Claim No. 2026/MISC/005

IN THE SUPREME COURT OF GIBRALTAR

BETWEEN:

R. (ON THE APPLICATION OF FABIAN PICARDO KC MP)

Claimant

and

SIR PETER OPENSHAW, DL

Defendant

DEFENDANT'S SKELETON ARGUMENT
FOR HEARING ON 9 – 20 NOVEMBER 2026

References are as follows:

- *To the Comprehensive Electronic Bundle:* **[Tab/Page]**
- *To the Report:* **[R/Paragraph at Tab/Page]**

INTRODUCTION

1. These submissions are filed on behalf of Sir Peter Openshaw DL, Chairman of the Inquiry into the Retirement of the Former Commissioner of Police ('**the Chairman**'), who is the named Defendant in this Claim. They are based on the Defendant's Summary Grounds ('**DSG'**), updated to address new points arising in C's Reply and Skeleton Argument. While this has led to some duplication, it is intended to assist the Court by setting out D's case in this single document.

2. The Chairman delivered his Final Report to HMGOG on 6 November 2025 ('**the Report**'). The Report was published by HMGOG on 23 December 2025. C now seeks permission to judicially review fourteen categories of the Chairman's findings. He is not joined in this action by the other Government parties also represented by Peter Caruana & Co, including the Former Deputy Governor Nicholas Pyle OBE or the Attorney General Michael Llamas KC.

3. This claim is an extremely unusual one. As will be developed below, it is very rare for courts to undertake judicial review of the final report of an inquiry, and even rarer for such claims to succeed. Indeed, the Inquiry team has not been able to locate <u>any</u> successful examples of an inquiry's final report being successfully challenged in the UK since the

introduction of the Inquiries Act 2005, nor has C identified any either. That is no doubt because of the nature and purpose of judicial review proceedings, which is to challenge to the *legal validity* of a decision. The court of review is not allowed to "*examine the evidence with a view to forming its own view about the substantial merits of the case*". The Court should only explore the evidence to the extent required "*to see if the decision is vitiated by … legal deficiencies*": ***Reid v Secretary of State for Scotland*** [1999] 2 AC 512, Lord Clyde at 541F.

4. C's claim suffers from two key flaws:

    a. First, most of the grounds are simply disagreements with the Chairman's factual findings, based on C's own views as to what evidence should be preferred. It is evident from C's Grounds and Skeleton that C strongly disagrees with the Chairman's disbelief of his evidence on several matters, but that was a conclusion which the Chairman was plainly entitled to reach, and disagreement is not a basis for judicial review. Notably: (1) none of the grounds, when properly analysed, demonstrate that there was no evidence on which a finding could be based, as opposed to disagreeing with the weight of conflicting evidence; and (2) except for Ground 12, the grounds effectively argue that C's own testimony should be preferred to documentary evidence.

    b. Second, judicial reviews based on rationality and reasonableness require the claimant to prove that no reasonable tribunal could have reached the decision. The challenged findings do not come close to this: the Report contains no obvious material errors or instances where the evidence supporting a contrary finding to that reached by the Chairman is overwhelming. On the contrary, C has had to go to enormous length and detail to try to explain his objections to the Chairman's findings. In para 18 of C's Skeleton Argument, C states he is re-assured by the DSG describing his grounds as "*semantic*", "*technical*" and "*legalistic*". He states: "*They are what a challenge to the Report on C's Grounds needs to be if it is to succeed*". With respect, that misunderstands the nature and scope of a judicial review of an Inquiry's factual findings.

A. PERMISSION

5. As was anticipated in the DSG, the Court has elected to roll up the issue of permission with the substantive hearing of this matter. The Chairman did not object to such an approach and recognises the cost and time saving that it has brought about. However, his position remains that permission should not be granted on any of the grounds, because none of them have a realistic prospect of success.

6. C's inappropriate approach – effectively an attempt to re-argue the merits through a forensic attack on specific passages of the Report – is clear from his Grounds and Skeleton. This renders the claim "*hopeless, frivolous and vexatious (i.e. clearly ill-founded)*" (applying the test set out in para 5 of **C's Reply at [5/126]**).

B. THE GENERAL TEST ON JUDICIAL REVIEW

7. The approach of the supervisory court to judicial review was summarised by Lord Woolf MR in the Court of Appeal in ***R (A) v Lord Saville of Newdigate*** [2000] 1 WLR 1855 at [31] (emphasis added):

> "It is accepted on all sides that the tribunal is subject to the supervisory role of the courts. **The courts have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal.** In exercising their role **the courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts**. However, subject to the courts confining themselves to their well-recognised role on applications for judicial review, it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The court must also bear in mind that it exercises a discretionary jurisdiction and where this is consistent with the performance of its duty **it should avoid interfering with the activities of a tribunal of this nature to any greater extent than upholding the rule of law requires**."

8. Further guidance can be found in **Supperstone, Goudie and Walker on Judicial Review (7th Ed)** ('**Supperstone**') at §8.7 (emphasis added):

"..the court is not concerned with what it regards as the appropriate decision, but rather with the quite different test of whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the decision under review as a permissible one. Adopting the words of Cooke P in *Webster v Auckland Harbour Board*, what is required before the court may intervene is that **the decision is one outside the limits of reason.**"

9. See further the guidance in **Supperstone** at §§8.8, 8.12, 8.48, 8.51 and 8.56. As the Editors emphasise at §8.51:

> "It is to be stressed that ... in all these cases the court is concerned only to consider whether the finding of fact is one which has no reasonable basis, and is not interfering with the decision-maker's function of resolving disputed matters of fact falling within jurisdiction. ... It may also be noted that evidence of scrupulous care and a meticulous approach on the part of the decision-makers will render it unlikely that they have reached a view of the facts not reasonably open on the basis of the material before them."

10. Where the Claimant's fundamental human rights are engaged, the test is that adopted by Sir Thomas Bingham MR in ***R v Ministry of Defence ex p Smith*** [1996] QB 517:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. 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 in the sense outlined above."

C. JUDICIAL REVIEW OF PUBLIC INQUIRIES

11. It is extremely rare for Core Participants in public inquiries to judicially review the contents of the final Inquiry report. As explained by the Court of Appeal of New Zealand in ***Peters v Davison*** [1999] 2 NZLR 164: "*the great majority of judicial challenges to commissions of*

inquiry concern commissions which are still carrying out their tasks or may indeed not even have begun to operate." In other words, judicial review challenges are typically brought in relation to decisions about the process of an ongoing Inquiry.

12. The leading textbook on public inquiries, **Jason Beer KC on Public Inquiries** (2011) ('**Beer'**), puts the matter succinctly at §11.09: "*...challenges to the final conclusions of inquiries are possible. There is no doubt, however, that they are extremely difficult.*"

13. There are strong policy justifications for this, namely the difficulty of effective challenge without a complete rehearing, and that finality is vital. The continued possibility of litigation would be "*paralysing*", when one of the main reasons for inquiries is the "*rapid re-establishing of public confidence*" (**Beer** at §11.03). Similar warnings as to the difficulty of challenging an inquiry report's findings can be found in **The Practical Guide to Public Inquiries** (2020), at p280-1 and p285. See, in particular, p.280-1 (including a quote from Rory Phillips KC):

> "In general, the very limited number of reported JRs of inquiries in mid-flow in England is the clearest possible evidence that the Courts give Chairs/Panels a very wide degree of latitude in running their own procedures and in conducting their own hearings. ...
>
> The court's approach to reviewing decisions made by ministers, chairs and inquiry panels has been one of deliberate restraint and reluctance to interfere."

14. D does not dispute that as a matter of principle, findings of fact are "*in theory*" amenable to judicial review: see **Beer** at §11.27. Observations, comments or impressions are also reviewable. However, the law strictly circumscribes when findings of fact can be disturbed, and there is an established reluctance to interfere with an inquiry's findings of fact, even where they are susceptible to judicial review. See, e.g. **De Smith's Judicial Review** (9th Ed), §1-16:

> "*Even if findings of fact are amenable, the court will be reluctant to intervene for the same reasons – and subject to the same caveats – as it is cautious about quashing findings of fact made by tribunals and ombudsmen.*"

C1. UK decisions

15. The Chairman's Counsel have conducted a detailed review of judicial reviews of public inquiries under the Inquiries Act 2005 (UK), on which the Inquiries Act 2024 (Gibraltar) is based. Not a single example has been located of a successful judicial review of the contents of an Inquiry's final report in the UK since 2005. Instead, the authorities fall into three categories, all of which relate to decisions pre-dating the final report:

    a. Reviews of decisions, usually made by Government, about the formation of a public inquiry. These include reviews of decisions to: hold or not hold an inquiry; adjourn, suspend or terminate an inquiry; appoint persons to the Inquiry panel; or define the Inquiry's terms of reference.

    b. Reviews of decisions about the evidence-gathering process, including decisions to: grant restriction orders or uphold claims of public interest immunity; adopt closed material procedures; refuse to admit an expert report; call or not call certain witnesses; make disclosure requests; or grant anonymity or protective measures for witnesses.

    c. Review of decisions about the conduct and management of the Inquiry, including Core Participant status, public funding, and the timing of submissions.

16. A rare example of an attempt to judicially review the content of an Inquiry's final report in the UK was ***R (On the Application of E7) v Holland*** [2014] EWHC 452 (Admin), which concerned the Inquiry into the shooting of Azelle Rodney by police. The Inquiry's Report rejected the account of the police officer who killed Mr Rodney (known as 'E7'), and held that E7 did not believe for good reason that Mr Rodney presented a threat to life. A single judge of the High Court refused permission for judicial review, which was upheld by the Divisional Court.

17. Much like the present claim, the claimant's grounds argued that the Chairman's findings were "*illogical, irrational and based on misquoting evidence*": at [15]. E7 submitted that "*it was irrational of the Chairman to the Inquiry to reject E7's evidence; that it was capable of support from the evidence of [another officer] and [a bystander] and that the expert and objective evidence leaves sufficient room so that E7 could have had adequate observation of Azelle Rodney*": at [39].

18. The Inquiry submitted that the Chairman was fully entitled to reject E7's account: at [40]. For example, the Report had explained why he considered E7 to be unreliable and why the accounts of the other officer and bystander did not offer critical support to E7: at [42].

19. The Divisional Court rejected the criticism of the Inquiry's conclusions (its reasoning is at [43]-[45] and [57]-[58]), going so far as to say that the grounds were "*unarguable*": at [59]. Its approach is neatly encapsulated at [46]:

> "In summary, recognising that we are not a tribunal of fact and that our task is only to consider whether there are arguable grounds for judicial review, that is to say, for submitting that the findings of the Inquiry were irrational or perverse, we have no doubt that they are not."

20. Sir Brian Leveson P summarised the approach to such a challenge at [18]:

> "As for the approach, it is not contentious between the parties that the court can only intervene if any particular finding is irrational or perverse. In *Reid v Secretary of State for Scotland* [1999] 2 AC 512, concerning a challenge to a decision refusing to discharge a restricted patient under the Mental Health (Scotland) Act 1984, Lord Clyde put the matter (at 541F) in these terms:
>
> > 'Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal

deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.'"

21. Sir Brian Leveson P then added at [20], which encapsulates the invidious position of this Court when examining factual findings made following a lengthy Inquiry:

> "The way in which this Inquiry proceeded is important. Sir Christopher was engaged upon the inquisitorial process of investigating Azelle Rodney's death for some three years. There were some 30 days of evidence with 85 witnesses (of whom 76 gave oral evidence). 26 of the witnesses were experts in a wide variety of fields (which included detailed analysis of contemporaneous video and audio material). There was a substantial quantity of documentary evidence. Sir Christopher held site visits and a reconstruction. No review which this court can conduct could start to match the advantages that he had and, in the context of any review of findings of fact (a fortiori, where, as here, the test is irrationality or perversity) it is important to bear in mind the words of Lord Hoffmann in *Biogen Inc. v Medeva Plc* (1997) 38 BMLR 149, [1996] UKHL 18, [1997] RPC 1 (at para. 54) which are even more apposite when there is no appeal on the facts:
>
> > "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.""

22. Sir Brian Leveson P's acknowledgment of the "*advantages*" that the Inquiry panel possesses in assessing the evidence rings true in this case. The Inquiry ran for some 3.5 years between the First Preliminary Hearing (June 2022) and the publication of the Report (November 2025). The Chairman listened to 24 days of live evidence and submissions in both open and closed session, alongside consideration of five document bundles totalling some 36,516 pages (the equivalent of 50 lever arch files). He received written

submissions from the Core Participants at every stage, including during the Maxwellisation process where C's submissions ran to 47 pages [**35/18183**].

C2. Commonwealth decisions

23. C's Grounds refer to three decisions in Commonwealth jurisdictions where there were successful judicial reviews of the contents of inquiry reports. However, each of these is markedly different and obviously distinguishable from the present claim. C argues that the Chairman's "*attempts to distinguish cited cases on their facts* [are] *irrelevant*" and that "*the cases are important because of the legal principles that they establish*" (**C's Reply para 8.1** at **[5/127]**). As made clear in the DSG, the Chairman does not dispute the legal principles on which C relies. However, cases turn on their facts and legal principles are only decisive if they are properly engaged by the facts at hand.

