INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

WRITTEN SUBMISSIONS ON BEHALF OF
ONE OR MORE OF
THE GOVERNMENT PARTIES (AS INDICATED)
for the Fifth Preliminary Hearing on 25th– 26th October 2023

A. ATTORNEY GENERAL'S REASONS FOR ENTERING NOLLE PROSEQUI

1. The Commissioner has directed that the extent to which, if at all, the Attorney General can and should be asked about the discontinuance of the prosecution of the Thomas Cornelio, John Perez and Caine Sanchez (collectively referred herein to as "**the Defendants**") be considered at the Fifth Preliminary Hearing ("**PH5**") and, for that purpose has asked CPs to answer the following questions:

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

(1) What was the legal basis on which the prosecution discontinued: (a) section 59 of the Gibraltar Constitution; (b) section 223 of the Criminal Procedure and Evidence Act; (c) both; or (d) some other basis?

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

(2) In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?
(3) If so, is it within the Terms of Reference of the Commission to ask the question?
(4) If so, can the Attorney General properly be asked why he discontinued the prosecution?
(5) If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above?

(6) Is the Inquiry entitled to draw any inference(s) from a failure by the Attorney General to answer the question in (2) above?

(7) In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?

2. Background facts. Before answering the Commissioner's questions on behalf of HM Attorney General, Michael Llamas CMG, KC ("**the Attorney General**" or "**AG**"), we set out some salient background facts, as follows:

2.1. The Defendants were charged, variously, with counts relating to one or more offences of conspiracy to defraud, computer misuse, aiding and abetting unauthorized access to computer material and misconduct in public office, relating to the National Security Central Intelligence System ("**NSCIS**"). An indictment was preferred on 16 December 2020 ("**the Indictment**").

2.2. On 21 January 2022, the Attorney General entered a Nolle Prosequi in respect of all counts on the Indictment and all the Defendants ("***the Nolle***") in exercise of powers conferred upon him by section 59 of the Gibraltar Constitution Order 2006 ("**the Constitution**") and all other enabling powers, thereby discontinuing the criminal proceedings against the Defendants on the Indictment.

3. Each of the Commissioner's questions is responded to on behalf of the Attorney General in paragraphs 4-29 below.

Question 1: What was the legal basis on which the prosecution discontinued: (a) section 59 of the Gibraltar Constitution; (b) section 223 of the Criminal Procedure and Evidence Act; (c) both; or (d) some other basis?

4. As the Chief Justice found in his Judgment dated 8 August 2023 in *Cornelio, Perez and Sanchez v Rex*[1] ("**the Judgment**"), the Attorney General entered the *Nolle* in exercise of powers conferred upon him by section 59 of the Gibraltar Constitution Order 2006 ("the Constitution") and all other enabling powers (para 3 of the Judgment).

[1] 2023/GSC/029

5. This is reflected in the terms of the *Nolle* itself, in which the Attorney General declared as follows:

> "*IN EXERCISE of the powers conferred on me by Section 59(2)(c) of the Gibraltar Constitution Order 2006, and all other enabling powers, I MICHAEL LLAMAS CMG QC, Her Majesty's Attorney General for Gibraltar, consider it desirable to discontinue the Criminal Proceedings issued against THOMAS CORNELIO, JOHN PEREZ and CAINE SANCHEZ in respect of the following offence*: [Statement of Offence and Particulars of Offence in respect of each count set out in full]".

6. The reference to *"all other enabling powers"* may be thought to be a reference to section 223 of the Criminal Procedure and Evidence Act ("**CPEA**"). It could not be a reference to section 232 because, firstly, the *Nolle* professes to be a discontinuance by way of *Nolle Prosequi* (see title to section 223), and, secondly, the power to discontinue a prosecution under the power and procedure in section 232 applies only before the indictment is preferred, which was not the case of the *Nolle* which (as stated above) was entered *after* the Indictment had been preferred.

7. The fact that the *Nolle* was entered into by the Attorney General in exercise of his power under section 59(2)(c) of the Constitution appears to be common ground. In para 20 of his Second Affidavit, Mr McGrail says that the Attorney General entered the *Nolle "apparently believing that his exercise of the section 59(1)(c)* [sic] *power is not capable of being judicially examined"*.

8. In any event (although it is submitted that no issue arises that the Inquiry can or needs to resolve in this respect) section 223 CPEA probably does not constitute any different or additional power to that contained in section 59(2)(c) of the Constitution, for the following reasons:

   8.1. Section 223 CPEA and section 59(2)(c) of the Constitution are to precisely the same terms and effect. The Constitution is supreme law, and its provisions have primacy over the CPEA. The latter could not validly make lesser or greater provision that is inimical with the former. Accordingly, section 223 CPEA would

appear simply to be an unnecessary repetition of the constitutional provision in section59(2)(c).

8.2. The purpose of section 223 appears to be to legislate the practical arrangements, consequences and requirements upon entering a *nolle prosequi*, provided for in subsections (2)-(5).

Question 2: In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?

9. For the avoidance of doubt, the *Nolle* was not entered for any reason connected with the sufficiency of the evidence to sustain a successful prosecution. Indeed, the Attorney General stated the contrary publicly at the time, and the Inquiry is therefore entitled to proceed, for the purposes of this Inquiry, on the basis that the AG believed that the evidential test was met and that therefore there was sufficient evidence to consider that there was a realistic prospect of conviction of all the Defendants of the charges against each of them on the Indictment.

10. It is submitted on behalf of the Attorney General that the correct answer to this question is: no, in the factual context of the Inquiry it is not relevant to ask why the Attorney General discontinued the prosecution, for the following reasons.

