respect of disclosure (either provided by the CP or to the CP by the Inquiry) by

4pm on 29 September 2023. This date follows a request by the RGP for such an extension.

b. CPs shall file/serve skeleton arguments by 4pm on 16 October 2023 addressing:

- i. questions concerning discontinuance of the prosecution
- ii. any applications for restriction orders.

Sir Peter Openshaw, DL

11 August 2023