Mahon v Air New Zealand [1984] AC 808

24. **Beer** describes this authority as "*one of the only reported successful challenges to the final conclusions of an inquiry…*" (§11.25) and as one arising in "*peculiar*" circumstances (§11.09). In this case, a Royal Commission into the Mount Erebus Airline Disaster concluded that the dominant cause of the accident was the act of the airline (Air New Zealand) in changing the computer track of the aircraft without telling the captain or crew, and that the airline had undertaken a "*calculated campaign of deception*" to conceal this. In judicial review proceedings, the airline successfully set aside a costs order (requiring it to contribute towards the costs of the Commission).

25. The decision highlights an important distinction between, on the one hand, findings which were based on <u>no</u> probative evidence or had not even been put to witnesses, and, on the other, disagreements about the appropriate weight to be ascribed to conflicting evidence. Lord Diplock (delivering the Privy Council's judgment) held at 830F that: "*there was no material of any probative value upon which to base a finding that a plan of this kind ever existed. Before their Lordships counsel for the judge have not been able to point to any such material*." In particular, the finding that an airline official had intimidated other staff to conceal relevant evidence "*must have come like a bolt from the blue. It was not based on any probative evidence and neither Captain Eden nor* [the airline] *was given any opportunity of dealing with it*": at 829E. See also Lord Diplock at 835H:

> "No such suggestion was ever put to Mr. Brown when he gave evidence at the inquiry. He was accordingly given no opportunity of dealing with the accusation of deliberately seeking to deceive [air traffic control] as to the direction from which to expect the aircraft that was to be made against him by the judge. This was a clear breach of the rules of natural justice which flaws the judge's finding which their Lordships have just cited, and which was specifically identified later in paragraphs 376 and 377 as being part of the 'litany of lies.'"

26. It can readily be appreciated that these failings by the Commission were concerned with questions of procedural fairness (i.e. a failure to put a serious allegation to a witness and a complete lack of evidence for a finding). Certainly, the Commission's errors were of a different nature and order to any alleged in these proceedings – see, e.g., 821F-822B, 824E-825A, 826G-827F, 828B-830G, 831E-833B, 833F-835D, 835F-836F.

27. By contrast, the Privy Council recognised at 836D that the report contained "*many other findings of fact by the judge upon which there had been conflicting evidence the reliability of which it was for him to assess; with his assessments a court whose functions are limited to judicial review has no jurisdiction to act otherwise than to accept them as correct*."

28. Lord Diplock, at 832H, summarised the limited circumstances in which a finding of fact is amenable to judicial review (emphasis added):

> "As courts whose functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, **unless (1) the procedure by which such findings were reached was unlawful … or (2) primary facts were found that were not supported by any probative evidence or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based upon an evident logical fallacy**."

Peters v Davidson [1999] 2 NZLR 164

29. In this case, the New Zealand Court of Appeal ('**NZCA'**) overturned the High Court's decision to strike out a judicial review of the report of the 'Magnum Inquiry'. In that Inquiry, a member of the New Zealand Parliament alleged that the Commissioner of Inland

Revenue and the Director of the Serious Fraud Office acted unlawfully and incompetently in not prosecuting a group of companies for tax evasion. The Commission found no tax avoidance or fraud, and no incompetence by the Inland Revenue Department or the Serious Fraud Office. It criticised the MP for making the allegations. The NZCA held that errors of law could render the Commission's report amenable to judicial review.

30. The NZCA set out a helpful explanation of the court's role on judicial review of a commission's findings at [6]:

> "Proceedings by way of judicial review are markedly different in character from an appeal. They are concerned with whether a person entitled to act pursuant to a statutory power does act within the terms of the power, in a rational way, applying the law correctly and acting fairly. The reviewing Court's concern is therefore with the validity of legal processes and the Court is not entitled to substitute its own findings of fact as if it were rehearing the evidence. It was the commission, not the Courts, who was charged with the responsibility of reporting to the Governor-General. The Court's responsibility in this case is to examine the legal correctness of the commission's reasons for certain conclusions and criticisms and, if it should find that the reasoning is legally incorrect, then to consider whether it should make a formal declaration about the validity of the conclusions and their effect on criticisms."

31. While C seeks to rely on this NZCA judgment, it only established the now uncontroversial proposition that inquiry findings can, as a matter of principle, be challenged on the basis of errors of law. Needless to say, each case will turn on its facts.

32. When the claim was remitted to the NZ High Court (see [1999] 3 NZLR 744), it held that the Commission's conclusions that there was no tax avoidance or fraud were errors of law based on erroneous interpretations of statutory provisions (in the Income Tax Act 1976). These misinterpretations led the Commission to characterise the transactions as lawful and, in turn, criticise an MP who had criticised the parties to those transactions. It should be noted that these were specific errors about the interpretation of legislation relevant to the facts of that Commission, namely whether taxpayers are required to disclose certain information for the purposes of determining the amount of a tax credit (see [42], [45], [48]-[50]) and whether non-disclosure debars entitlement to tax credits (see [52]-[53], [59]-[60], [69]-[70]). With one exception (the Thirteenth Challenged

Finding, about the interpretation of s34 of the Police Act), C does not allege that the Chairman erred in law by erroneously interpreting legislation.

Pyaneandee v Lam Shang Leen [2024] UKPC 27

33. This case concerned a public inquiry into drug trafficking in Mauritius. The Inquiry's report was critical of the conduct of Mr Pyaneandee, who was a barrister, by suggesting that he had some involvement in attempting to pervert the course of justice and to shield drug traffickers: at [4]. Mr Pyaneandee sought permission for judicial review. The Privy Council declared that certain passages were in breach of the principles of natural justice and should be "*disregarded*": at [90]. However, as in ***Mahon***, its reasons for doing so focused on unfairness in the Inquiry's process, not errors in the Commission's substantive reasoning. The issues identified were (1) pre-determination of issues by the Inquiry (at [73]); (2) the claimant not being provided with advance copies of the evidence and witness statements, an issue which was exacerbated by his sight and hearing problems (at [75]). The Board concluded at [75]:

> "The failure to afford the appellant any of these opportunities put him at a disadvantage when he gave evidence and was a breach of the standards of fairness and natural justice in this case."

34. The Board also raised other concerns about the Report and the procedure adopted by the Commission, including that it contained an incomplete and unbalanced account of the claimant's response to the allegations, and that one of the key allegations against the claimant – that he had attended prison as a spy for drug dealers – was unsupported by evidence and never even put to him, and so should not have appeared in the Report (at [77], [79] and [81]). Again, the basis for the Board's interference with the commission's findings can be seen to be founded upon serious procedural failings.

35. For further Commonwealth examples of successful challenges on procedural grounds in a similar vein to ***Pyaneandee***, see ***Landreville v The Queen*** [1973] FC 1223 (the Federal Court of Canada found that an inquiry erred in failing to reconvene to allow allegations of serious misconduct to be put to the witness before making a finding that he had been guilty of such misconduct) and ***Campbell v Mason Committee*** [1990] 2 NZLR 577 (in another NZ Inquiry, the committee that wrote the report accepted they had made a procedural error by failing to inform witnesses about severe personal findings or giving them the opportunity to comment before publication).

D. THE GROUNDS OF REVIEW IN THIS CLAIM

D1. Procedural fairness?

36. Paragraph 2 of C's Grounds [**2/19**] refer to three bases for seeking judicial review: (1) irrationality or unreasonableness; (2) illegality; and (3) procedural unfairness. However, procedural unfairness does not form the basis of any submissions in the body of C's Grounds or Skeleton.

37. In any event, no process issues of the type raised in ***Pyaneandee, Landreville*** and ***Campbell v Mason Committee*** (above) arise. C was represented throughout by Leading Counsel; had sight of all witness statements and disclosure in advance of giving evidence; and had the opportunity to respond to proposed criticism about him in the Draft Report during the Inquiry's Maxwellisation process. During that process the Inquiry wrote to C on 4 July 2025 attaching an Annex of the criticism about him contained within the draft report [**33/18160**]. C was provided with nearly four weeks to respond until 31 July. At C's request, the Inquiry agreed to extend this deadline until 8 August [**34/18181**]. C responded on 8 August 2025 [**34/18183**], addressing each of the proposed criticisms in detail (his letter ran to 47 pages). The Chairman carefully considered the arguments made in the letter, and in some instances made amendments to the Draft Report, demonstrating that he engaged fully with C's points and had them in mind when finalising the Report. Many of the criticisms that C made in the letter are replicated in this judicial review: Counsel can take the Court to examples at the hearing.

38. The reference to procedural fairness in paragraph 2 of C's Grounds may intend to encapsulate alleged breaches of natural justice. C repeatedly alleges that the Inquiry breached the so-called 'Mahon rules', which concern reaching findings without any evidence, and failure to have regard to conflicting evidence. However, it is submitted that these rules are better considered through the lens of irrationality and unreasonableness, because C is essentially alleging that it was not open to the Chairman to reach certain findings of fact on the available evidence.

D2. Irrational or unreasonable decisions

39. The authorities impose a very high standard for disturbing a finding of fact on the basis of 'irrational' reasoning. 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": ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 at 410D per Lord Diplock. Put another way, if viewed through the lens of 'reasonableness': "*two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable… Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable*": ***Re W (an Infant)*** [1971] AC 682 at 700 per Lord Hailsham. The Chairman agrees that in a modern context, the test of 'unreasonableness' is a more helpful lens than 'irrationality', but has used both terms in these submissions because C's Grounds used both terms.

40. In deciding whether a finding is irrational or unreasonable, the authorities emphasise an important distinction between a finding being based on <u>no</u> probative evidence, and a factfinder giving differing weight to conflicting evidence. In ***Begum v LB of Tower Hamlets*** [2003] UKHL 5, Lord Millett explained at [99]:

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. … The court cannot substitute its own findings of fact for those of the decision making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court."

41. See also ***R (Governing Body of X) v Office for Standards in Education, Children's Services and Skills*** [2020] EWCA Civ 594, which was a judicial review of a report by the Office for Standards in Education, Children's Services and Skills. The Court of Appeal addressed a submission about the weight to be given to conflicting evidence at [44]-[45]:

> "…dissatisfaction with the findings and conclusions of the inspection report does not, of itself, amount to a demonstration of irrationality. A central theme in these proceedings, reiterated in different forms with different examples, is the grievance that the inspectors placed too much or too little weight on certain evidence. That grievance, without more, has no traction in a claim for judicial review. The weight attached to a particular document – if available and relevant – was a matter for the inspectors, subject only to the traditional principles of public law.

Disagreement on the appropriate weight is never, on its own, a proper basis for a public law challenge."

42. C is correct that the supervisory court may assess whether evidence is sufficiently probative of the fact found or inference made by the decision-maker, and may quash a decision where this is not the case (see **C's Reply para 8.3** at **[5/129]**). Crucially, however, it can only do so if "*no reasonable tribunal could have regarded it as sufficient to warrant such a finding*", or if "*the weight of facts pointing to one course of action is overwhelming*" (**Supperstone** §8.56). This is a much higher test than the reviewing Court simply preferring one piece of evidence over another. As an example of the type of error required for such a reversal, see ***R v Ealing London Borough ex p Richardson*** (1982) 4 HLR 125, where the Borough's decision-maker's calculations were found to be "*wildly wrong*" (see in particular Lord Lane LCJ a132-135, O'Connor LJ at 136 and Kerr LJ at 137).

43. See also **Supperstone** at §11.40, paraphrasing from Stanley Burnton J in ***R (Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and North West Region*** [2001] EWHC Admin 901, at [77(f)]: "*It is often difficult to explain why one witness is preferred to another. Generally speaking, a tribunal's decision will not be inadequately reasoned if it does not give such an explanation.*"

44. These principles are also reflected in the inquiry context in ***Re Royal Commission on Thomas Case*** [1982] 1 NZLR 252, which was an unsuccessful attempt to judicially review the contents of an Inquiry's final report in NZ. The Report concluded that two police officers had planted a shellcase in the accused's garden to manufacture evidence. The officers argued that these findings were unfair because due notice was not given of these allegations, and the evidence relied upon was "*insubstantial and tenuous*": at 267.35. The Court of Appeal rejected this ground, finding at 273.4 that:

> "*…we have not been satisfied by the applicants that any of the challenged findings of the Commission were based on evidence which the Commission were not entitled to regard as hav*[ing] *probative value. The weight of the evidence was a matter for the Commission, not for the Court in these proceedings.*"

D3. Inconsistency as a subset of irrationality

45. In ***R (Governing Body of X)*** (above), the Court of Appeal appeared to accept that internally inconsistent reasoning could amount to irrationality, but emphasised the high bar that would apply to such a ground. See at [45]:

> "I reject the submissions made … to the effect that the inspection report is, in various respects, internally inconsistent to the point of being perverse. That argument is unrealistic. … The reality here is that the inspection report is not universally disapproving or censorious of the school's performance, but sets out a number of specific conclusions across the range of relevant issues in the inspection. Such differences are, in this case at least, merely the expression of different judgments on different questions. They do not involve self-contradiction, or even inconsistency. In my opinion, they do not come close to irrationality."