11. **First**:

11.1. If (which it is submitted is not the case) it is relevant to ask the question, it could only be in the context of Issue 5, namely:

> "*5. The investigation* [underlining added for emphasis] *into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ("the Conspiracy Investigation"), and the RGP's handling of the same, including but not limited to the RGP's execution of search warrants as part of that investigation on 12 May 2020 ("the Search Warrants"). In particular:*
>
> > *5.1. Did Mr McGrail seek or receive advice from the Director of Public Prosecutions ("DPP") or the AG as to the execution of the Search Warrants, and did Mr McGrail accurately communicate any*

advice from the DPP or the AG on the Search Warrants (or lack thereof) to the CM and/or AG?

5.2. Was the RGP's execution of the search warrants on 12 May 2020 contrary to an agreement or understanding with the AG and/or the DPP?

5.3. Did the AG and/or CM place any or any inappropriate pressure on Mr McGrail regarding the investigation or otherwise interfere with the investigation, and in particular the decision to execute the Search Warrants?"

11.2. The central allegation against the AG is not that in 2020 he was motivated by a desire to protect the Defendants (Cornelio, Perez and Sanchez) from investigation or prosecution. The central prevalent allegation (albeit that it is firmly denied) is that he sought to interfere to protect James Levy CBE KC ("**James Levy**") from investigation as a suspect and prosecution. See in this respect:

11.2.1. At para 10 of Mr McGrail's written submissions for the First Preliminary Hearing:

> "*Following the execution of the search warrant, Mr McGrail was berated by the CM and AG at a meeting for taking action without prior notice or approval. Over a series of meetings and private conversations, enormous pressure was placed on Mr McGrail and other members of the RGP by the CM and AG to change their approach to investigating the Prominent Individual* [a reference to James Levy], *including not treating them as a suspect, not interviewing them under caution and giving them questions in advance of their interview*."

11.2.2. At para 49 of Mr McGrail's written submissions for the First Preliminary Hearing:

> "*Mr McGrail was forced to end a 36-year unblemished career, in which he had attained the highest possible level of professional achievement, because the Chief Minister and the Attorney General in particular made an improper intervention into a criminal corruption investigation*". The Chief Minister's sole intervention had been in relation to the warrant against James Levy.

11.2.3. See also paras 18-25 (*"the vanishing reason"*) of Mr McGrail's written submissions dated 20 July 2022 in reply to the Government Parties' submissions dated 8 July 2022.

11.2.4. Para 29 of Mr McGrail's written submissions dated 20 July 2022:

> *"He was ultimately left with two bad options, both of which were triggered by the execution of the search warrant as part of the Op Delhi investigation"*. (Underlining added for emphasis)

11.2.5. See also paras 1-7 of Mr McGrail's Statement of Factual Position for Second Preliminary Hearing dated 20 September 2022.

11.3. James Levy was not one of the Defendants and was, therefore, not a beneficiary of the *Nolle*. Indeed, the RGP had long before the *Nolle* was entered lost interest in him as a potential defendant, and (if they ever had it) in the Chief Minister, Mr Picardo. At the time the *Nolle* was entered, neither James Levy nor the Chief Minister were suspects or persons of interest to the RGP investigation. As such, they were not in any jeopardy which the *Nolle* would protect them from. The reasons for the *Nolle* do not therefore engage the alleged interference or the alleged motives for it.

11.4. In those circumstances, the *Nolle* cannot properly be regarded as a subsequent manifestation (or *ex post facto* evidence) of the Attorney General's alleged (and denied) motivation (in May 2020) to protect the Chief Minister or James Levy.

11.5. In paragraph 19 of his Second Affidavit, Mr McGrail invokes the *Nolle* only for the following purpose that: *"The events post my resignation chime with the AG's startling emotional statements in May 2020 that he would* '*defend the CM to the death'"*.

11.6. That statement, taken out of its proper context as it is by Mr McGrail in the cited paragraph of his Second Affidavit, was in reference to the citing of the Chief Minister in the pre-interview disclosure document provided to James Levy (see

paragraph 58.16 of Mr McGrail's First Affidavit), not in reference to the prosecution of the Defendants.

11.7. Nothing in the prosecution of the Defendants threatened any personal interest of the Chief Minister (or for that matter of his friend, partner and mentor, James Levy) and the discontinuance of the prosecution cannot therefore credibly or forensically be said to *"chime with the AG's startling emotional statements in May 2020 that he would 'defend the CM to the death'"*.

12. **Second**:

12.1. Issue 5 is relevant to the Inquiry only to the extent, if at all, that it constituted a reason or circumstance leading to Mr McGrail's ceasing to be Commissioner of Police in June 2020 by taking early retirement.

12.2. The relevance of Operation Delhi itself is therefore limited to the extent to which it may have operated on the mind of the Interim Governor and the Chief Minister to wrongly place Mr McGrail in a position where he felt he had to retire. The Attorney General did not have a statutory role and did not participate in the discussions, decisions or events leading to Mr McGrail's retirement (save the James Levy search warrant exchanges).

12.3. Whatever may have been the Attorney General's motives and reasons for entering the *Nolle*, they are not a reason or circumstance leading to Mr McGrail's ceasing to be Commissioner of Police in June 2020 by taking early retirement.

12.4. Even if (which is not the case), the Attorney General had entered the *Nolle* for the entirely improper reason and purpose of protecting the Defendants (or anyone else) from the potential outcome or consequences of the discontinued prosecution, including his wish to *"defend the CM to the death"* (para 19 McGrail 2) and/or to 'cover up' *"a very serious case involving allegations of fraud and sabotage of the NSCIS platform"* (para 20 McGrail 2), that would still not be relevant to Issue 5, still less to the issue under Inquiry, namely, a reason or circumstance leading to Mr McGrail's ceasing to be Commissioner of Police. It would simply mean that,

in those hypothetical (and non-existent) circumstances, the Attorney General was *"protecting the Chief Minister to the death"*.

