IN THE SUPREME COURT OF GIBRALTAR

Claim No. 2026/MISC/005

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE KING ON THE APPLICATION OF FABIAN PICARDO, KC MP, CHIEF MINISTER OF GIBRALTAR

Claimant

-and-

SIR PETER OPENSHAW, DL

Defendant

CLAIMANT'S REPLY

TO DEFENDANT'S SUMMARY GROUNDS FOR CONTESTING CLAIM

References:
***"C"**: the Claimant*
***"C's Grounds"**: the Claimant's Statement of Facts and Grounds for Judicial Review dated 04/02/26*
***"D"**: the Defendant*
***"DSG"**: the Defendant's Summary Grounds for Contesting the Claim dated 23/03/26*
"***ECHR***": European Convention of Human Rights

1. **Overview.** This Reply deals only with matters relevant to permission to proceed. The DSG says that it seeks "*to assist the Court by ensuring that all relevant evidence and authorities are before it*" (§1). With respect to its authors, neither is achieved. However, the applicable legal principles set out in DSG are incomplete and it fails to deal with most of the C's grounds of challenge and, where it purports to provide reasoning and justification for findings, it does not properly address or dispose of C's claim.

2. **The DSG mischaracterises C's claim**. This claim is ***not*** about C seeking to avoid criticism. But criticism must be lawfully made. C challenges that in respect of 14 findings. But, contrary to the assertions in DSG, the claim is NOT about litigating "*disagreements with the Chairman's factual findings, based on C's views on what weight should be given to conflicting evidence*" (§4), nor "*an attempt to re-argue the merits through a forensic attack on specific passages of the Report*" (§7) nor inviting the court to form and substitute its own view about the substantial merits of the case (though the court may explore the evidence to see if the decision is vitiated by legal deficiency[1]). C makes ***no*** claim on these bases, and the D is wrong to suggest that he does.

3. **Not otherwise justiciable**. These mischaracterisations of the claim may have led D to the surprising (and, respectfully, legally unsustainable) submission that his decisions - that the serving Chief Minister (and senior barrister) has intentionally misled a statutory body (effectively a finding of dishonesty) and repeatedly attempted to "grossly improperly" interfere in a live police investigation - should ***not*** be reviewed by the Court. In other words, that the lawfulness of his decisions should not be tested by the court. That even though his decisions interfere with C's fundamental ECHR and constitutional right to respect for his reputation and are not otherwise appealable or justiciable because of D's statutory immunity from defamation claims. This would place Gibraltar in breach of the ECHR.

4. **The test for permission.** The usual test is whether there is an arguable ground of review which has a realistic prospect of success[2] (i.e., broadly similar to the "no real prospect of success" test for summary judgment in other proceedings).[3] The threshold is a **low** one.[4] The purpose of the requirement for permission is to "***prevent the time of the court being wasted by busybodies with misguided or trivial complaints***"[5] and to eliminate at an early stage claims which are **hopeless, frivolous and vexatious** (i.e. **clearly ill-founded**[6]).

5. D contends that the claim discloses no arguable ground of review which has a realistic prospect of success. But as Lord Diplock has said:

"*The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage*.

If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave..."[7]

6. **The test is amply met.** D's attempt to litigate the challenges at this stage is therefore inappropriate. The legal test for permission is amply met, and in any case the DSG neither correctly sets out the applicable legal principles nor successfully rebuts C's claims. C's claim amply meets the "realistic prospect of success" test. But in this case, there is a still further reason for the court to grant permission to proceed, namely, the general importance of the issues involved.[8] The Court should therefore grant permission on the papers, as sought by C.

Applicable legal principles

7. The parties agree on some legal points, including importantly, that the *substantive content* of the report of a public inquiry (including decisions, comments and criticisms) can be judicially reviewed by the court on usual JR grounds,[9] including lack of probative evidence and self-contradictory (or otherwise logically fallacious) reasoning.[10]

8. But the legal principles expounded in DSG are in some instances wrong and in others unhelpfully incomplete. In so far as they concern the permission issue, these are dealt with in this §8, below.