D4. Unlawful decisions

46. C's Grounds regarding the illegality of findings in the Report can be divided into three subcategories.

    a. Four findings were outside scope of the Commission and therefore ultra vires (First, Second, Fifth and Fourteenth Challenged Findings).

    b. The Report's interpretation of s34 of the Police Act contained an error of law (Thirteenth Challenged Finding).

    c. Various findings interfere with C's right to reputation under s7 Constitution and Article 8 ECHR (every challenged finding).

47. As to (a), the Inquiry does not dispute that under s7 Inquiries Act 2024, the functions conferred on the Inquiry panel are only exercisable "*within the Inquiry's terms of reference*", and that decisions outside the terms of reference would be ultra vires. However, the Chairman does not accept that the challenged findings fell outside the Inquiry's terms of reference. This will be developed below in relation to each specific finding where this is alleged.

48. As a general point, the Inquiry's terms of reference were very broad, namely: "*the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in*

June 2020 by taking early retirement". As Counsel to the Inquiry ('**CTI**') submitted in opening at the Inquiry, the inclusion of the word "*reasons*" imposed upon the Inquiry an obligation to determine the cause(s), explanation(s) or justification(s) for Mr McGrail's early retirement. However, the inclusion of the word "*circumstances*" meant that the Inquiry's remit was broader than merely looking for direct causes of Mr McGrail's early retirement, and extended to looking at facts connected with or relevant to that event. Further, the words "*leading to*" reinforced the need for a link between the reasons and circumstances and Mr McGrail ceasing to be Commissioner of Police, but maintained the broader nature of the exercise than a pure assessment of the direct causes.

49. As to (b), the Inquiry also accepts that, in theory, an error of legal interpretation could be a valid ground of judicial review where it was sufficiently material. In ***Peters v Davison*** (above), the New Zealand Court of Appeal accepted it was arguable that there were "*errors of law of sufficient materiality, going to the substance of a significant part of the report, to warrant a declaration*". The Inquiry does not accept that the Report contained an error of law about the Police Act, or one of sufficient materiality: see the Chairman's response on the Thirteenth Challenged Finding below.

50. As to (c), again the Inquiry does not dispute that the Court may (in theory) intervene to protect a person's reputation where required, for example by granting a declaration that certain findings in an inquiry report are invalid. This is because both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis: see ***Peters v Davison*.** However, there are four important provisos.

51. First, the fact that a Report has negatively impacted someone's reputation is not in and of itself a basis for judicial review. This is not a defamation claim. As explained by Lady Simler in ***Pyaneandee*** at [53] (emphasis added):

> "…the first question to be asked is whether a fair-minded, detached, and objective reader would conclude that passages in an inquiry report however they might be described (whether as findings, observations, comments, remarks, or recitals of evidence), either form a component part of an adverse decision affecting an individual or adversely affect an individual's reputation. **If so, judicial review will be available as a remedy where the commission has acted without jurisdiction or otherwise irrationally, unlawfully, or unfairly in breach of the principles of natural justice**."

52. Second, when determining the impact of the Report on C's reputation, "*it is not appropriate to parse the impugned passages in a report sentence by sentence, as both parties sought to do in this case. Rather, the impugned passages should be read as a whole to see what is conveyed to the fair-minded reader*": Lady Simler in ***Pyaneandee*** at [53]. C's Grounds fall into this error by mounting a detailed forensic attack on specific passages of the Report and fail to acknowledge other findings about C in the Report which accepted his evidence or which provide important context to the challenged findings.

53. Third, there is a complex question as to whether C's Article 8 right to protection of his reputation is engaged, in circumstances where the Report concerns his actions whilst in public office as Chief Minister. For Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life: ***Axel Springer v Germany*** (2012) 55 EHRR 6 at [83].

54. The Strasbourg case law establishes that the limits of critical comment on public figures is wider than for private individuals, as they inevitably and knowingly expose themselves to public scrutiny and must therefore display a particularly high degree of tolerance. This is particularly the case for the most senior politicians. See, for example, ***Mesić v Croatia*** 45066/17 (2023) 77 EHRR 24, where the European Court of Human Rights stated at [75]:

> "… the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see, for example, ***Eon v France***, no. 26118/10, § 59, 14 March 2013). These considerations apply even more so to the present case as the applicant was not an ordinary politician but a head of State. Moreover, like in Eon, the impugned article did not target the applicant's private life (ibid., § 57) but referred to his conduct in the exercise of his official duties."[1]

55. The extent to which Article 8 protects politicians was considered in detail in ***Yeo v Times Newspapers Ltd*** [2015] EWHC 3375 (QB), a defamation claim relating to an article accusing Tim Yeo MP of agreeing to act as a paid Parliamentary advocate, promoting a

[1] For recent applications of this principle see ***Banks v Cadwalladr*** [2021] 1 WLR 1417 (QB), per Steyn J at [127]-[133], applying the ECHR's original formulation in ***Lingens v Austria*** 9815/82 (1986) 8 EHRR 407.

foreign energy company's private agenda for cash. Addressing whether the MP's Article 8 right was engaged by the publication, Warby J (as he then was) held:

> "141. It is clear from the Strasbourg and domestic jurisprudence that a defamatory publication can engage the right protected by art.8(1) to respect for private life. It is also tolerably clear that not all defamatory publications will do so. I do not consider that the cases justify Mr Browne's submission that art.8 is engaged in the present case because the seriously defamatory attack on the Claimant's political conduct suggests a fundamental lack of personal integrity...
>
> 147. The claimant was a serving MP, and a Committee chair. The articles related wholly and exclusively to his conduct in those public roles, and not in any way to his private or personal life. I do not consider that the nature of the information is such as to engage art.8. Further, Mr Yeo is unsurprisingly a robust individual and, although I have no doubt he has suffered considerable stress and anxiety as a result of publication there was, on the evidence, no interference of any seriousness with his family or home life, or with his relationships within his community. In summary, this was a disclosure that related to his public roles, not his private life. The consequences for him of the attack on reputation that was involved were not of a nature or gravity such as to engage art.8; his "personal integrity" was not undermined. It follows that in my judgment the right approach in principle is the one indicated by the European Court in the Sunday Times case and by Lord Nicholls in Reynolds itself."

56. This precise issue is analysed in an article by Helen Quane of Swansea University titled "*Challenging the report of an independent inquiry under the human rights act*" (2007, *Public Law* 529) which comments as follows on p539:

> "At the same time, one has to appreciate the restrictions on this route to judicial review. The ECtHR has stated that there must be some prejudice to an individual's right to private life before there is any protection for honour and reputation under A.8.[2] The Court has adopted an increasingly broad interpretation of "private life" ranging from matters concerning one's health, sexual orientation, and family to one's business and professional relationships as well as public activism in certain

[2] See the ECtHR's admissibility decision in ***Aslan v Malta*** (Application No. 29493/95, February 3, 2000).

circumstances.[3] There are, however, limits. In particular, it is unlikely that the concept of "private life" would cover a public official's performance of his or her functions. This makes it very difficult, if not impossible, for public officials to use A.8 to challenge findings that are critical of the way in which they performed their official functions. This need to establish a link between the attack on one's reputation and one's private life represents an important limitation on the extent to which A.8 can be used to challenge an Inquiry's findings in judicial review proceedings."

57. To similar effect, **Beer** argues at §11.54 that while the concept of a "*private life*" can be construed widely and cover matters such as a person's professional career, it is "*unlikely to extend to the performance of public functions by a public official, unless (conceivably) comments or findings about an official's private life are thought by an inquiry to ground some sort of criticism of his ability to perform his function. Examination of those public functions will of course be the main business of most public inquiries*". The Court will recall that it was C who called the Inquiry, thus creating the platform for intense public debate on these issues. The public reaction to and comment on the Report were not only to be expected, but to be desired as an outcome of a successful public inquiry (see **Beer** at §6.03).[4]

58. Fourth, even if C's Article 8 rights are engaged by the findings in the Report, Article 8 is not an absolute right. Article 8(2) provides that: "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals,* ***or for the protection of the rights and freedoms of others***" (emphasis added). C makes the same point in his **Reply** (para 8.4 at **[5/129]**) that "*sufficient justification*" is required to interfere with Constitutional Rights. It is necessary for the Court to consider whether any interference with C's Article 8 rights is proportionate, having regard to competing rights of others: in this case the Article 10 right

[3] See the ECtHR's judgment in ***Rotaru v Romania*** (Application No. 28341/95, May 4, 2000), para. 43, and the partly Dissenting Opinion of Judge Bonello in that case.

[4] C stated as follows in his Ministerial Statement on the Publication of the Report: "*I expect robust public debate around the criticisms in the Report. This will just show that Gibraltar is a jurisdiction that is a mature and open democracy, as did my decision to convene the Inquiry in the first place. For me, when you are the subject of criticism, you do not hide or give up. You face the music. You learn the hard lessons. And then, you move forward.*" [**39/18350**]

to freedom of expression of public in reading the Inquiry Report and learning about matters of great public interest, as well as Core Participants, witnesses, and persons who chose to speak publicly about the inquiry findings. As Lady Hale explained in ***Campbell v MGN Limited*** [2004] UKHL 22 at [148]:

> *"There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life."*

59. Certainly, even if interference with the Claimant's Art 8 right is found, the extent of such interference is necessarily tempered by the fact that he is the Chief Minister, who called the Inquiry himself, and he must, in a democratic society, be prepared to permit a fair degree of assessment and even criticism of his conduct of the office.

60. C's Witness Statement details the reputational harm which he alleges was caused by the challenged findings, relying on various public statements and news reports which were critical of him [**38/18236**]. However, these statements were made in circumstances where (1) the findings were rational and lawful for the reasons set out below; and (2) the findings were extremely serious. One would expect a politician to 'wear' the types of criticism that C has objected to - such as comments by the leader of the Opposition (Keith Azopardi) and a political campaigner (Rebecca Calderon), opinion pieces by local lawyers and politicians (Nick Cruz KC, Damon Bossino, Charles Gomez), and press releases by Mr McGrail (essentially C's 'opponent' in the Inquiry). Furthermore, C himself contributed to the public discussions about the Report, including stating in a televised press conference that the Report "*vindicates*" him and "*completely exonerates*" the Government [**39/18343**]. It is difficult to reconcile these comments with the extensive alleged reputational damage that he now claims.

E. C'S NEW "OVERARCHING GROUNDS"

61. C's Skeleton raises three "Overarching Grounds". D submits that these points are best addressed in context within the Fourteen Challenged Findings (for example, what the relevant "act" was during C's berating of Mr McGrail). However, D also responds generally as follows.

E1. C's motive

62. C argues that because the investigation continued after Mr McGrail's retirement without interference, it is irrational to conclude that C had been motivated by trying to protect Mr Levy KC (because he took no further steps after Mr McGrail retired). It is correct that the Chairman accepted that the investigation continued [**R/12.417 at 8/753**], and also explicitly rejected that C was seeking to put an end to the entire investigation [**R/10.133 at 8/448**]. However, that is not inconsistent with the Chairman's earlier findings that C (1) attempted to interfere with the investigation through his berating of Mr McGrail on 12 May; and (2) in doing so was motivated by a desire to protect Mr Levy. As detailed below, the documentary evidence supported the Chairman's conclusions on both of these points, and he concluded (as he was well entitled to do) that it was more probative than C's own oral testimony on the points of dispute.

63. There could be any number of reasons why C did not interfere or attempt to interfere in the investigation after Mr McGrail's retirement. For example, Mr Levy's phone was returned to him in October 2020 without being examined [**13/13734**]; C may have considered that he had done enough to send a message to the investigators; C may have received legal or other advice telling him to cease; C may have felt cautious after the 'backlash' following Mr McGrail's retirement; or C may simply have had a change of heart.

64. It was not for the Chairman to conclude why C did not persist in attempting to interfere after Mr McGrail's departure, particularly given that the period running up to Mr McGrail's departure was the focus of the Inquiry. C's contention that these possible explanations should have been put to C at the hearing or in the Maxwellisation process is mistaken, as the Report did not make these findings. They are posited as examples only, of why C's claim that one finding was inconsistent with the other was flawed, and why the Chairman's findings were not beyond the bounds of reason.

E2. Alleged conflation of act and motive

65. The Chairman, an experienced criminal judge, of course accepts the distinction between act and motive, and has not equated them, as C contends. However, the Chairman's role was not to decide questions of criminal liability including whether the elements of particular offences were made out: cf **C Skeleton para 33.3**. C committed various acts which were, as a matter of common sense, capable of constituting attempted interference with the live investigation. These are addressed in turn below.