12.5. This is not an inquiry into the sufficiency or propriety of the Attorney General's reasons for entering the *Nolle* nor into whether the Attorney General exercised his power properly or lawfully.

12.6. Furthermore, posing the question *"why the Attorney General discontinued the prosecution"*, or even receiving an answer to it is irrelevant to and/or does not assist the Inquiry's work because:

12.6.1. The reasons that would be given by the Attorney General (if the public interest did not impede his ability to do so), and which are genuine and entirely lawful and proper, will either be accepted by other CPs or not.

12.6.2. If the reasons are accepted, they are necessarily irrelevant, and if they are not accepted, they are also irrelevant because there will simply exist a disagreement about them by the CPs, which disagreement the Commissioner is unable to resolve.

12.6.3. It would not be open to the Inquiry to assess the reasonableness or sufficiency of the Attorney General's reasons, nor to assess whether the protection of the public interest of Gibraltar required or justified, or not, the entry by him of the *Nolle* (or indeed whether that public interest of Gibraltar should be prioritised over other public interests).

12.6.4. The issue is thus sterile in so far as concerns the Inquiry.

12.7. Mr McGrail has in the past appeared to wish to convert this Inquiry into an inquiry about the propriety of the Attorney General's reasons for entering the *Nolle*. In para 20 of McGrail 2, he alleges (entirely speculatively, without evidence and having no clue as to what the reasons for entering the *Nolle* may have been) that the entering of the *Nolle* by the AG was contrary to Gibraltar's *"reputation and adherence to the rules of law"* and, as if that were not serious enough, effectively a 'cover-up' of *"a very serious case involving allegations of fraud and sabotage of the NSCIS platform involving people in high positions in this jurisdiction"*.

12.8. The making of allegations by Mr McGrail (whether they are disputed or not) does not determine the relevance of an issue to the Inquiry, still less does it have the effect of expanding the Inquiry's Terms of Reference.

12.9. In any event, such allegations relating to events two years after his retirement are most unlikely to be relevant to it, let alone to be a reason or circumstance leading to it.

12.10. For good measure (in relation to the bald allegations) Mr McGrail adds that the 'cover-up' was done by the Attorney General *"apparently believing that his exercise of the section 59(1)(c)* [sic, (2)] *power is not capable of being judicially examined"*. This is misconceived. Whilst this Inquiry cannot do so, section 83 of the Constitution specifically provides that section 59(5) *"shall not be construed as precluding a court of law from exercising jurisdiction in relation to any question whether* [the Attorney General] *has performed those functions in accordance with this constitution or any other law or should not perform those functions"* (our underlining for emphasis). In short, judicial review by a court of law. As the Privy Council found in *Mohit v DPP of Mauritius*[2] that provision means that the decision of the AG under section 59(2)(c) of the Constitution is amenable to judicial review by (but only by) a court of law. No one has sought to do so.

13. Accordingly, the reasons why the Attorney General entered the *Nolle* is not relevant to the issue under inquiry, and if it is capable of any conceivable relevance, it is too tangential and remote.

Question 3: If so, is it within the Terms of Reference of the Commission to ask the question?

14. For the reasons stated in answer to Question 2, the reason why the Attorney General discontinued the prosecution is not within the Terms of Reference of the Commission.

[2] [2006] 1 WLR 3343; [2006] UKPC 20

Question 4: If so, can the Attorney General properly be asked why he discontinued the prosecution?

15. The answer to this question raises the issues that arise in Question 5. In short, there is no legal impediment to the Attorney General being asked, but he cannot be required to answer (as to which see the answer to Question 5 below).

16. Section 59(5) of the Constitution provides that: *"In the exercise of the powers conferred upon him by this section the Attorney-General shall not be subject to the direction or control of any other person or authority."*

17. The courts have decided that the words in section 59(5) of the Constitution (cited in the preceding paragraph above) mean that the Attorney General cannot be required, whether in answer to questions or otherwise, to give his reasons for entering a *nolle prosequi*. See in this respect:

    17.1. *Mohit v DPP of Mauritius*[3]. *Mohit* concerned powers held under the Mauritius Constitution by the DPP in the same terms as section 59(2)(c) of the Constitution, including the provisions of section 59(5) of the Constitution. It was a case concerned with whether the DPP was subject to judicial review by the courts in the light of the provisions of the Mauritian equivalent of section 83 of the Constitution. The Privy Council held that it meant just that, namely that such decisions were amenable to judicial review by a court of law.

    17.2. Having so found, it said (at [22]) that the effect of the section in the Mauritius Constitution identical to section 59(5) of the Constitution meant that:

> *"it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content."*

[3] [2006] 1 WLR 3343; [2006] UKPC 20.

17.3. Applying that long-established principle in <u>*Cornelio, Perez and Sanchez v Rex*</u>[4], the Chief Justice held that *"it is clear that HMAG has no obligation to give reasons when entering a nolle prosequi"* (at [21]. See also [23]). He therefore declined to compel the Attorney General to disclose the reasons for entering the *Nolle* in this case, which is the prosecution which arises in this Inquiry.

18. **<u>Other persons</u>**. Furthermore, this principle that the Attorney General is not obliged to provide reasons for entering the *Nolle* is not limited to seeking that information directly from <u>him</u>. In <u>*Cornelio, Perez and Sanchez v Rex*</u> the Chief Justice ruled that: "*To seek any such reasons from knowledge which may have been acquired by the DPP would be to subvert the statutory provisions and HMAG's right not to provide them*." (at [23]). He accordingly refused to order disclosure of the DPP's knowledge of the reasons that led the Attorney General to enter the *Nolle*. The same must logically and rationally apply to any other person who may be aware of those reasons and to whom the AG has selectively entrusted that information in confidence for particular reason.

