

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

FIFTH PRELIMINARY HEARING - OUTLINE SUBMISSIONS for Paul Richardson

Discontinuance / Nolle prosequi

1. We have not yet been shown the answers of Messrs Llamas, Perez, Cornelio or Sanchez to the Commissioner's first question:

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

2. Questions 2 to 7 are addressed to Mr Richardson and most other CPs.

Question 2

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

3. Messrs Cornelio, Perez and Sanchez were charged and indicted in December 2020. In March 2022 the trial judge was due, for the first time, to examine in public the evidence against them. On the 21st January 2022 Mr Llamas entered a *nolle prosequi* in each of their cases. Each had therefore to be discharged, and the evidence did not see the light of day.
4. Consideration and adjudication of Issue 5 in the inquiry's list of issues will require examination of

(A) the 'relevant facts' of 'The investigation into the alleged hacking and/or sabotage of the NSCIS alleged conspiracy to defraud, 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', and

(B) 'to what extent, if at all, did [this] constitute a reason or circumstance leading to Mr McGrail ceasing to be the Commissioner of Police...'.

5. Mr McGrail ceased to be the Commissioner of Police on the 9th June 2020. His resignation followed conversations and correspondence between various permutations of Messrs Picardo, Llamas, Britto, Pyle and McGrail between 12th May and 9th June.
6. If but only if Mr Llamas in entering the *nolle prosequi* in 2022 may still have been influenced by some or all of the same considerations as influenced him and/or Mr Picardo and/or Mr Pyle in May 2020, it would be relevant for the Commissioner to ask Mr Llamas why he discontinued the prosecution.
7. There are clues in the contemporaneous 2020 records as to which of the several issues in the inquiry's present list may have inspired Mr Pyle's and Mr Picardo's and Mr Llamas's decision making in 2020. The Inquiry will test those clues by questioning.
8. In his statement of July 2023 Mr Llamas remembers that his decision in 2022 'was based on matters that were brought to his attention over a year after the events of May/June 2020' and 'The reasons for *nolle* two years later had nothing to do with the events of May/June 2020 being examined by the Inquiry' [Llamas #2 @47, 53].
9. The Solicitor General remembers Mr Llamas considering a *nolle prosequi* as early as 13th May 2020. The ability of the A-G to 'pull it' [the prosecution] by using his 'magic wand' had been acknowledged by Mr McGrail and Mr Llamas on tape that same day.
10. The DPP remembers discussing with Mr Llamas in March 2021 a number of awkward questions about Mr Picardo and Mr Levy and the administration which would surface if the criminal trial were to proceed [e-mail 8/3/21 15:22].
11. In 2022 Mr Llamas did not give reasons when he entered the *nolle prosequi*.
12. In his 2023 statement Mr Llamas said only what his reasons were not.

Question 3

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

13. The Commissioner has a very broad remit. He has been appointed ‘to inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement. The Commissioner is to ascertain the facts and report to the Government on the above matters’.
14. The Commissioner has decided to do this by reference to his list of ten issues.
15. Unless the Commissioner is persuaded that Mr Llamas’s 2023 account (at paragraph 8 above) can adequately be tested against the 2020 and 2021 evidence alone, and either confidently endorsed or confidently doubted, without further enquiry, the question why the A-G discontinued the prosecution of the three defendants may be relevant to Issue 5.

Question 4

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

16. The Commissioner has the power to require Mr Llamas to attend before him, bring with him any document which the Commissioner needs to see if he is to get at the truth in Issue 5, and answer any question which sits within his terms of reference. Sections 8 and 10 of the Commissions of Inquiry Act 1888 provide as follows.

8. (1) The commissioners...may require the attendance before them... of any person whose evidence in the judgment of such commissioners may be material to the subject matter of any inquiry to be made by the commissioners under this Act, and may require such person to bring before them all such books, papers and writings as to such commissioners may appear necessary for arriving at the truth of all matters to be inquired into by them under this Act.

(2) Every such person shall attend before the commissioners and shall answer all such questions as may be put by the commissioners touching the matters to be inquired into by them, and shall produce all books, papers and writings required by them, and in his custody or under his control, according to the tenor of the summons:

Provided always that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal.

10.

...and no person shall be excused from answering any question put to him by the commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to incriminate such person.

Question 5

If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above? (for the avoidance of doubt, the "question" referred to is that set out in (2), namely why the Attorney General discontinued the prosecution)

17. The natural construction of sections 8(2) and 10 above is that Mr Llamas would be required by the 1888 Act to answer the question, if asked. It would be an offence for him to fail to do so. Section 12 of the Act provides as follows.