E3. Inconsistency of findings

66. There is no inconsistency in the Chairman finding that some instances of C's conduct amounted to attempted interference, and that other instances did not amount to interference or attempted interference but were nevertheless improper or grossly improper. As explained in ***R (Governing Body of X)*** (above), these differences are "*merely the expression of different judgments on different questions. They do not involve self-contradiction… They do not come close to irrationality.*"

67. In any event, the premise of this argument is incorrect, as there are instances where the Chairman expressly found that C's conduct was both improper and attempted interference. Interference can obviously also be "*improper*" (indeed, C's Counsel himself used the phrase "*improper interference*" during the Inquiry: see **R/11.384 at 8/626**). See, for example:

    a. First Challenged Finding: "*the meeting on 12 May was a grossly improper attempt to interfere in a legitimate police investigation and operation*" [**R/11.87 at 8/541**].

    b. Fourth Challenged Finding: "*this is another grossly improper attempt by Mr Picardo to interfere in an active criminal investigation by the RGP*" [**R/11.357 at 8/618**].

    c. Sixth Challenged finding: "*Mr Picardo is improperly attempting to protect his friend and mentor from the consequences of a warrant lawfully issued*" [**R/11.351 at 8/616**].

F. SUBMISSIONS ON THE FOURTEEN CHALLENGED FINDINGS

68. These submissions now focus on each of the fourteen challenged findings. The arguments about unlawful reputational harm to C have been addressed generally above, and are therefore not repeated below in relation to every ground.

F1. First Challenged Findings (C's Grounds para 17-22)

69. This ground concerns the meeting between Mr McGrail, C and Mr Llamas on 12 May 2020, after officers attended Hassans with the warrant. C has fallen far short of demonstrating that the Chairman's conclusions were "*outside the limits of reason*".

70. As to C's arguments that the Chairman's findings about the impact of the berating were irrational or inconsistent:

    a. C is correct that the Chairman did not accept that the Chief Minister's "*berating*" was designed to pressure Mr McGrail to call back the officers from Hassans [**R/11.74 at 8/538**]. However, it does not follow that the Chairman's separate finding (that the meeting was an "*attempt to interfere in a legitimate police investigation and operation*": **R/11.87 at 8/541**) was wrong or inconsistent. A finding that the berating was not designed to pressure Mr McGrail to call back the officers from Hassans leaves open the conclusion that the berating was an attempt to interfere with the ongoing operation and investigation. The berating itself was the '*act*' that constituted attempted interference, motivated by a desire to protect Mr Levy.

    b. C ordered Mr McGrail to attend the meeting at the office of the Chief Minister at a time when the RGP were still at Hassans, with a search warrant which authorised them to seize Mr Levy's devices [**R/11.83 at 8/540**]. Although the Chairman found that C did not demand that Mr McGrail immediately order his officers to withdraw, the timing, tone and nature of his trenchant criticisms laced with expletives, with direct threats of '*consequences*', were plainly intended to express his disapproval at the RGP's actions so far and, the Chairman found, influence the direction of the continuing investigation. The manner of attempted interference was therefore clear, contrary to C's submission (**C Skeleton para 37.4**). Accordingly, the Chairman held that through the berating, C was "*moving to protect Mr Levy … from the likely consequences of the warrant being executed, or his phones being*

interrogated" [**R/11.85 at 8/541**]. Further, the Chairman accepted Mr McGrail's evidence that he believed, by C's reference to 'consequences', that his "*head was on the line*" [**R/11.58 at 8/533**].

c. The Chairman judged the question of attempted interference objectively: whatever Mr McGrail perceived, or whatever the result, the Chairman considered that the meeting constituted an attempted interference. He was entitled to draw this conclusion on the basis on both the evidence of what occurred at the 12 May meeting, and later events.

d. C is wrong to claim that "*there was no evidence whatsoever before the inquiry (or finding by D) that C then or later (ever) tried to influence the police to prevent the execution of the warrant or the examination of Mr Levy's devices*" (**C Skeleton para 37.5**). There was overwhelming evidence to this effect, on which the Chairman based several critical findings about C, such as (i) the text messages exchanged between C and Mr Baglietto, (ii) C's disclosure of confidential information about the DPP's advice to Hassans, and (iii) C's text message to Mr Llamas about discontinuing the proceedings (each addressed below and particularly in the Eleventh Challenged Finding). This evidence sheds light on the purpose of the berating and suggests that C was fighting Mr Levy's 'corner'.

e. Further, C has never resiled from his support for Mr Levy and disapproval of the RGP: see for example **R/11.179 at 8/569** ('*Mr Picardo said that [he and Mr Baglietto] probably discussed 'the disgraceful way in which the police had abused their powers in seeking to obtain a search warrant when a production order should have been pursued, which was my view'*) and **R/11.291 at 8/599** ('*He said that he shared with Mr Baglietto … his outrage at the RGP's obtaining of a search warrant, which he considered had been obtained improperly instead of a production order. Mr Picardo set out his view that the use of the search warrant was a breach of Mr Levy's human rights…*'). The Chairman properly took this background into account.

f. The Chairman also had regard to Mr Llamas's evidence that he felt '*very uncomfortable*' and suggested that '*maybe that was an exchange that should not have happened, thinking about it in hindsight*' [**R/11.43 at 8/530**], and the

'*significant*' fact that Mr McGrail was moved to contact Dr Britto [**R/11.140 at 8/556**].

g. For the same reasons, the challenged findings do not breach the rules of natural justice, as there was a clear evidential basis for the finding.

71. The Chairman's findings about when and how C, as Chief Minister, is entitled to express criticism were also not irrational or inconsistent:

a. D's finding that C was entitled to express criticism did not amount to a finding that it was appropriate for him to do so in all manners and in all circumstances. C's suggestion that criticism cannot be rendered improper "*because it is delivered in a manner and language that is … inelegant or inappropriate or angrily*" is incorrect as a matter of common sense. In every human interaction, tone, message and the position of the speaker are all clearly capable of changing the meaning and impact of spoken words. In this interaction, C was not just '*angry*' but, as the Chairman found, '*in a towering rage*' [**R/11.129 at 8/553**]. At the time of the berating, C had also not had sight of the documents setting out the RGP's case against Mr Levy, including the application for the warrant [**R/10.154 at 8/454; R/10.170 at 8/460; R/10.143 at 8/452**]. He was not in the position of the judge in ***R (Andrew Mountbatten-Windsor)***, cited in **C's skeleton at 37.13**. Any 'parallels' did not justify C's actions.

b. Similarly, the context in which the words are conveyed can have a very significant impact. Compare: (a) an in-person berating in front of the Attorney-General at No 6 Convent Place relating to a business partner and mentor of the Chief Minister, with (b) strong criticism set out in measured terms in an official letter, on a matter in which the Chief Minister had no personal or business interest.

c. It was therefore entirely consistent for the Chairman to find that the Chief Minister was entitled to be "*highly critical*" of the RGP [**R/11.85 at 8/540**] – in instances where that criticism is independent, properly motivated and delivered appropriately. In this case, the Chairman found that it was none of the three: as well as the criticism's inappropriate delivery, C had no legal standing in criminal investigations [**R/11.83 at 8/540**], had a personal and financial connection to Mr Levy and the NCSIS investigation, and knew nothing of the contents of the warrant

or evidence against Mr Levy which might have informed his criticism [**11.84 at 8/540**].

d. Relatedly, C challenges the Chairman's observation that the point when criticism risks becoming interference is "*difficult to define*". The Chairman was not suggesting that it is impossible to determine whether certain conduct constitutes attempted interference, but simply commenting that identifying the exact line where criticism risks becoming interference is challenging. In any event, C's objection leads nowhere. The Chairman held that this meeting "*plainly*" crossed the line [**R/11.85 at 8/541**]: this was not a marginal case, and therefore the difficulty did not arise.

72. As to illegality, C has singled out the Chairman's comment that "*Mr Picardo still seeks to defend his actions… makes it much worse*" [**R/11.87 at 8/541**] as ultra vires. The comment was neither gratuitously critical, as C contends, nor outside the Chairman's Terms of Reference. It was very much germane to the Chairman's analysis of C's evidence as to his actions on 12 May. It fell squarely within the terms of reference, particularly because the Chairman was, through that comment, rejecting C's "*jurisdiction argument*" (see below), which C advanced as a justification for stepping in to defend Mr Levy.

A clerical and inconsequential error

73. The Chairman accepts that C has identified one immaterial and obviously typographical error in the Report. At [**R/11.39 at 8/529**], the Chairman stated that "*Mr Picardo confirmed that Mr McGrail had said that the DPP had advised that Mr Levy should be treated as a suspect*". In fact, C's evidence was that Mr McGrail said the DPP had been advising throughout and had been consulted; he did not use the word "*suspect*". However, this error – an obvious drafting slip-up as opposed to a misunderstanding of the evidence – leads nowhere. The Chairman's lengthy discussion at [**R/11.141 – 11.151 from 8/557**], the parts of the transcript referred to in [**R/11.39 at 8/529**], and the series of questions that he posed directly to C at the hearing [**27/17779]** demonstrate that the Chairman was acutely aware of C's evidence on whether and when he became aware that Mr Levy was a suspect. Further, he was specifically aware that C maintained that Mr McGrail did not tell him that Mr Levy was a suspect at the 12 May meeting. It was a key dispute in the Inquiry. In particular, the Chairman found at [**R/11.150 at 8/562**]: "*I also accept that Mr*

McGrail did not spell out to him during the course of that fraught meeting on 12 May that Mr Levy was now a suspect."

74. As a result, the finding that the 12 May 2020 meeting was an "*attempted interference*" was plainly not based on or derived from the misstatement in [**R/11.39 at 8/529**] or any misunderstanding of the evidence. The Chairman had the correct position clearly in mind. This is therefore not a proper basis for judicial review, and the Court should not permit C to take advantage of an obviously clerical and inconsequential error in the context of a 700-page Inquiry report. That is particularly so given it is clear that the error made no difference to the outcome, on which see **Supperstone** §8.50.

F2. Second Challenged Findings (C's Grounds para 23 – 28)

75. This ground concerns the Chairman's rejection of C's so-called "*jurisdictional argument*": that by calling Mr McGrail into his office on 12 May, he was acting to protect the reputation of Gibraltar [**R/11.79 at 8/539 and R/11.86 at 8/541**]. As above, the relevant 'act' was the berating itself.

76. Again, this falls far short of demonstrating irrationality or a breach of natural justice:

    a. D's finding was two-fold. First, as a general point, that equating the interests of a "*small circle of rich, powerful and influential individuals in Gibraltar*" may tend to conceal misconduct. This was the Chairman's summary and rejection of C's '*jurisdictional argument*'. Contrary to **C's Grounds at para 26.1 [2/31]**, the Chairman did not impute these exact words to C. Second, the Chairman determined that on these specific facts, C was not seeking to protect the reputation of Gibraltar, but to protect his friend Mr Levy [**R/11.85-86 at 8/541**]. That is not to say that the interests of Gibraltar and the powerful circles could never, in theory, coincide. However, based on C's actions and subsequent evidence, the Chairman concluded that his true motivation was to protect Mr Levy and not to protect Gibraltar's reputation. That was an inference which was open to the Chairman on the evidence, and did not require a positive statement to that effect by C.

    b. Mr McGrail's evidence was not that he notified C about the warrant by text because he accepted that the "*public interest*" was engaged. Rather, he knew the warrant against Mr Levy "*was going to have an impact*" because of his prominence

in Gibraltar [**T/6/192.10-16 at 17/17148**]. In short, it was a "*delicate*" situation. It was certainly not an invitation for C to make submissions, let alone to deliver an immediate, in-person berating. Nor did it somehow recognise that C was bound to act to protect Gibraltar's reputation.

c. Even if C did not immediately realise that Mr Levy was a suspect, this does not mean he was not motivated to protect Mr Levy. C knew that a warrant had been granted and that searches were underway. Although C insisted that Mr McGrail did not inform him that Mr Levy was a "*suspect*", C accepted in evidence that it was his understanding that '*search warrants are not executed against people who are not suspects*' and so he was '*starting to become concerned that he might be a suspect*' [**R/11.145 at 8/557**] (see also **27/17769, 27/17855**). C also recognised that had he been told that Mr Levy was a suspect "*then it might have made my intervention inappropriate*" [**16/17779**].

d. Despite this, C later devoted significant energy to devising strategies on how Mr Levy might stop his phone from being examined. There was therefore ample evidence supporting the Chairman's conclusion as to C's motivation (and forming the basis for rejecting C's own testimony), including (i) the strength of C's reaction on 12 May (without even knowing the evidential case against Mr Levy); and (ii) subsequent corroboratory evidence which shed light on his conduct at the time (C's text messages with Mr Baglietto and Mr Llamas, and the meeting in his home on 17 May 2020 with Mr Baglietto and Mr Levy). The Chairman was also entitled to take into account C's evidence in the Inquiry itself, and his failure to disclose his meeting with Mr Levy on 17 May until late in the Inquiry process, which also shed light on his conduct and motivation at the relevant time. These matters are addressed below.