<u>Question 5: If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above?</u>

19. The Attorney General is the guardian of the public interest[5], and in that sense, he is under an <u>obligation</u> to safeguard it, including (but not limited to) in relation to revealing the reasons for entering a *nolle prosequi*. It would necessarily be a breach of duty on the part of the Attorney General to jeopardise the very public interest of which he is, in law, the guardian

20. Specifically in the case of stating reasons for entering a *nolle prosequi*, there would appear to be no requirement for the AG to refuse to give reasons. In *Mohit*, the Privy Council said (at [22]) that *"it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be."*

21. Accordingly, in a case where disclosing the reason would not itself cause harm to a public interest, the AG is at liberty to provide his reasons for entering a *nolle prosequi*. But in a case, such as this one, where to disclose his reasons would cause harm to a public interest

[4] 2023/GSC/029.
[5] *Attorney General of the Cayman Islands v James Cleaver & Co and others* [2006] UKPC 28 at [Headnote (i)], [23],[24], [26] and [27].

(especially the very public interest that he sought to protect by entering the *Nolle*) he has an obligation not to provide the reasons in a manner that may jeopardise that public interest.

22. As stated orally on behalf of the AG in the oral hearing of PH4, he will not, for these very reasons, disclose the reasons for entering the *Nolle* unless ordered to do so by a court of law of final recourse. And furthermore, he will take the necessary pre-emptive legal steps to seek to ensure that no other person who may know those reasons, is placed in a position where he may be asked that question and feel obliged or at liberty to answer it. It is his judgment that doing so would visit serious prejudice on a vital public interest of Gibraltar (which to be clear is not its national security interests, much as those do of course exist).

Question 6: the Inquiry entitled to draw any inference(s) from a failure by the Attorney General to answer the question in (2) above?

23. The Inquiry is not entitled to draw any inferences from a failure by the Attorney General to answer Question 2, namely, why he discontinued the prosecution, and it would be contrary to law to do so.

24. The AG has stated publicly that he discontinued the prosecution because it was in the public interest to do so and disclosing the reasons why it was in the public interest to do so would cause the very same damage to the very same public interest as would have been caused if the prosecution had proceeded.

25. It would neither be lawful nor proper to draw any other inference as to the AG's reasons because:

25.1. The applicable case law establishes that it would be wrong to do so. In *Gouriet v HMAG & ors*[6], the House of Lords (as it then was) said as follows:

25.1.1. At page 487 G-H:

> *"The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not*

[6] [1978] AC 435.

wish the prosecution to continue. He need not give any reasons."

25.1.2. At page 489 C-G:

"*The Attorney-General did not in my opinion act improperly as now suggested on behalf of Mr. Gouriet.*

> *"there is no greater nonsense talked about the Attorney-General's duty," said Sir John Simon in 1925, "than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case.' It is not true, and no one who has held that office supposes it is." (See Edwards, The Law Officers of the Crown, p. 222.)*

However clear it appears to be that an offence has been committed, it is, as Sir Hartley Shawcross then Attorney-General said in 1951, the Attorney-General's duty

> *"in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order." (See Edwards, p. 223).*

This approach which the Attorney-General should make when considering whether a prosecution should be started, is in my opinion the kind of approach he should have made to the question of giving his consent to Mr. Gouriet's application.

In deciding whether or not to prosecute "there is only one consideration which is altogether excluded," Sir Hartley Shawcross said, "and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes." (See Edwards, pp. 222-223.) In the discharge of any of the duties to which I have referred, it is, of course, always possible that an Attorney-General may act for reasons of this kind and may abuse his powers. ***One does not know the reasons for the Attorney-General's refusal in this case but it should not be inferred from his refusal to disclose them that he acted wrongly****."* (Our underlining and bold type for emphasis)

25.1.3. At page 491 B-C:

> "*Such considerations may have been present to the mind of the Attorney-General when he considered Mr. Gouriet's application on the Friday and may have provided valid grounds for his refusal of consent. Whether they did so or not, one does not know but I have mentioned them as they seem to me to suffice to show that* ***even if good legal reasons for his decision were not immediately apparent, the inference that he abused or misused his powers is not one that should be drawn****."* (Our underlining and bold type for emphasis)

25.2. Even if it was not the applicable common law that an adverse inference should not be drawn from the Attorney General's refusal to say why he entered the *Nolle*, it would be inappropriate and wrong to do so in this case. This because the Attorney General is entirely willing to provide a full explanation of his reasons to the Commissioner privately and confidentially on terms that he will not publicise those reasons or share them with any person other than STI and CTI, confidentially. In circumstances where the Commissioner has access to the reasons for the *Nolle*, it would be wrong for him to draw speculative inferences to any other effect from the Attorney General's refusal to provide those reasons to others.

26. It may be that this question has been inspired by reference in para 22 of *Mohit*, that: *"The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief."* The Chief Justice picked up on this in para 23 of his Judgment in *Cornelio, Perez and Sanchez v Rex*, when he said: *"That said, at such stage as all the evidential material falls to be considered, it may be proper to draw inferences from the failure to provide the reasons."* These pronouncements do not mean that adverse inferences can be drawn as to the Attorney General's reasons for entering the *Nolle*, because:

26.1. That would be contrary to what the House of Lords said in *Gouriet*, and the Chief Justice's *"may be proper"* (not "would be") statement in *Cornelio, Perez and Sanchez v Rex* is not a statement of the law and is, in any event, *obiter*, and therefore not a binding ruling of the law.