8.1 **As to attempts to distinguish key cases/procedural and substantive challenges**. Attempts to distinguish cited cases on their facts is irrelevant and, in any event, unsound. The cases are important because of the legal principles that they establish in relation to the amenability to judicial review of the substantive findings (including comments and criticisms) of a public inquiry report (and not just in relation to procedural challenges). It is also wrong to seek to give the impression that judicial review is in practice limited to cases of procedural challenges and that the possibility of challenge on substantive grounds is just "*as a matter of principle*" (as stated by the D in §22). DSG is therefore wrong to say (§24) "*as in Mahon, their* [the court's] *reasons for doing so focused on unfairness in the Inquiry's process, not errors in the Commission's substantive reasoning*". All of *Mahon, R (E7) v Holland, Peters v Davidson, Pyaneandee* and *Landreville* were cases that involved challenges to the substantive findings of reports of Inquiries and not just on procedural grounds. Indeed, in *Mahon,* the lawfulness of substantive findings of the report were successfully challenged because (as alleged in our case) they were *based upon an illogical conclusion* and *self-contradictory and unsupported by evidence*[11] and drew improper conclusions from such statements of fact to the detriment of the claimant.

8.2 **<u>As to the test of irrationality</u>**. The DSG states (§34) that a finding of fact is irrational "**only**" if it is "*so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (per Lord Diplock[12])*. But, as the court is aware, this simply means "unreasonableness". What is required before a court will intervene on this ground is that the decision is one "outside the limits of reason"[13]. Lord Diplock's words should not be mischaracterised to suggest that the bar is higher or more offensive to or critical of the decision-maker than it is. As has been stated, the word irrationality "*wrongly casts doubt on the mental capacity of the decision-maker*" and "*the use of a term redolent of severe criticism carries with it the danger that a court may not intervene in a case where intervention is needed*"[14] (which is why the term "unreasonableness" is now preferred). In the UK Supreme Court, it has been expressed thus: "*…In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).*"[15]

8.3 **<u>As to 'reasonableness' and weight and sufficiency of evidence</u>**

(i) D's contention that a judicial review court is not concerned with matters of 'weight' of evidence is too simplistic and incorrect, as the cases cited by D in §31-33 DSG themselves show. The law has moved on from *Council of Civil Service Unions* [1985]:

> "*The common law of judicial review in England and Wales has not stood still in recent years… They* [the courts] *continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them."*[16]

(ii) While the question of weight between competing considerations is normally a matter for the decision-maker rather than the review court, 'reasonableness' reviews involve considerations of "**weight and balance**", with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context.[17] What is reasonable depends upon the subject-matter and nature of the decision.[18] "*The more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable*"[19]. The "*highest standards of reasoning*" must be applied by a decision-maker before inferring dishonesty.[20] The impugned findings fail to meet this test.

(iii) The court will intervene where the facts found, taken as a whole, could not reasonably warrant the conclusion of the decision-maker. The evidence must be *sufficient*.[21] **If the**

weight of facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld.[22] The DSG ignores this legal principle in favour of the erroneously incomplete view that "weight" a matter for the Chairman and not reviewable and C's claim therefore "hopeless". This is wrong. Evidence must be *sufficiently probative* of the fact found or inference made. If not, the court may quash the decision if no reasonable tribunal could have regarded it as *sufficient* to warrant such a finding.[23]

(iv) Some categories of cases will require the court to subject a decision to the more rigorous examination e.g., "fundamental rights cases" in which the complaint is of interference with a person's fundamental rights (i.e. a right under the ECHR and/or the Gibraltar Constitution), e.g. to respect for reputation, ***as is the case in this Claim***. Such cases require "*anxious scrutiny*" by the judicial review court which goes beyond conventional Wednesbury unreasonableness.[24] The seriousness of the impugned findings and their effect on the C's reputation in this case are self-evident.

8.4 **As to the significance of the interference with the C's reputation**. The court's power to intervene to protect a person's reputation is not just "in theory", as posited in § 40 of DSG. C has a ECHR (art 8) and Constitutional (s.7) right that his reputation should not be injured *without sufficient justification*. i.e., that it is lawful and proportionate. This engages the need for **'anxious scrutiny**' by the court of the decision to ensure that there is indeed "sufficient justification". In *R v Lord Saville, ex p. A* the court said that "*It is not open to the decision-maker to risk interfering with fundamental rights in the absence of* ***compelling justification***" (our emphasis). [25] The impugned decisions are the antithesis of "*compelling justification*."

8.5 Furthermore, because it is an ECHR fundamental right, failure of proper access to the court to protect that right (which is limited to judicial review given that there is no right of appeal and that the Chairman is statutorily immune to defamation claims) would place Gibraltar in breach of Article 6 ECHR (and Section 8 of the Constitution).