12. If a person–

(a) on being duly summoned as a witness before the commissioners makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required by the commissioners to be taken, or to produce any document in his power or control legally required by the commissioners to be produced by him, or to answer any question to which the commissioners may legally require an answer; or

(c) does any other thing, which would, if the commissioners had been a court of law having power to commit for contempt, have been contempt of that court;

the commissioners may certify the offence of that person under their hand to the Supreme Court, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

18. If the Attorney-General of England & Wales were asked why she had entered an equivalent *nolle prosequi* in the UK, it might well be argued on her behalf that she need not answer, that her decision was non-justiciable. That is because her power to enter a *nolle prosequi* is a non-statutory prerogative power. The English A-G is said, classically, not to be required to give reasons or consult on her prerogative decisions

because she is instead “responsible for his acts before the great tribunal of this country, the High Court of Parliament”¹. Whether a credible challenge to the grant of *nolle prosequi* in England & Wales would today prompt a revision of the longstanding position that the English A-G’s decisions are non-justiciable is an interesting question, but not one which the Commissioner need determine. That is because the A-G of Gibraltar, like the DPP of Mauritius, and unlike the A-G of England & Wales, is a creature of statute.

19. A good starting point may be whether, in the absence of this Inquiry, the Gibraltar A-G’s decision to discontinue would be susceptible to judicial review. The relevant sections of the Gibraltar Constitution are at 59 and 83. The most helpful authority, addressing pretty analogous circumstances in Mauritius, is *Mohit v DPP of Mauritius* [2006] UKPC 20.

20. Section 59 of the Gibraltar Constitution [Annex 1 to the Gibraltar Constitution Order 2006] provides:

‘(1) *There shall be an Attorney-General for Gibraltar whose office shall be a public office.*

(2) *The Attorney-General shall have the power in any case in which he considers it desirable so to do –*

...

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted by himself or any other person or authority.

...

(5) 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.’

21. Section 83 of the Gibraltar constitution provides:

‘No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed

¹ Cockburn CJ in *R v Allen* (1862) 1 B&S 850; Viscount Dilhorne in *Gouriet v Union of Post Office Workers* [1978] AC 435

those functions in accordance with this Constitution or any other law or should not perform those functions.'

22. The combined effect of sections 59 and 83 is that the Gibraltar A-G's discontinuance of the prosecution of the three defendants would be susceptible to judicial review.
23. If the Gibraltar A-G's discontinuance decisions are justiciable – and they expressly are – it would be odd if they were not also susceptible to a Commission of Inquiry under the 1888 Act.
24. This commission of inquiry is not a court of law. Its process is inquisitorial, not adversarial. Its powers, like those of the Gibraltar A-G, are statutory. Unlike the A-G its powers are unusual and exceptionally broad.
25. The Gibraltar Government has deemed it advisable to issue this commission 'for the public welfare', appointing as Commissioner a High Court judge well versed in judicial review.
26. Rather than repeating passages of the *Mohit* judgment – to which all CPs will no doubt refer in their submissions – may we draw the Commissioner's attention in particular to paragraphs 17, 20 and 21 and make the following submissions.
 - (i) There are obvious similarities, as well as some differences, between the issues raised in our Inquiry and those arising in Mauritius.
 - (ii) Section 72 of the Mauritius Constitution and section 59 of the Gibraltar Constitution are almost identically worded.
 - (iii) Both sections create a public officer who is empowered to discontinue criminal prosecutions – the DPP of Mauritius, the A-G of Gibraltar.
 - (iv) The officers' roles are analogous, their powers derive from their constitutions, they have no prerogative power, they are not answerable to Parliament.

- (v) Both sections 72 and 59 are supplemented by a saving clause for court jurisdiction – section 119 in Mauritius, section 83 in Gibraltar.
- (vi) Neither constitution uses the language of *nolle prosequi*².
- (vii) In the passage cited with approval from the Fiji case³, the sort of purported exercises of power which were considered reviewable included those in which ‘contrary to the provisions of the Constitution, the [public officer] could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the [public officer] were to act upon a political instruction the decision could be amenable to review’, or is the power were exercised ‘in bad faith...’.
- (viii) It will be for the Commissioner to say whether such a possibility is raised for investigation on the material before him in this Inquiry.

Question 6 *Is the Inquiry entitled to draw inferences from a failure by the Attorney General to answer the question in (2) above?*

27. If Mr Llamas were asked the question by the Commissioner and declined to answer, knowing the likely section 12 consequences of his failure, the Commissioner would be entitled to draw whatever inferences he considered reasonable in the context of the evidence as a whole.