26.2. *Mohit*, which is the source of the reference to the drawing of inferences, was a case in which the issue was whether the Mauritian DPP's decision under its equivalent of section 59(2)(c) of the Constitution was, in principle, susceptible to judicial review (in light of the Mauritian equivalent of section 83 of the Constitution). The courts in Mauritius had decided that it was not amenable to judicial review. The Privy Council ruled that it was amenable to judicial review.

26.3. Accordingly, *"the relief"*, the appellant's entitlement to which was referred to in para 22 of *Mohit*, is the usual judicial review relief, namely: was the decision made in "lawful, proper or rational manner" and, if it was not, remitting it to the decision-maker to make it again in such a manner (see Headnote and at page 3350 C-D).

26.4. That is the context in which the reference to the drawing of inferences in para 22 of *Mohit* must be read and understood: *"The Supreme Court* [to whom the case was remitted] *must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief."* In short, the inferences that may be drawn (and in any event, from available evidence, not speculative allegations) are whether the decision was made in a lawful, proper and rational manner, and not as to the reasons for the decision by the DPP to enter the *nolle prosequi*.

26.5. In any event, whatever may be the correct interpretation of the last-cited words in para 22 in *Mohit*, they inure to the benefit only of a court of law in the exercise of its judicial review jurisdiction. They do not inure to the benefit of this Inquiry, which is neither a court of law nor engaged in the judicial review of the Attorney General's decision.

26.6. However much para 22 of *Mohit* may inure to the benefit of a court engaged in a judicial review, it cannot overcome the obstacle that section 59(5) of the Constitution poses to the Inquiry. Drawing critical inferences as to the Attorney General's reasons for entering the *Nolle* presupposes and requires that the drawer of those inferences has subjected the Attorney General to a measure of *"control"* in breach of section 59(5).

Question 7: In relation to questions 2 and 4 above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?

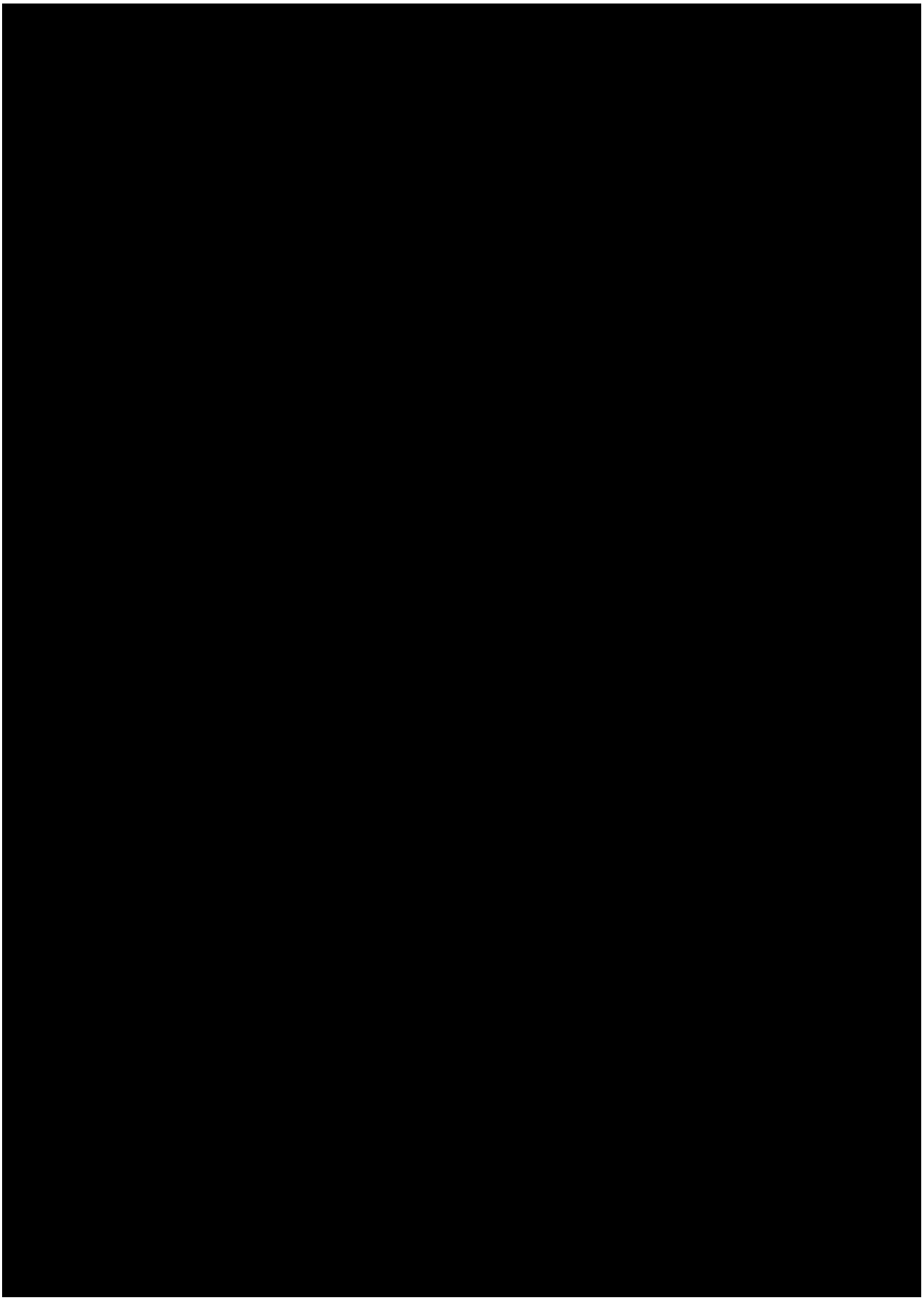
27. The Inquiry is bound by the decisions in *Gouriet*, *Mohit* and the Judgment of the Chief Justice in *Cornelio, Perez and Sanchez v Rex* for the reasons set out below.