8.6 **The DSG itself makes the case for permission.** Some of the D's submissions are by themselves sufficient to dispose of his submission that permission should be refused. In §43, D acknowledges that "*there is a complex question as to whether C's Article 8 right to protection of his reputation is engaged*". In §47, he acknowledges that "*it is therefore necessary for the Court to consider whether any interference with C's Article 8 rights is proportionate, having regard to competing rights of others*". It is sufficient to state at this stage that this cannot be determined

without a trial of the action, and it is therefore manifestly inappropriate for D to argue both this ***and*** that permission should be refused.

9. **D's rebuttal of the claims**

9.1 This Reply is not the place to join issue with the D and is therefore limited to high-level comment germane to permission.

9.2 The DSG fails to deal with most of C's grounds of challenge. Where it attempts to do so, it does so only in part, and often based on a mischaracterisation of C's claim and purporting to answer a case that C has not put (in the nature of "Aunt Sally" argument). In respect of many of C's Grounds, D's purported rebuttal tends to sustain rather than to undermine the un reasonableness claim. The DSG also wrongly ignores that a finding (much more so an inference) of fact made against the preponderance of the evidence may be irrational (or unreasonable).

9.3 C's claim is not "extremely unusual" in commonwealth common law jurisdictions with similar laws and legal systems to those in Gibraltar. The surprising complaint that the claim is "a forensic attack on specific passages of the Report" and that C's Grounds are "semantic and technical" or "legalistic" are not understood, but they do not address or dispose of the claim, still less of the permission application.

9.4 In short, the DSG fall a very long way short of disposing of C's claim without a trial and therefore of delivering the "knockout blow" required to defeat permission. The court should grant permission on the papers.

Sir Peter Caruana KCMG KC

Christopher Allan

Philip Dumas

13 April 2026

[1] *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541F-542A

[2] *R (Green Ports) v Gibraltar Ports Authority* (2024/GSC/031) at [2]. See also §9.1.3 of the Admin Court Judicial Review Guide (2025) and cases therein cited (at fn. 163).

[3] *De Smith's Judicial Review* (9th ed.) at §16-051.

[4] *R (Green Ports)* (above) at [2] and *AG of Trinidad & Tobago v Ayers-Cesar* [2019] UKPC 44 at [2]

[5] *R v IRC, Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 at 642.

[6] *De Smith's Judicial Review* (9th ed.) at § 16-048.

[7] *R v IRC, Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643-644.

[8] *R (Gentle) v Prime Minister* [2006] EWCA Civ 1078 at [23].

[9] C's Grounds (§7-13) and D's Summary Grounds (§3,4,10,19,21,40 and 41).

[10] *Mahon v Air New Zealand* [1984] AC 808 at 832H.

[11] *Mahon* at 823-825 and 831-836.

[12] Per Lord Diplock in *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410D.

[13] Per Lord Cooke of Thorndon in *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 452 and *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532 at § 32; *Supperstone, Goudie & Walker Judicial Review* (7th ed.) at §8.7.

[14] *Supperstone, Goudie & Walker Judicial Review* (7th ed.) at §8.16.

[15] *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2018] UKSC 25 per Lord Carnwarth JSC at [40].

[16] *R (Q) v Secretary of State for the Home Department* [2004] QB 36 at [112].

[17] *Kennedy v Charity Commission* [2014] 2 WLR 808, 51-56; *Supperstone, Goudie & Walker Judicial Review* (7th ed.) at § 8.11 and 8.56.

[18] *Supperstone, Goudie & Walker Judicial Review* (7th ed.) at §8.39.

[19] *R v Ministry of Defence, ex p Smith* [1996] QB 517, CA.

[20] *Supperstone, Goudie & Walker Judicial Review* (7th ed.) at §8.44.

[21] R *(British Sky Broadcasting Ltd) v Central Criminal Court* [2012] 2 WLR 3288.

[22] *West Glamorgan County Council v Rafferty* [1987] 1 All ER 1005, 1021J per Ralph Gibson LJ.

[23] For example, *R v Ealing London Borough, ex p Richardson* (1982) 4 HLR 125; the court will, if necessary, go behind the account of the facts given by the decision-maker for this purpose: *East Hampshire District Council v Secretary of State for the Environment* [1978] JPL 182; affd [1979] JPL 533; *Forkhurst v Secretary of State for the Environment and Brentwood Dis trict Council* (1982) 46 P&CR 89; *R (McNally) v Secretary of State for Education* [2002] ICR.

[24] *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 per Lord Bridge; *R (Mahmood) v Secretary of State for Home Department* [2001] 1 WLR 840, CA.

[25] *R v Lord Saville, ex p. A* [2000] 1 WLR 1855 at [34] and [37].