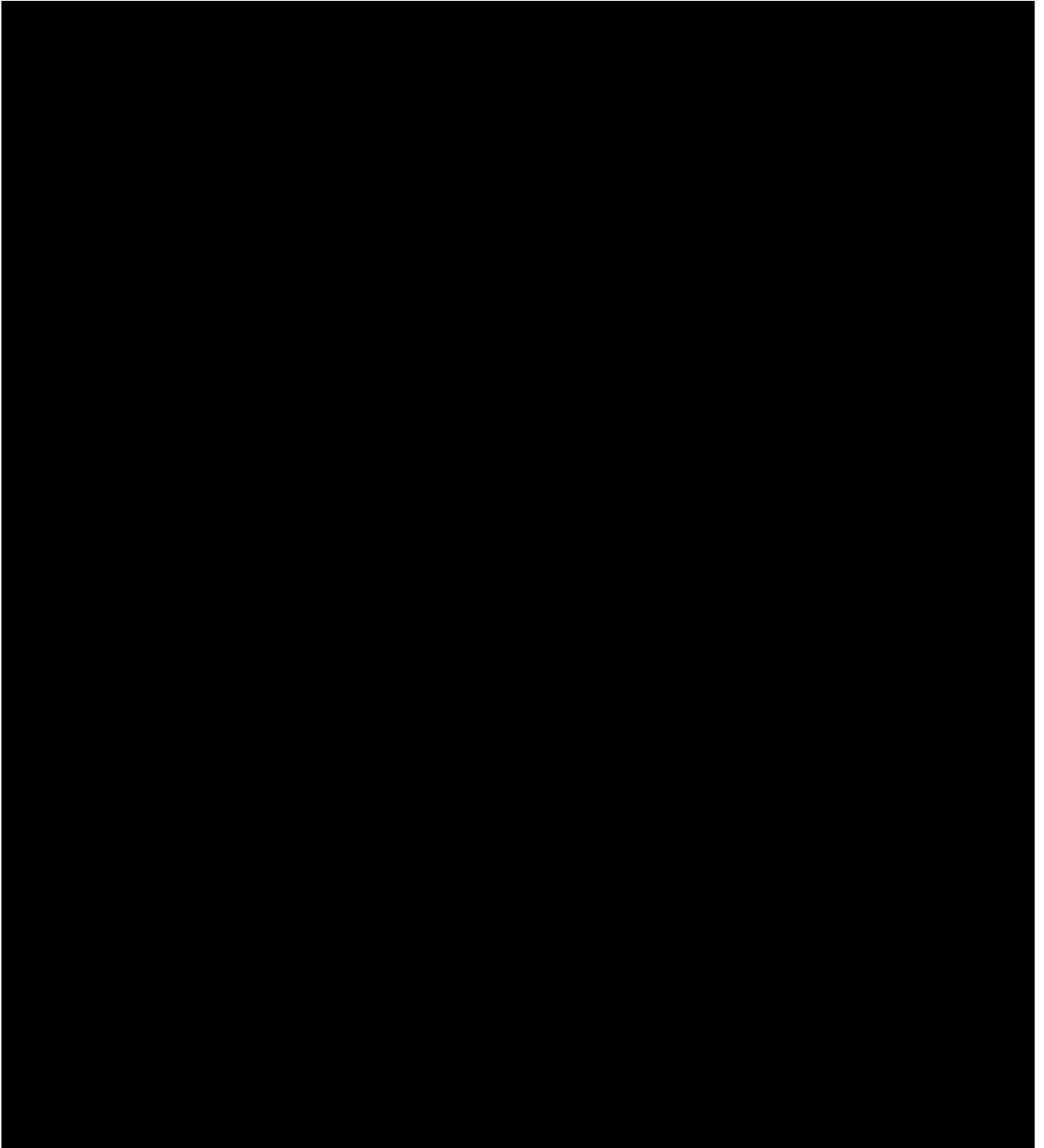
Question 7 *In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?*