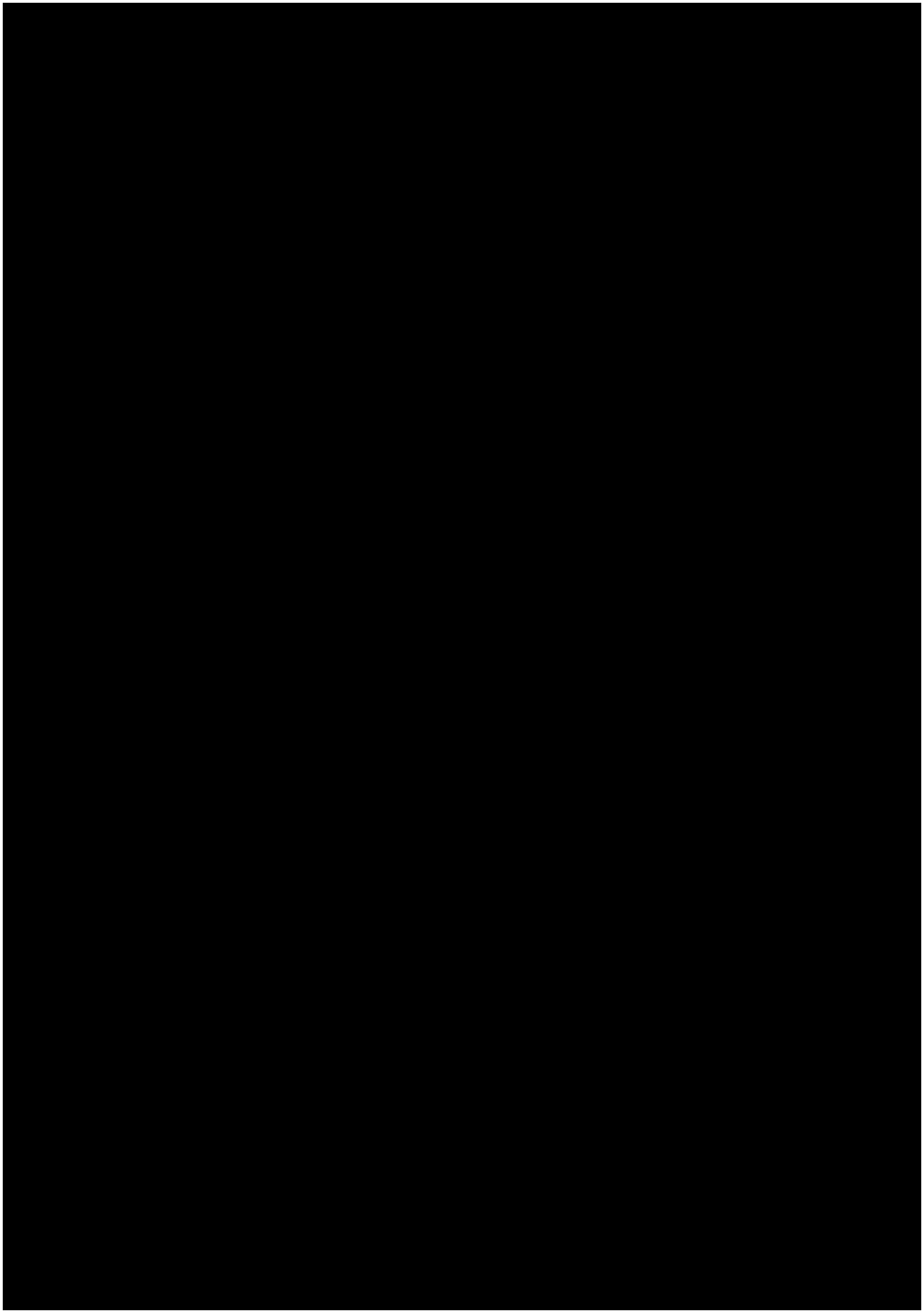
28. The interpretation of the Constitution is a matter for the courts, by whose interpretative rulings this Inquiry is bound. However much this particular Commissioner may have a professional judicial background as a retired high court judge, the Inquiry is not a court of law.