77. Turning to C's argument on illegality, a finding as to the Chief Minister's motivation for berating Mr McGrail on 12 May is plainly part of the relevant factual matrix, and even a "*circumstance*" which led to Mr McGrail's retirement. It is not arguable to suggest that this is ultra vires.

F3. Third Challenged Findings (C's Grounds para 29 – 34)

78. This ground concerns the message sent by C to Mr Baglietto on 14 May 2020, which stated: "*The last limb refers: Dismissal with total loss of Pension Benefits forfeiture of*

pension benefits will be used as a disciplinary measure only in [cases] where the Police Officer is convicted of treason or some other offence which is gravely injurious to the State or is liable to lead to serious loss of confidence in the Police Force." [**R/11.297 at 8/601**] This was an extract from the Police Disciplinary Regulations.

79. C does not deny sending this message, but objects to two aspects of the Chairman's language:

    a. First, that C was not making "*proposals*" about disciplinary penalties, but rather "*set*[ting] *out what could happen in the event that it were true*" [**27/17792**]. This was referring to somewhat far-fetched allegations about Mr Richardson obtaining employment from Bland, addressed further below. However, C's text message did not refer to the allegations, nor did it include any indication that he did not believe them and that this was therefore only a hypothetical mapping out of potential consequences. In fact, C's evidence was that he did not even believe the theory about Mr Richardson at the time [**27/17791**]. Therefore, the more reasonable reading of his message, which the Chairman preferred (and was certainly entitled to prefer), was that C was indeed making a '*proposal'*. There was certainly no overwhelming evidential case contradicting that conclusion.

    b. Second, that the Chairman used the term "*removal*" to summarise what C was proposing, rather than "*dismissal*". This is purely semantic. "*Removal*" amounts to the same thing as a "*dismissal*". C sent a text message quoting this section, including the word dismissal. This is probative and compelling evidence that C was proposing that an option (for whatever reason) was to seek to dismiss or remove a police officer. It is also denied that this finding is in any way inconsistent with the Chairman's subsequent reference to the message being "*regarding pension entitlements*" at [**R/11.351 at 8/616**].

80. The finding is also not rendered irrational because C had no power under the Police Disciplinary Regulations. As the Chairman found, C was "*proposing*" or "*suggesting*" this option to Mr Baglietto [**R/11.304 at 8/603**]. Raising this idea or route is in itself capable of being a "*grossly improper attempt*" at interference, even if someone else would need to execute the power, or it was ultimately an impossibility.

81. Moreover, the Chairman was entitled to reject C's evidence that this message was about Mr Richardson and not Mr McGrail. Far from being an "*arbitrary opinion*" backed by "*no*

evidence", the Chairman reached this conclusion on the basis of C's actions and subsequent evidence (including his assessment as to its credibility), including:

a. C's berating of Mr McGrail and later steps to remove Mr McGrail from office;

b. the fact that C made this "*completely unexpected suggestion*" about a theory of Mr Levy's relating to Mr Richardson for the first time in his oral evidence, after failing to mention it in (at that stage) four witness statements [**R/11.302 at 8/603**], and also suggested in evidence that he did not even believe the theory about Mr Richardson at the time of sending the message; and

c. the fact that neither Mr Levy nor Mr Baglietto had mentioned the point about Mr Richardson's job offer with Bland in their evidence to the Inquiry [**R/11.302 at 8/603**].

82. In this context, it was clearly open to the Chairman to conclude that this message was about Mr McGrail, despite C claiming he knew the Police Discipline Regulations did not apply to the Commissioner of Police (there was no contemporaneous evidence of C possessing such knowledge). Contrary to C's submission (**C Skeleton para 47.3**), the Chairman *did* reject C's evidence that he knew that the Police Regulations did not apply to the Commissioner **R/11.303 at 8/603**]. It should also be noted that the very next paragraph reads as follows:

> "It would be bad enough if the Chief Minister was proposing the removal of Mr McGrail, as the Commissioner of Police in overall control of the investigation into his friend, Mr Levy, but let me consider – as he contends – that the extract was indeed directed at Mr Richardson. The position would then be that the Chief Minister is seeking to suggest to the lawyer of a man suspected of serious crime the circumstances in which Mr Richardson, the Senior Investigating Officer, in charge of the investigation of that serious crime, could be removed from office, and therefore removed from the investigation. Whether he was gunning for Mr McGrail, as Commissioner of Police, or Mr Richardson, as the Senior Investigating Officer, this was a grossly improper attempt by Mr Picardo at interference with the investigation." **[R/11.304 at 8/603]**

83. It is clear from that paragraph that whether the Chairman accepted C's evidence that it was aimed at Mr Richardson or preferred the interpretation that it referred to Mr McGrail,

he considered that the sending of the message and its proposal was a grossly improper attempt to interfere with the investigation.

84. C also seeks to criticise D's findings that (a) it was "*much more likely*" that the intended target of the proposal was Mr McGrail, and (b) that the message "*shows that he firmly had IM in his sights*". C asserts that "*It is not logically possible to find something "firmly" on the back of something else which is only "much more likely".*" However, the Chairman's use of "*firmly*" is not, as C appears to believe, a measure of the firmness of Chairman's finding, but rather of the firmness within which C had Mr McGrail in his sights.

85. Finally, the fact that the Operation Delhi investigation continued notwithstanding Mr McGrail's removal did not make it irrational or unreasonable to find that the message constituted attempted interference at the time it was sent. Even though the investigation continued, it is easy to comprehend how a proposal to remove of the Commissioner might have had an impact on the conduct of the ongoing investigation. This point is addressed further in relation to the Fifth Challenged Finding below.

F4. Fourth Challenged Findings (C's Grounds paras 35 – 40)

86. This finding concerns the message sent by C to Mr Llamas on 18 May 2020, which was a copy of section 59 of the Gibraltar constitution [**R/11.352 at 8/616**]. Mr Llamas responded "*(2)(b)?*"; to which C responded "*Exactly. In re a search warrant as a 'proceeding*'" [**R/11.353-354 at 8/617]**. Section 59 relevantly provides:

> "(1) There shall be an Attorney-General for Gibraltar whose office shall be a public office.
>
> (2) The Attorney-General shall have power in any case in which he considers it desirable so to do –
>
> > (a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);
> >
> > (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
> >
> > (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
>
> [...] (4) The powers conferred upon the Attorney-General by subsection (2)(b) and (c) shall be vested in him to the exclusion of 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."

87. The Chairman was entitled to find that sending this message to Mr Llamas was a grossly improper attempt to interfere with the investigation [**R/11.357 at 8/618**].

    a. Subsections (4) and (5) of the Constitution require the Attorney-General to exercise his powers to the exclusion of and without the "*direction or control*" of any other person.

    b. Even if the Chief Minister may be entitled to ask the Attorney-General to consider "*properly*" using his powers (which is not accepted), the Chairman had already found that C was not acting in support of a "*public interest*" of Gibraltar, and was instead acting with the improper motive of protecting Mr Levy: see above.

    c. It is immaterial that Mr Llamas did not ultimately use his powers in this way, or that a Court may have needed to satisfy itself that it was proper to exercise such powers.[5] The Chairman's finding was that the act of sending the message, late at night in the context of the search warrant '*crisis*', was an attempt to interfere. Contrary to **C's Skeleton para 54**, sending the message was the relevant "act" of attempted interference, and if Mr Llamas had reacted differently (which was out of C's control) it would, or at least could, have caused actual interference.

    d. The objection in **C's Grounds para 39.4 [2/39]/Skeleton para 52.3** is not understood. When CTI put to C that he sent this message "*in the context of criminal proceedings against your very close friend, your mentor, your business partner*", C voluntarily interjected: "*Who is also the only Star Performer in Chambers and Partners in Gibraltar, Gibraltar's biggest rainmaker, one of the greatest sources of business for the finance centre … So, of course, undoubtedly, he is those things to me but he is also those things to Gibraltar and therefore also of my concern in that respect.*" [**27/17802**]. This recalled his earlier answer at **[27/17776**], including that "*I'm seeking to protect the reputation of the jurisdiction. This is about James Levy, a senior partner of the largest law firm in*

[5] A point which the Chairman doubts, given that there is no obligation on the Attorney-General to give reasons for the discontinuance of proceedings under Section 59(2)(c) – see ***Mohit v DPP of Mauritius*** [2006] UKPC 20 at [22] and ***Cornelio and ors v R***, 2023/GSC/029 at [22].

Gibraltar … the only star performer year after year in Chambers and Partners". It is therefore incorrect that "*Mr Picardo did not say anything to the effect that he was protecting Mr Levy*". He did say words to that effect, and although he emphasised his "jurisdictional" concern, he also acknowledged his personal concern. For the reasons already explained, the Chairman was entitled to reject C's evidence that his real motive was the former. This finding was therefore neither unreasonable nor in breach of any rule of natural justice.

F5. Fifth Challenged Finding (C's Grounds para 41 – 45)

88. This ground concerns the Chairman's finding that after 12 May, "*Mr Picardo needed to proceed with extreme caution and circumspection, because any unexplained contact could have at least the appearance of an interference with the police investigation*" [**R/11.151 at 8/562**]. This finding immediately followed from the Chairman's conclusion that C either learned or deduced that Mr Levy was a suspect very shortly after the police left Hassans on 12 May [**R/11.150 at 8/562**], and so "*henceforward*" needed to proceed with caution.

89. This finding comes nowhere close to the threshold for irrationality:

    a. It is expressed in moderate terms which are difficult to deem objectionable: unexplained contact with a suspect and his lawyer "*could*" "*at least*" have the "*appearance*" of interference, and C needed to proceed with "*caution*" (not even cease contact altogether). It is not clear how this finding could have any impact on C's reputation (and thus his Article 8 right). It was merely a finding as to the need to proceed with caution and circumspection after he deduced that Mr Levy was a suspect, not a finding of actual misconduct. Similarly, C's criticism that "*there is no act capable of 'tending to' interfere*" misses the point, as the finding was a warning about the need for caution over subsequent contact in the circumstances existing from that point onwards, rather than a finding as to a specific act.

    b. Right from the outset on 12 May C himself recognised the need to be cautious: when Mr McGrail notified C by message that the officers were at Hassans, he responded that "*Given my close personal relationship with JL, I won't comment further*" [**R/11.3 at 8/519**].

c. As with the question of bias in public life (where the focus is not just actual bias but the appearance of bias), third party perception of interference can be just as important. It is certainly not "*an irrelevance, factually and legally*" (**C Skeleton para 59**). The Chairman was entitled to conclude that, as a holder of public office, it would have been prudent for the Chief Minister to minimise any appearance of police interference, particularly given C's widely known business relationship and friendship with Mr Levy. In fact, this was an entirely obvious conclusion, not least due to the importance of the rule of law, separation of powers, and obligations of impartiality in the Ministerial Code. For example, para 7.1 of the Ministerial Code establishes the principle that: "*Ministers must ensure that no conflict arises, **or could reasonably be perceived to arise**, between their public duties and their private interests, financial or otherwise*" (emphasis added).

d. It is noteworthy that at the time, Mr De Vincenzi perceived a risk of conflict of interests involving C and Mr Levy, an attitude of which the Chairman approved [**R/11.405 at 8/631, 11.407 at 8/632, 11.409 at 8/632**]. The Chairman made similar findings about Mr Llamas's need to act with caution when faced with the potential appearance of conflict (see eg [**R/11.135 at 8/555**, **11.166 at 8/566]**). See also the finding to the same effect about Mr Baglietto and Mr Levy [**R/11.329 at 11/611**].

90. As to illegality, this finding was within the Inquiry's terms of reference as a fact relevant to the "*circumstances*" leading to Mr McGrail's retirement. C's dealings with Mr Levy in May 2020, and their propriety or impropriety, were at the heart of the Inquiry. It was obviously necessary for the Chairman to determine the circumstances in which C proceeded from 12 May onwards.

F6. Sixth Challenged Findings (C's Grounds para 48 – 52)

91. This ground primarily concerns the Chairman's findings that it was improper for C to meet with and speak to Mr Levy (an RGP suspect) and Mr Baglietto (Mr Levy's lawyer) about the suspected offence. C does not challenge the Chairman's broader findings that the culture of informal and un-minuted meetings in Gibraltar could give rise to "*the inappropriate communications of confidential information, to the granting of inappropriate favours, and to the creation of inappropriate reciprocal obligations*" [**R/11.326 at 8/610]**, as well as conflicts of interest not being properly identified.

92. C objects that the finding about C attending this meeting is not grounded in "*established legal principle or legal provision*". However, the Chairman is not entitled to determine a person's civil or criminal liability under s4 Inquiries Act 2024 (and no doubt if the Chairman had adopted and applied a legal standard, C would have objected to it on the basis of s4). Necessarily, the finding that C behaved "*improperly*" was not a legal determination, but the Chairman's opinion based on the constitutional context, the Ministerial Code and the cumulative evidence of the clandestine dealings between C, Mr Levy and Mr Baglietto. This fell squarely within his terms of reference to inquire into the "*circumstances*" leading to Mr McGrail's retirement. The Chairman was entitled to express such an opinion.