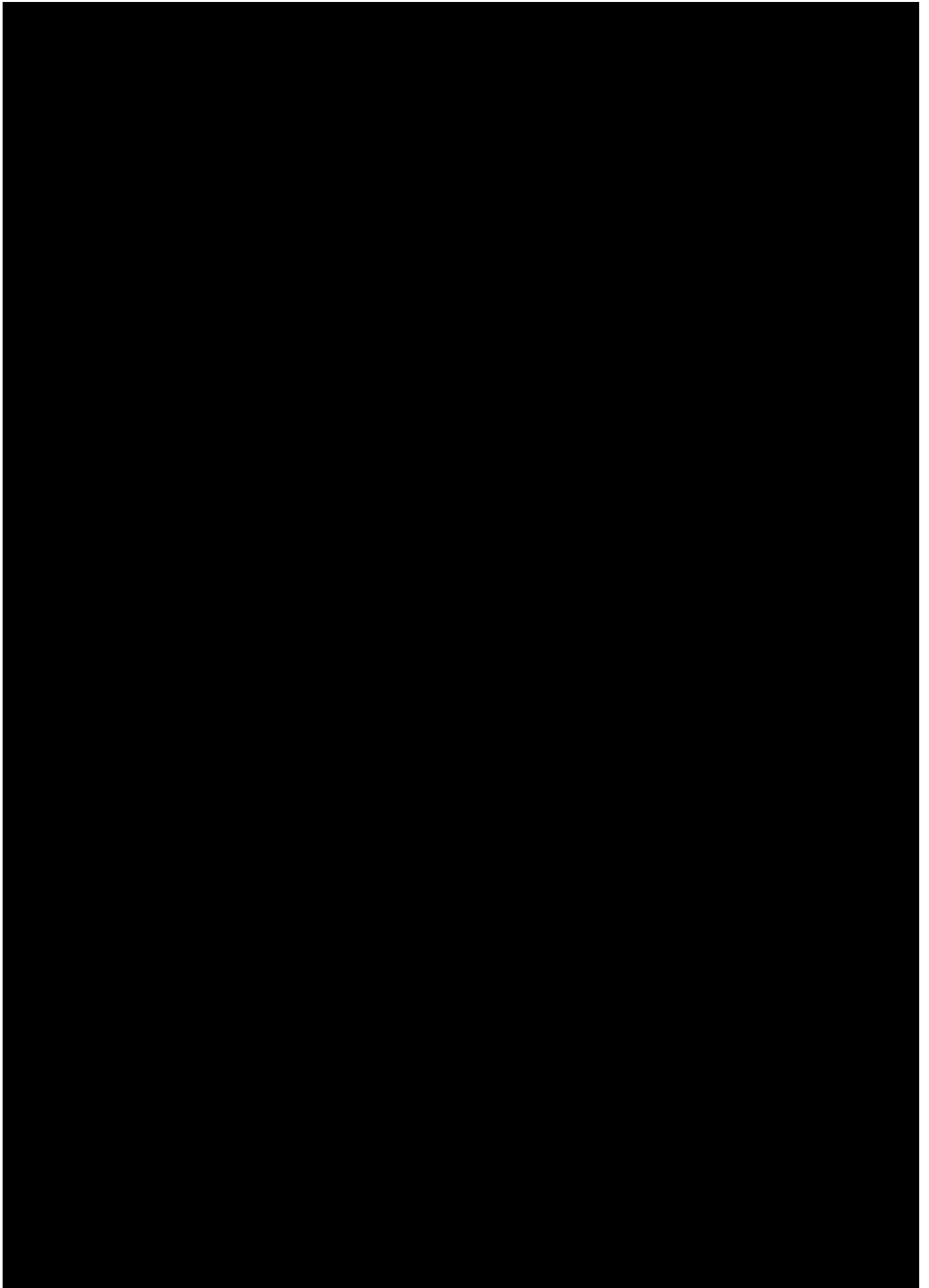
28. The Inquiry is not bound by Dudley CJ’s criminal costs judgment in the Cornelio, Perez, Sanchez case.

² By contrast section 223 of the Criminal Procedure and Evidence Act 2011

³ *Matalulu v DPP* [2003] 4 LRC 712

29. The Inquiry might treat a first instance Gibraltar judgment as persuasive if relevant, but the judgment of the 8th August 2023 was made in a context different from that in which the present questions arise.







Modifications to the provisional list of issues

46. No submissions.

Modifications to witness classifications

47. We await Mr Devincenzi's further statement in clarification of his 24/8/22 affidavit. We will submit that his evidence about events and conversations on 7th April 2020, 13th May 2020 and in mid June 2020 is very likely to be of potential significance sufficient to require his attendance as a category 1 (restricted) witness.

Timetabling the Main Inquiry Hearing

48. May we ask that the following be included among the Commissioner's many other relevant considerations when deciding a date for the main hearing:

- (a) The Superintendents' Association, which funds Mr Richardson's representation, is a small organisation with a small membership and very limited means;
- (b) The Association is funded from the annual individual subscriptions of its members and not from public funds;
- (c) A debilitating duplication of expense would be incurred if Mr Richardson's representation had to be replaced.

17th October 2023

Patrick Gibbs KC

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