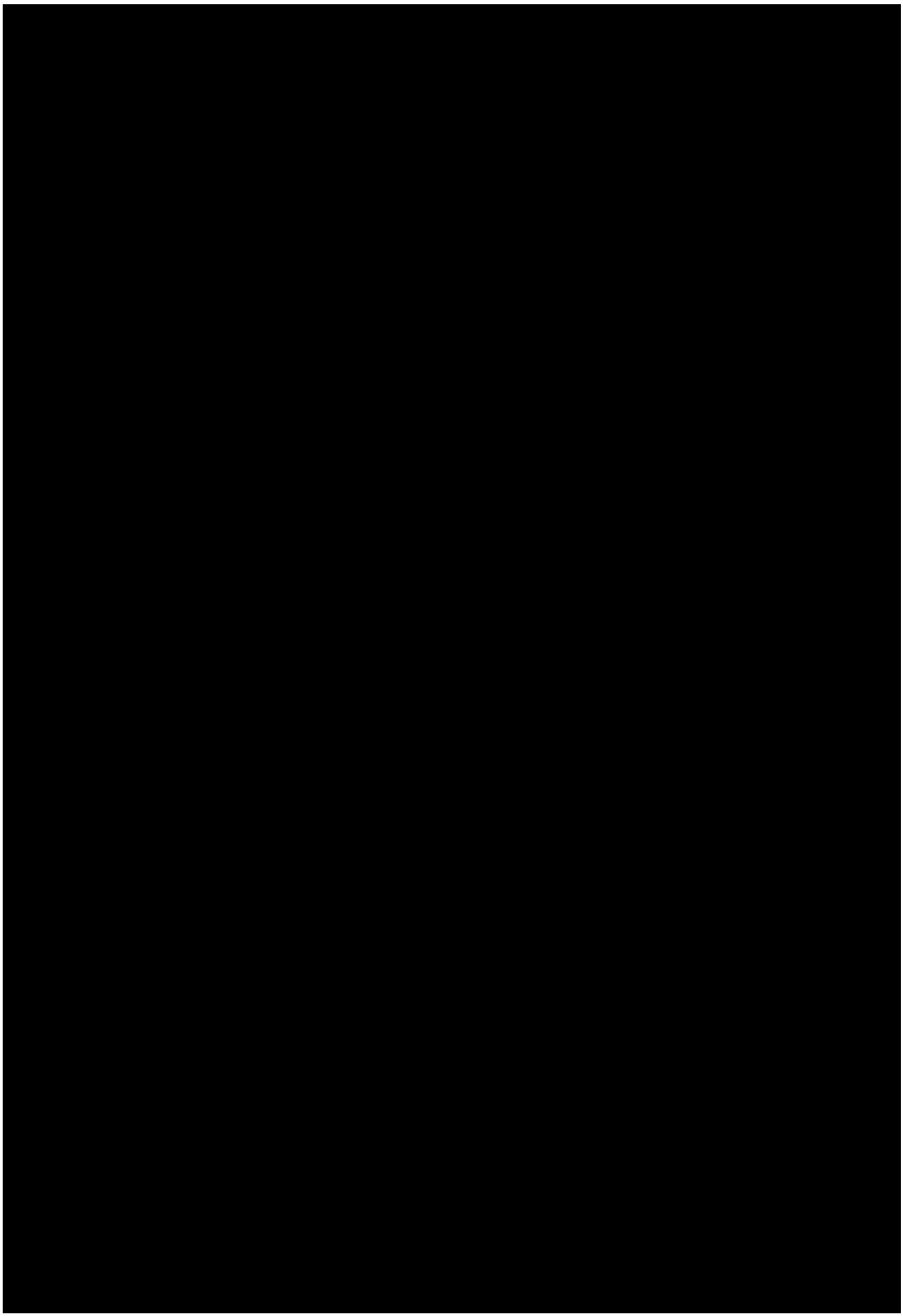
29. The applicable principles established by, and the rulings in these decisions bind this Inquiry, notwithstanding the provisions of sections 10 and 12(b) of the Commissions of Inquiry Act, because:

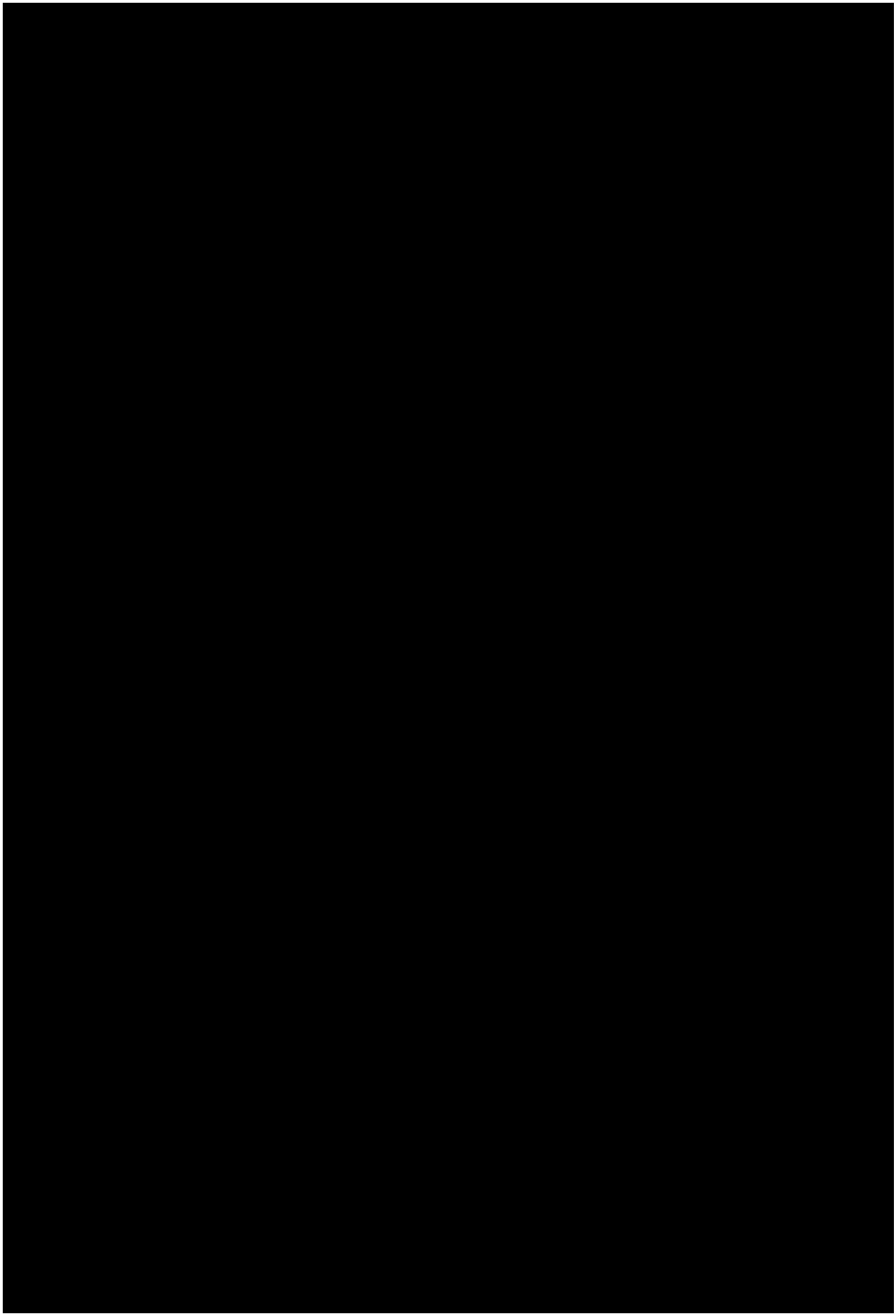
    29.1. The provisions of the Constitution (as interpreted by the courts) i.e., section 59(5) have primacy over any other law, including statute law adopted by the Gibraltar Parliament (e.g., the Commissions of Inquiry Act). There is a legal imperative that all laws of Gibraltar will be interpreted and applied in a manner consistent with the Constitution and, if any is not, such provision will be applied in modified form so that it will be so consistent (by the application of the so-called *"blue pencil"* rule).