93. The fact that the Chief Minister has no legal standing in prosecutions in Gibraltar, as the Chairman pointed out in [**R/11.83 at 8/540**], did not make his conduct proper. On the contrary, it demonstrates that, given his senior office and thus influence, as well as his access to highly sensitive and confidential briefings and information, he needed to act with circumspection and care when expressing views on criminal investigations, and interacting with suspects and their lawyers. This was particularly the case in relation to a mentor and business partner of his. C himself recognised this in his initial message to Mr McGrail upon being notified of the warrant: "*Given my close personal relationship with JL, I won't comment further*" [**R/11.3 at 8/519**]. In this instance, far from having no involvement in the investigation and being entirely independent of it, C had been briefed on it by the RGP, had discussed the matter at length with Mr McGrail and the Attorney-General, and had also been briefed with sensitive and confidential information (albeit ultimately erroneous) as to the DPP's 'advice' on the warrant. He had therefore benefited from confidential inside information from the investigation and was unable to act independently of the police and prosecution.

94. The final finding which C challenges under this ground is the Chairman's conclusion that "*as with the messages he sent on 14 May regarding pension entitlements, Mr Picardo, as Chief Minister, was again canvassing ideas with the lawyer of a man suspected of serious crime as to how his interests could best be protected or advanced. … I consider here that again, Mr Picardo is here improperly attempting to protect his friend and mentor from the consequences of a warrant lawfully issued"* [**R/11.351 at 8/616**]. However, by use of an ellipsis, C has omitted the key factual basis for this finding, which was a text message exchange between Mr Picardo and Mr Baglietto on 17 May about the HMIC Report. Mr

Picardo had texted: "*That is page 13 of the HMIC report published last week. Look at the bit I have highlighted in red. Boom.*" [**R/11.340 at 8/614**]. The highlighted section of the HMIC report stated that officers were using personal devices to examine offenders' phones. In a subsequent message to Mr Baglietto C stated "*I think the above is of major to* (sic) *the issues raised this week. It will be important. Remember the HMIC report is public.*" [**12/3841**]. C admitted in evidence that this part of the HMIC Report "*went to the very core of the issue that was in play; Mr Levy's electronic communications device being in the hands of the RGP*" [**R/11.341 at 8/614**]. On this basis, the Chairman was entitled to conclude that Mr Picardo intended to deploy this as an argument against the RGP having access to Mr Levy's telephones, and that this was improper [**R/11.351 at 8/616**].

F7. Seventh Challenged Findings (C's Grounds para 53 – 56)

95. This ground challenges the Chairman's conclusion that, at the meeting on 17 May 2020, C gave his approval to the proposal of Mr Levy providing a written statement to police rather than attending for interview [**R/11.330 at 8/612, R/11.332 at 8/612**]. This finding was not irrational. It was an inference that the Chairman was entitled to draw on the basis of all the evidence before him, including in particular the following:

    a. The powerful coincidence in timing of Mr Baglietto's email to Mr Llamas (confirming that Mr Levy would give a written statement to the RGP), which he sent at 1451hrs. The meeting had started sometime after 1403hrs [**R/11.313 at 8/606]**], and so the Chairman concluded that it had been sent during the meeting or immediately after Mr Baglietto left the Chief Minister's house [**R/11.330 at 8/612**].

    b. The evidence before the Inquiry about what had been discussed at that meeting, and the Chairman's rejection of C's evidence about Community Care Trust (addressed below), which he assessed as lacking in credibility. Contrary to there being no evidence or probative fact supporting such a conclusion, C himself gave evidence in his Fourth Affidavit that he, Mr Levy and Mr Baglietto had discussed the search warrant at the meeting **[11/2301]**.

    c. The fact that C had not addressed this meeting in a witness statement until his Fourth Affidavit, filed only weeks before the Inquiry hearing, coupled with the absence of any note of this meeting, from which the Chairman concluded that he had deliberately concealed this meeting (addressed below).

96. The finding that this approval by C was "*improper*" also cannot be irrational. Whether or not the RGP had already agreed to accept a written statement from Mr Levy, the Chairman was entitled to opine that the Chief Minister should not discuss detailed matters of police procedure with a person suspected of compromising the natural security of Gibraltar, nor give his approval to a proposed course of action (see eg [**R/11.323 at 8/610**). The Chairman considered his very involvement to be objectionable, no matter its impact.

97. The objection in **C's Grounds para 55.5 [2/45]/Skeleton para 65.4** regarding the timing of events is unfounded. Although C and Mr Pyle had already concluded that they would need to approach the GPA, it was not until 18 May (i.e. the day after the meeting in the Chief Minister's home) that events were *set in train* when C and Mr Pyle met Mr Britto [**R/12.52 at 8/651**].

F8. Eighth Challenged Findings (C's Grounds para 57 – 61)

98. This ground concerns a message sent by Mr Baglietto to C on the evening of 17 May 2020, after the meeting at C's home: "*Shocking but sadly doesn't come as a surprise! Thanks for your time today, bro. I think it reassured him a lot!*" [**R/11.344 at 8/615**]. C objects to the Chairman's finding that Mr Levy had been reassured by C's approach to Mr McGrail and Operation Delhi, but the Chairman's conclusion was entirely rational. C's evidence that the reassurance had related to Mr Levy's position with the Gibraltar Community Care Trust was implausible, as the Chairman found.

99. In contrast, the Chairman's conclusion was clearly supported by the following evidence and logic:

    a. the sheer unlikelihood that the purpose of the meeting had been to discuss the tangential issue of the Community Care Trust, rather than the pressing issue of the day (the warrant). This was particularly given the attendance of Mr Baglietto, who has no role at the Trust [**20/17321**] and no recollection of it being the purpose of the meeting [**20/17322**], whereas he thought it "perfectly plausible" that the search warrant might have been raised [**20/17322**];

    b. C's surrounding conduct, including sending messages to Mr Baglietto and Mr Llamas canvassing ideas to assist Mr Levy, and more generally his strong views on the warrant and investigation and his evidence that he was "*evangelising about this to anyone who would care to listen*" [**16/17808**];

c. C's own evidence that the matter of the search warrant was discussed at the meeting (eventually given in his Fourth Affidavit at para 17 [**11/2301**]):

> "At the meeting with Mr Levy KC I remember we discussed, again, how legally improper it had been, in our view, for the RGP to have proceeded by way of search warrant and not Production order, how outraged I was by the fact that I believed that Mr McGrail had lied to me about the advice he'd had in that respect and my subsequent complete loss of confidence in him.";

d. the email sent by Mr Baglietto to Mr Llamas during or immediately after the meeting confirming that Mr Levy would give a written statement (see above);

e. the fact that C raised the Community Care Trust for the first time in his Fourth Statement, filed only weeks before the Inquiry hearing began [**R/11.317 at 8/608**];

f. the fact that none of the retrieved messages referred to the Community Care Trust [**R/11.322 at 8/609**]; and

g. the absence of any notes of the meeting [**R/11.321 at 8/609**].

100. C's point (**C Skeleton para 69.1**) that C was giving "*direct evidence*" and not an "*explanation*" is incorrect. C was giving evidence against the backdrop of the message from Mr Baglietto to C that the meeting on 17 May had "*reassured him a lot*", and therefore his evidence was, in effect, an explanation of that message.

F9. Ninth Challenged Finding (C's Grounds para 62-66)

101. This ground concerns a message sent by C to Mr Baglietto on the evening of 17 May 2020, quoting s76 of the Police Act (relevantly, "*the magistrates' court may, on the application either by member of the Force or by a claimant of the property make an order for the delivery of the property to the person appearing to the court to be the owner thereof*") [**R/11.306 at 8/604**]. C accepted in evidence that this was very likely a proposal to retrieve Mr Levy's phone from the RGP [**R/11.307 at 8/605**].

102. C challenges the Chairman's conclusion that C's message was improper. However, the Chairman's finding was entirely rational. As the Chairman pointed out, "*one only needs to set out this proposition to demonstrate its gross impropriety*" [**R/11.311 at 8/605**].

103. C argues that he was merely "*suggesting to a person's lawyer how someone can exercise their legal right to lawfully retrieve property*" (**C's Grounds para 65.1 at 2/49**), and that the Chairman inferred that "*even proper acts are improper*" (**Skeleton para 75**). Once again, this does not view C's conduct in appropriate context or have proper regard to the nature of the investigation, C's role, his relationship with Mr Levy, and the briefings that he had received. Mr Levy was not just "*a person*": he was suspected of involvement in a conspiracy endangering the national security of Gibraltar, following a detailed police investigation. C is the Chief Minister of Gibraltar, and responsible for issues of national security. He had been briefed on this investigation, had discussed it with Mr McGrail and the Attorney-General, and had received confidential information as to the DPP's advice. In those circumstances, C was not acting as a mere friend and could not act independently of the RGP, as he asserts that he was entitled to do.

104. As the Report notes, C also recognised the "*tension*" between proposing an application against the police, and on the other hand needing to fit the bill of any such application as Minister of Finance [**R/11.310 at 8/605**] – the only instance at the Inquiry where C acknowledged a conflict.

105. The fact that the Court would have needed to adjudicate on any application under s76 does not exonerate C's act. He was still seeking to prevent the police from interrogating a suspect's phone by proposing ideas to his lawyer [**R/11.311 at 8/605**].

F10. Tenth Challenged Finding (C's Grounds para 67-70)

106. This ground concerns the sequence surrounding C's disclosure of the 17 May 2020 meeting to the Inquiry. The Report is correct that C did not disclose the fact of this meeting until "*very shortly*" before the Main Inquiry Hearing. The Chairman set out the sequence of events in **[R/11.314 at 8/606] - [R/11.315 at 8/607]**, summarised below:

    a. C did not mention the meeting in his lengthy First (22 May 2022) or Second (20 July 2023) Affidavits.

    b. He did not mention it even in his Third Affidavit (15 November 2023), written in response to the Inquiry specifically asking him about his contact with Mr Levy, and requesting dates and times of any relevant conversations.[6] CTI asked C why the

[6] See letter Triay to Caruana & Co dated 25 September 2023. For example, the Inquiry asked "*Please provide an overview of the contact between Mr Picardo and Mr Levy KC on the following topics: (a) Mr Levy's status*

meeting was not mentioned in this Affidavit. C responded that it fitted within paragraph 11, in which he had stated that "*my frequent conversations with Mr Levy KC about the search warrants were mostly telephonic and, as I have already said, there was no record beyond those already disclosed… There were no meetings in my office such as may have resulted in a note of it*". C maintained that paragraph 11 did not *exclude* events like the meeting of 17 May and that it was one of the "*conversations*" referred to in that paragraph [**27/17786**].

c. C's messages with Mr Baglietto, which led to the Inquiry's further questions about the 17 May 2020 meeting, were exhibited to his Third Affidavit. The messages simply stated, without context and amidst many pages of other messages in that exhibit: "*12 noon he says*"; "*Let me know when you are on your way up*"; "*Como vais*"; "*Picking Up now*"; and then later "*Thanks for your time today bro. I think it reassured him a lot!*" [**12/3841**]. The messages did not even name Mr Levy. Exhibiting these messages in this manner is not the same as disclosing the fact of the meeting with Mr Levy on that date, and giving proper evidence as to what was discussed. The Inquiry had to follow up with yet further questions before C finally addressed the meeting in his Fourth Affidavit.

d. In his Fourth Affidavit (18 March 2024, three weeks before the Main Inquiry Hearing began), C finally said that he recalled seeing Mr Levy on one occasion, accompanied by Mr Baglietto at his (C's) home. C sought to justify this omission from his earlier statements by saying that the meeting on 17 May was about Mr Levy, and "*not a meeting convened to discuss Ian McGrail*" (even though he accepted that Mr McGrail was discussed) [**27/17796**]. He then later said that he did not recall this meeting when drafting his Third Affidavit, and added "*If I had to recall every time I have spoken to James Levy, met James Levy and in particular met him on a Sunday, I would spend the rest of my days and would not be finished by the time I died at 120*".

107. In these circumstances, as well as his evidence-based conclusions on what was discussed at that meeting (see above), it was open to and reasonable for the Chairman to

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as a 'person of interest' in the Operation Delhi Investigation; (b) the warrants issued by the Magistrate in respect of Mr Levy. Please provide (a) dates and times of any relevant conversations; (b) notes of those conversations or an explanation of what was discussed if no notes exist; and/or (c) any written communications or documents recording any communications between Mr Picardo and Mr Levy KC on the above topics." [**36/18230**]

infer that C did not refer to this meeting earlier because he "*knew that others would find it to be deeply inappropriate*" [**R/11.316 at 8/607**]. The Chairman was entitled to draw a distinction between exhibiting vague messages to a statement, and providing express evidence as to the meeting in a witness statement. In short, the Chairman inferred that C could no longer avoid answering the question.