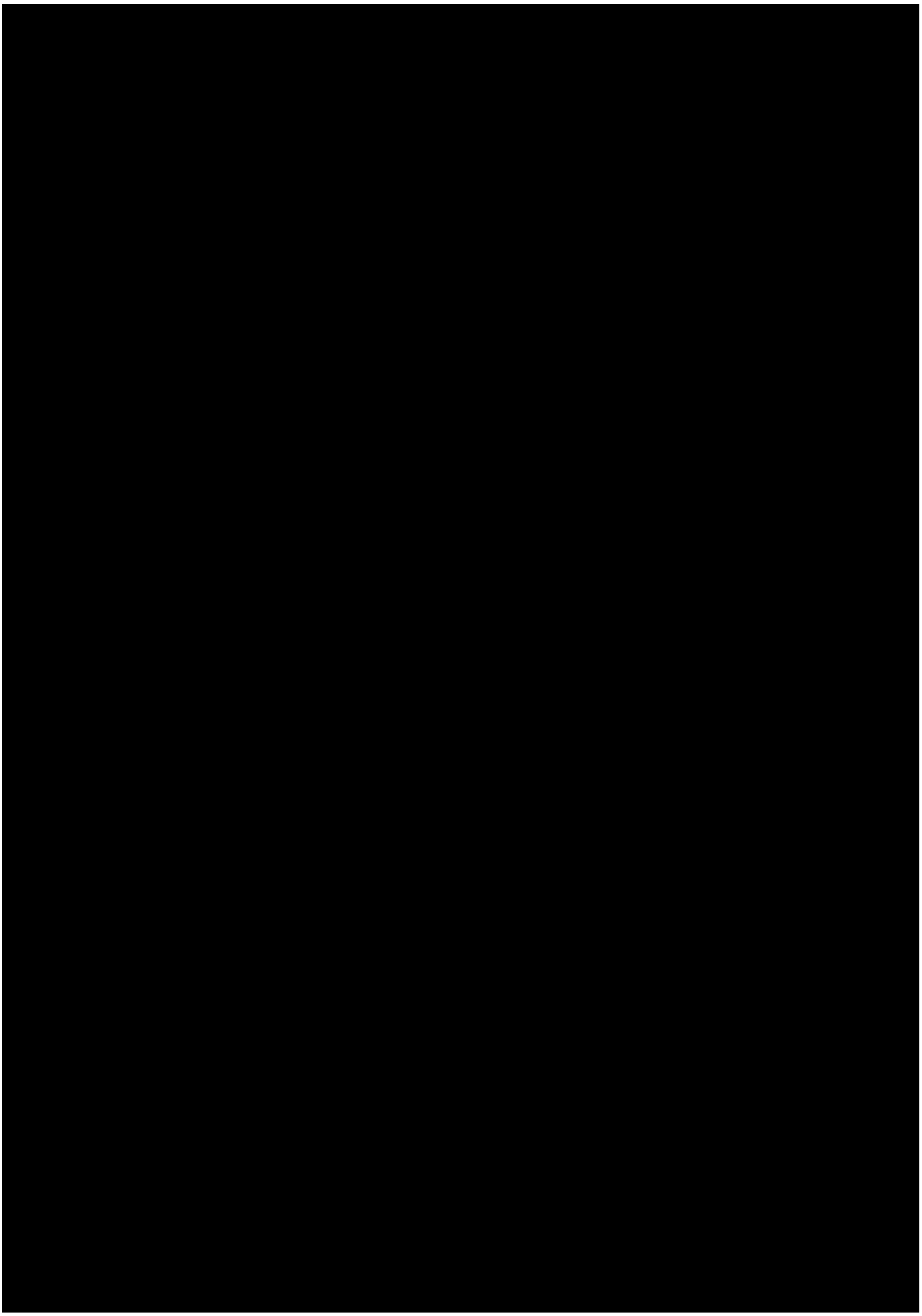
    29.2. In any event, section 12 of the Commissions of Inquiry Act says that a person is in the jeopardy therein specified if he refuses *"to answer any question to which the Commissioner may legally require an answer"* (our underlining for emphasis). Given the provisions of section 59(5) of the Constitution, and the decisions in *Gouriet*, *Mohit* and *Cornelio, Perez and Sanchez v Rex*, any question posed to the Attorney General that requires him to state his reasons for entering the *Nolle* would not be a question to which the Commissioner *"may legally require an answer"* (emphasis added).











SIR PETER CARUANA KCMG KC
CHRISTOPHER ALLAN

Suite 933 Europort
Gibraltar

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