108. Even though C maintained that he was free to meet with Mr Levy [**R/11.319 at 8/608**], that was after the existence of the meeting had been revealed. This is not inconsistent with wanting to conceal the meeting from the Inquiry in the first place. Further, (a) maintaining an entitlement to meet, and (b) nevertheless seeking to conceal the meeting altogether to avoid a difficult explanation, are not necessarily inconsistent.

109. The assertion in **C's Skeleton para 80.5** that the Chairman's finding that the meeting was to discuss the Investigation was "*another inference-based finding for which there was no evidence*" is incorrect given C's evidence in his Fourth Affidavit (set out above) and oral evidence that the subject of Mr McGrail was discussed at the meeting.

F11. Eleventh Challenged Finding (C's Grounds para 71-74)

110. This ground objects to the Chairman's finding that C was "*determined in one way or another*" to thwart the search warrant [**R/12.369 at 8/739**]. This overlaps significantly with Ground 1. C argues that "*there is no evidence whatsoever … to the effect that the Claimant sought to prevent the execution of the warrant or the examination of the devices*" [**C's Grounds para 73.3 at 2/52**]. This is wrong: there was copious evidence that C was working behind the scenes to further Mr Levy's interests and ensure that his phone was not interrogated, including:

    a. the messages to Mr Baglietto with various proposals, including the reference to s76 of the Police Act, which sought to retrieve Mr Levy's phone from the RGP, and his evidence that he spoke to Mr Baglietto "*at length*" about Mr Levy's representation, including whether Mr Levy should be advised to judicially review the RGP's actions [**R/11.291 at 8/600**];

    b. the message to Mr Llamas about s59(2) of the Gibraltar Constitution; to which Mr Llamas responded "*(2)(b)*" and C replied – in his own words – "*Exactly. In re a search warrant as a 'proceeding'*" [**R/11.353 at 8/617**];

c. C's own admission that he had told Hassans and Mr Levy that the DPP had not advised on the warrant [**R/11.251 at 8/589**]. The Chairman separately concluded that this was a "*grossly improper disclosure of confidential material, which he must have known, and intended, might assist his defence to the detriment of the prosecution*" [**R/11.257 at 8/591**]. Notably, C does not challenge that finding. This information was used by Hassans in their letters to the RGP seeking the return of Mr Levy's devices [**R/11.108 at 8/546**].

111. The Chairman also found at [**R/11.25 at 8/526**] that although Mr Levy had handed over the devices "*voluntarily*", "*it is rather strained usage of the word 'voluntarily', since he handed it over under compulsion and with protest and only to avoid the warrant being executed, with all the consequential adverse publicity*." As a result, it is semantic for C to argue that he could not have "*thwarted*" the warrant because it had not been executed. The threat of Mr Levy's devices being examined, Mr Levy attending a police interview, a further warrant being obtained, an ongoing police investigation and even Mr Levy being charged, remained very much live.

F12. Twelfth Challenged Findings (C's Grounds para 75 – 86)

112. This is the lengthiest of C's Grounds, running to nearly 20 pages. That in itself may suggest to the Court that the exercise it is being asked to undertake is not appropriate for judicial review. As emphasised in ***Pyaneandee***, the Court should not review the report "*sentence by sentence*".

113. The findings challenged by this ground are, in summary, that (a) C never doubted that the Gibraltar Police Authority ('**GPA**') would do what he told them; (b) C misled the GPA about his real reasons for losing confidence in Mr McGrail; (c) the GPA would have made a more searching enquiry had they been told the truth; and (d) C's omission of Mr Levy's name, the search warrant and the 'lie' from the 'second letter' from the GPA to Mr McGrail was "*sinister*". These factual findings were inferences ultimately drawn by the Chairman after seeing, hearing and carefully considering live evidence from several witnesses, and feeding into his analysis his impressions of a raft of documents created by different parties. Such findings are quintessentially inapposite for judicial review.

114. Addressing the findings in turn:

(a) "Mr Picardo, whilst ostensibly referring to the duty of the GPA to act independently, never doubted that they would not do as they were told to do – as indeed they did" [R/12.67 at 8/655]

115. The Court should read this paragraph of the Report in full. Its proper context is that, in an email to Mr Pyle on 17 May 2020 setting out his views on Mr McGrail's position, he stated (emphasis added):

> "*We would then also have the benefit of any representation that the Commissioner might have made under S.34(2) [of the Police Act]. That would mean that any decision you might make to engage your own powers, if the GPA were not to discharge their functions properly (which I have no reason to doubt they will certainly see to do), would be better informed and would enjoy the benefit of explanations / information provided by the Commissioner in the course of his representations under S.34(2).*" [**8/655]**

116. The underlined words provide obvious probative support for the Chairman's finding. C equated the GPA exercising their functions "*properly*" with the GPA inviting Mr McGrail to retire (rather than undertaking an independent inquiry and coming to their own view). This piece of evidence is sufficient to address to this ground. However, for completeness, D addresses each of C's points in turn below.

117. First, far from there being "*no evidence*", there was ample evidence that C and Mr Pyle effectively 'told' Dr Britto what to do at various points:

    a. Mr Pyle's evidence [**11/1094**][, confirmed in his email to the FCDO dated 21 May 2020, was that he told Dr Britto (at the meeting also attended by C) that, should the GPA determine that a call for Mr McGrail to retire was not appropriate, he would consider using the powers available to him under section 13(1)(f) of the Police Act. That is, he would deem a decision not to call for resignation a "*default*", absent "*strong and persuasive arguments*". He reported having further emphasised to Dr Britto that "*the GPA should be in no doubt as to the strength of my feelings*", and concluded that his powers under section 13(1)(f) "*only came into play "in default by the Authority" and as such, the GPA was under some scrutiny.*" He described Dr Britto as "*clearly shocked*", demonstrating the impact of this stern warning on him. He also reported that C had been "*visibly angry*" in the meeting and concluded that "[w]*ithout doubt, the Chief Minister has the bit*

between his teeth and wants the Commissioner removed from his position as soon as possible" [**R/12.106-12.109 at 8/667**].

b. Mr Britto's evidence, which the Chairman accepted, was that despite being told it was a matter for the GPA, he felt he was being given no choice at all [**R/12.94 at 8/664**]. Dr Britto stated that he was "*left in no doubt that one way or another it could happen*"; he "*felt pressured … because of this thing about me not doing my duty properly*" [**R/12.95 at 8/664**]; and was told "*this had to happen before the new Governor came in*", contributing to a sense of urgency [**R/12.102 at 8/666**].

c. At the hearing, Mr Britto gave evidence that he had begun to accept what was alleged in the Gomez letter, that the GPA had done what C and Mr Pyle wanted [**R/12.231 at 8/702**]. C's submission that the GPA "*remained entirely free to decline*" is divorced from the reality of the power dynamics in play.

d. The Chairman concluded, from his impression of Dr Britto's live evidence, that "*by character and personality, he was unable to resist what he felt to be the pressure being put upon him*" [**R/12.103 at 8/666**]. The Chairman noted the "*drama*" of Dr Britto's oral evidence that "*they're giving me a choice – but they're not really*" [**R/12.94 at 8/664**]. This is an excellent example of the Chairman being best placed to assess the totality of the evidence, which is not always captured by the transcript.

e. The evidence that C had messaged Mr Darren Grech (a member of the GPA) about needing his "*support*" on the issue of Mr McGrail's retirement [**R/12.111 at 8/668**] was also relevant. The Chairman held that whilst he did not doubt Mr Grech came to his own judgment, "*Mr Picardo's approach to him, in these terms, when under the Constitution Mr Grech had a duty to act independently, is to my mind obviously improper.*"

f. The tenor of the Government Parties' overall case was also consistent with the Chairman's finding that C always expected he would get his way. Their opening statement was thus: "*when a political power to which you are accountable expresses loss of confidence in you, you go*" [**R/12.123 at 8/672**].

118. Second, the evidence refutes that the GPA "*knew what they had to do and felt free to do it or not do it*" (as claimed in **C Skeleton para 88.2**)

a. The evidence above regarding Dr Britto's personality and the pressure that he felt is repeated.

b. Dr Britto was confused about the process for inviting representations, and expressly sought C's counsel on this point by text message [**R/12.143 at 8/677**]. C reassured Dr Britto that he was proceeding correctly, and even made edits to the 'first letter' to Mr McGrail that Dr Britto had drafted. That letter erroneously invited Mr McGrail to retire, but stated "*Please note that Section 34 (2) states that you shall have an opportunity to make representations before the Authority and that these shall, of course, be fully taken into consideration to allow the Governor, the Chief Minister and the Authority to express a firm and final view*" [**R/12.152 at 8/680**]. Whilst Mr Pyle accepted that the procedure described in this letter was flawed [**R/12.156 at 8/681**], C refused in evidence to give a view on whether this was consistent with s34 [**R/12.157 at 8/681**].

c. Dr Britto's reliance on C continued during the drafting of the 'second letter', produced in response to Mr McGrail's request for more detailed reasons. Dr Britto drafted this letter and C extensively amended it, as set out in [**R/12.159-164 at 8/682-3**], while omitting any express references to his main reason. The Chairman considered this to be "*sinister*" (see below). Again, Mr Pyle accepted that the letter should have included more particulars [**R/12.168 at 8/684**], but C insisted that its content was sufficient [**12.170 at 8/685, 12.177 at 8/686**].

d. The Chairman noted the deference that Dr Britto showed C, such as repeatedly apologising for bothering him. Dr Britto also stated that C was the only lawyer he could ask for advice [**R/12.160 at 8/682**]. The overall tenor of the evidence was that Dr Britto was confused and scared – indeed, he admitted that he did not even understand all of C's amendments to the second letter [**R/12.163 at 8/683**].

e. C asserts (**C Skeleton para 88.2**) that C and the Governor understood and accepted that the GPA was free to make its own decision. However, this is immediately contradicted by C's own recognition, in the same sentence, that: "*(although the Governor said he would then be minded to exercise his power under section 13 to call for IM's resignation)*". Of course, that power was only exercisable "*where the Authority has failed to discharge or perform a responsibility imposed on the Authority under this Act*".

a. Moreover, it is not inconsistent for Dr Britto to have felt pressure, but also to have hoped that by making representations, Mr McGrail might be able to maintain his post (cf **C skeleton para 88.3**).

119. Third, the Chairman was entitled to find that C meant the "*very opposite of what he and the Governor told the GPA in writing*" i.e. in the note of meeting (**C Skeleton para 88.5**). The Chairman concluded, as he was entitled to do, that despite paying lip service to the independence of the GPA in the written note, the following evidence was more probative:

a. C's actions and demeanour (as well as Mr Pyle's) during the meeting of 18 May, recorded in contemporaneous evidence including Mr Pyle's email to the FCDO referred to above;

b. The evidence that Dr Britto was heavily reliant on C and deferential to his office during the GPA process; and

c. C's actions in editing the two letters, which were not consistent with the independence (or at least the appearance of independence) of the GPA, as the Chairman found [**R/12.160 at 8/682**].

120. Fourth, the Chairman did not find, as suggested in **C Skeleton para 88.6**, "*that the fact that the GPA failed to follow the correct procedure 'demonstrates' that C 'never doubted' that they would not do so*" (a form of self-fulfilling prophecy). The Chairman in fact found that C knew the GPA would do as they were told. The basis for this was C's written observation ("*which I have no reason to doubt they will certainly see to do*") when coupled with the reference to the Governor's powers in the event of default. Additionally, C himself played a significant role in *ensuring* that the GPA did as told (as an active participant in the GPA's flawed procedure).

121. Fifth, and similarly, the GPA's missteps (which ran contrary to what was ostensibly stated in the Meeting Note) were – at least to some extent – materially contributed to, if not driven by, C. That is because C was an active participant in the GPA's erroneous procedure.

122. C's sixth point is not understood. The Chairman did not conclude that "*C knew (in advance) that all of them would not take the meeting note at face value*" (**C Skeleton para 88.8**). He did not need to: Dr Britto was the bridge between C and the GPA, and C was able to effectively control the process and the views of other members through the content of

the Meeting Note, the letters and his direct dealings with Dr Britto. He also knew that Mr Britto would introduce the Meeting Note to the GPA while giving his own experience and impressions of the meeting and his dealings with C, and therefore that the GPA would interpret the Meeting Note in the same way that Mr Britto did.

123. Seventh, the Chairman quoted Dr Britto's evidence that whatever pressure he may have felt from C and Mr Pyle, he did not transmit this to the other GPA members [**R/12.118 at 8/671**]. He did not accept this as a fact. C argues that the Chairman placed inadequate weight on this evidence. However, as the authorities demonstrate, this is insufficient as a ground of judicial review of a finding of fact. The weight to be given to evidence, particularly of live witnesses, is a matter for the Chairman, save that, exceptionally, the court can intervene where *no reasonable decision-maker* could have regarded the evidence as sufficient to warrant such a finding, or where there is overwhelming evidence to the contrary. That is a very high bar indeed. The Chairman was entitled to arrive at the conclusion that, contrary to Dr Britto's evidence, the pressure from C and Mr Pyle had in fact been transmitted. This is evident, for example, from the contents of the Informal Record of Meeting Note drafted by C [**13/12545**] (with original emphasis):

> "... the Chief Minister noted that Section 13 (1) (f) of the Police Act also gives the Governor authority to call for the **resignation** of the Commissioner where the Authority has failed to discharge its responsibility.
>
> The Chief Minister explained that both the Governor and he were particularly alive to the not so subtle differences between a 'retirement' (S.34) and a 'resignation' (S.13). The effect may be the same, but the route and signposting is markedly different. Both have recorded that the power of the Governor is much more explicit, for good reason."

124. The pressure exerted by C and the Governor is evident from the echo of those notes in the minutes of the GPA's emergency meeting on 21 May [**13/12698**]:

> "5. After discussion and based on what had been expressed by the Governor and Chief Minister and the contents of the file note, it was felt that the best course of action would be to activate Section 34 of the Act and invite the Commissioner to retire but always affording him the opportunity to make representations to GPA so we could arrive at a firm and final decision and able to make recommendations to Governor. The GPA felt that this recourse was better and 'gentler' than the

Governor potentially activating Section 13 which allows him to seek his resignation."

125. Eighth, the Chairman referred to the passage of the GPA minutes that C relies on at **Skeleton para 88.10**. The Chairman concluded that "*Dr Britto thought that at that stage there was a prospect of the GPA changing its views once the GPA received his representations*" [**R/12.139 at 8/676**]. The procedure summarised in the minutes was consistent with the procedure set out in the 'first letter' to Mr McGrail, which C helped draft.

(b) Deliberate concealment and misleading

126. This ground has no prospects of success and can be addressed briefly. As demonstrated above, C was not a bystander: he actively involved himself in the GPA process by reviewing and editing the first and second letters from the GPA to Mr McGrail. Mr Pyle did not do the same (although contrary to C's submissions he does not escape criticism on this issue – see [**R/12.63 at 8/653**, **R/12.103 at 8/666**]). Thus, contrary to **C's Grounds para 82.1**, C had actual knowledge that the GPA was not carrying out its statutory process properly and was not therefore "*entitled to assume that the GPA would properly carry out its own statutory process*", as he now claims. By contrast, there was evidence that Dr Britto was confused about the representations process and reliant on C for guidance (and indeed drafting of reasons in letters): see above. C is therefore wrong to claim that there is "*no rational basis for concluding that the Governor and C could have known*" that the GPA would not follow the proper statutory procedure.

127. In **Skeleton para 92**, C newly argues that C thought the procedure was being properly deployed. However, C suggesting that Dr Britto add a provision for Mr McGrail to make representations "*to the end*" of the letter does not establish this. C had read the draft letter in which the GPA had already invited Mr McGrail to retire and sought representations without setting out the basis of its complaint in detail. The Chairman was entitled to opine that this was plainly unlawful: see **R/12.153-4 at 8/680**.

128. The suggestion by C (**Skeleton para 97**) that any pressure on the GPA was applied by the Governor and not C is incorrect. C was present and an active participant at the meeting. C then drafted the Informal Record of Meeting Note, containing the passages set out above. As can be seen above, the pressure placed by C and the Governor at the 18 May

meeting found its way through to the GPA and manifested in the minutes of the GPA's emergency meeting of 21 May.

129. C's convoluted argument that C could not have had an intention to conceal the 'real reason' from the GPA because he knew it would be discovered through Mr McGrail's representations (a) ignores the fact that C participated in the GPA's flawed process as set out above, and (b) is not an overwhelming case for concluding that C did not have the intention to conceal. The Chairman was entitled to arrive at such a conclusion based on C's striking omission of any particulars relating to the 'real reason' from the three written documents that he prepared/helped draft (the Informal Record, the first letter and the second letter).

(c) "other members of the GPA … would have made a much more searching enquiry had they been told the truth"

130. This lengthy objection can be divided into five sub-parts.

131. First, that Dr Britto knew about "*the Hassans/Mr Levy connection and/or the lie*" – and therefore if the GPA did not know about these matters, that was Dr Britto's fault and not C's. The Report acknowledges the evidence that Dr Britto knew, to some extent, that C alleged Mr McGrail had "lied". At **R/12.100 at 8/665**, the Chairman set out Dr Britto's inconsistent evidence and clear confusion on this issue.

132. However, as he was entitled to do, the Chairman accepted Dr Britto's evidence that he failed to "*join the dots*" between the alleged lie and Mr Levy's involvement: see [**R/12.134 at 8/675**]. Of particular note is the Chairman's finding that during the meeting between Mr McGrail and Dr Britto on 22 May 2020 "*Dr Britto said that he had been told that* '*you had lied, you lied basically to the Chief Minister… Or omitted the truth', but he was not given any particulars of the lie. When – quite reasonably – Mr McGrail asked whether it was alleged that he had lied in connection with the Collision at Sea or in the 'particular case', Dr Britto replied: 'in everything'… thereby demonstrating that he had not understood from Mr Picardo the nature of his real complaint and grievance against Mr McGrail*." [**R/12.151 at 8/679**]. That was a conclusion which the Chairman was entitled to draw based on his impressions of lengthy live evidence from Mr Britto, Mr Picardo and Mr Pyle (and others) on the issue.

133. For the avoidance of doubt, it is not accepted that by 21 May the whole of Gibraltar knew that the RGP had executed a search warrant on Hassans/Mr Levy (**C Skeleton para 102**). There is no proper basis for the court to take judicial notice of that unsubstantiated claim, with a view to concluding that the GPA's members knew about the search warrant by 21 May.

134. Second, C argues that C did not know that Dr Britto would not mention the issue of a "*lie*" to other GPA members. However, the Chairman's key conclusion was that: "*I do not think that Mr Picardo ever gave all the relevant particulars of his complaint to Dr Britto and therefore Dr Britto did not – indeed he could not – pass them onto the other members of the GPA, let alone to Mr McGrail. He was never told the full facts as alleged by Mr Picardo, and in this sense, he never did 'join the dots*'." [**R/12.182 at 8/688**]

135. Most strikingly, in the documents which C had control over and amended (both draft letters and the note of the meeting), he chose to omit clear references to and particulars of the real reason for his loss of confidence: the warrant and 'lie' issue. It is telling that the matters which C relies on in **Grounds para 83.2 [2/64]**, as evidence that Dr Britto did know about the "*Hassans/Mr Levy connection*", are statements by Mr McGrail or Dr Britto (as opposed to C himself). In particular, C relies on dialogue from the recorded meeting between Mr McGrail and Dr Britto on 15 May (**Grounds para 83.3 [2/65]**) – which is particularly striking given C did not know about this meeting at the time. C has not pointed to any evidence that he himself made the link clear to Dr Britto and the GPA. On the contrary, C knew that Dr Britto would rely on the Informal Record of Meeting Note when reporting back to the GPA, and yet was "*cryptic*" on the topic of the search warrant and the alleged "lie" [**R/12.134 at 8/675**]. In a text exchange, Dr Britto told him: "*I know what I have to say to them* [the GPA] *but it would be good to have a summary of sorts*", and later "*Fabian – remember the notes you were going to send me either by WhatsApp or email – I don't want to get this wrong, please … thanks. Meeting my colleagues tomorrow at 9:30…"* [**12/3853**]. Therefore, C's second submission leads nowhere. (C makes the same point in his sixth submission, which is not sustainable given his active involvement in editing documents which misled the GPA.)

136. Third, C argues that Mr McGrail's detailed representations on 29 May 2020 ('**the Gomez Letter**'), revealing the Hassans connection in full, made "*no difference*" to the GPA. The Chairman noted that Dr Britto had made this same argument at **R/12.180 at 8/687** (albeit in relation to Mr McGrail). Needless to say, receiving allegations from Mr McGrail's lawyers

as to what they claimed was the "*real reason*" for Mr McGrail being invited to retire was no substitute for C spelling out first-hand and providing particulars as to what his real reason was, particularly as the GPA had already invited Mr McGrail to retire by that point, with his representations to follow. Therefore even if the Gomez Letter had made "*no difference*", that is not a fair or appropriate comparison.

137. In any event, **C's Grounds para 83.5 [2/65]/Skeleton para 105** mischaracterise Dr Britto's evidence. Dr Britto went on to say that after reading the Gomez Letter, and after consulting lawyers, he considered that there was a prospect of Mr McGrail remaining in post [**26/17691**]. He then took immediate action by seeking legal advice from Mr James Neish KC, and instructed Mr Neish to write to Mr McGrail withdrawing the s34 process. This is all detailed in [**R/12.220-224 at 8/700**]. The Chairman also noted Mr Lavarello's evidence that if the GPA had known about Mr Picardo's connection to Operation Delhi, the GPA would have sought legal advice earlier, and that the "*lie*" should have played a role in the GPA's deliberations [**R/12.137 at 8/676**]. It is therefore incorrect, as C argues, that proper particulars as to the lie would not have altered the GPA's decision-making (**C Skeleton para 113**). Once the background was revealed in full by the Gomez letter, the GPA immediately changed course.

138. Fourth, it is no answer that the GPA considered the Incident at Sea to be extremely serious. The witness statements of the GPA members made clear that their decision was largely based on the loss of confidence by C and Mr Pyle: [**R/12.120-121 at 8/671**]. However, the evidence demonstrated that the GPA did not understand the true reason for C's loss of confidence. The unchallenged evidence of Mr Lavarello (a member of the GPA, albeit not present at the meeting) is that he did not know about Operation Delhi, the search warrants or the lie to C at the time [**T/14/226.8 at 8/17649**]. The Chairman was entitled to deem these as consequences of C's deliberate underplaying (and thus concealment) of his real grievance. It would have been entirely foreseeable to (if not intended by) C that the 'lie' would not be mentioned to the other GPA members, based on what he had told Dr Britto and the contents of the note which Dr Britto planned to read out to the GPA members. At the very least, it would not be the focus of their discussions.

139. Fifth, C contends that the GPA had not been "*misled*" by C – that they knew the truth by 29 May (on receipt of the Gomez letter) and it made no difference to them. For the reasons set out above, not only is it inaccurate to suggest that the Gomez letter had no impact on the GPA, but they also took legal advice and decided to terminate the process altogether

at that point. This means that their failure to seek more information about the "lie" at that stage is irrelevant, and certainly does not establish that other members of the GPA were not misled by C.

140. C's sixth submission on this matter is addressed above, as part of the response to C's second submission.

141. Finally, the Chairman was entitled to form the view that even if the GPA's own process involved "*serious*" failings (which he found at **R/12.237 at 8/704**), that did not absolve C's misleading conduct. C did not refer specifically to the lie/Hassans connection in the meeting note or the two letters that he edited. It is an obvious point that Mr McGrail could not be expected to make representations on points that were not raised against him [**R/12.154 at 8/680**]. These matters are canvassed in detail in [**R/12.104 at 8/666** and **R/12.178-184 at 8/687**]. That is the real thrust of Ground 12 – that C deliberately underplayed his real grievance and thereby misled Mr Britto and ultimately the GPA. The flaws in the GPA process do not mean that C did not mislead the GPA, and indeed many of those flaws were either attributable or contributed to by C.

(d) The omission of the lie was 'sinister'

142. For the avoidance of doubt, the Chairman did not find that the "*lie*" was sufficient reason for C to have lost confidence in Mr McGrail. The Chairman's finding was only about C's genuine belief: "*I accept that Mr Picardo genuinely believed – and still believes – that Mr McGrail told him that the DPP had advised the RGP to apply for the search warrant and that this was a deliberate lie*" [**R/11.113 at 8/548**] and "*I also accept that Mr Picardo genuinely believed – and still believes – that Mr McGrail told him that the DPP had advised the RGP to apply for the search warrant and that he genuinely concluded that this was a deliberate lie, but he had misunderstood what Mr McGrail had said*" [**R/11.131 at 8/554**].

143. Even though the Chairman accepted that this belief was genuinely held, there was still a rational basis for concluding that C had taken steps to conceal his real grievance. It was evident that C was not willing to be open and transparent as to his real reason from the striking pattern of his original text message to Mr Pyle [**R/12.4 at 8/636**], the first letter [**R/12.154 at 8/680**], second letter [**R/12.176-7 at 8/686**] and note of meeting [**12.83-4 at 8/660**], none of which referred to the '*lie'* in any detail despite being lengthy documents. As the Chairman commented, "*being 'coy' about the events of 12 May does not catch the significance of this omission*" [**R/12.178 at 8/686**].

144. C's reliance (**Skeleton para 113**) on the Governor's loss of confidence and the GPA's response to that is a distraction from the central point: C's conspicuous determination not to convey any details about his real reason for losing confidence. C studiously avoided giving any detail about his real reason (Operation Delhi, the search warrant and the alleged 'lie') in any of the documents that he created at the time. The fact that the GPA deemed the Governor's reasons for losing confidence in Mr McGrail important does not materially affect the body of evidence on which the Chairman concluded that C's omission of such details was remarkable and, indeed, sinister. The Chairman was entitled to arrive at such a conclusion. He again did so on the basis of impressions drawn from live evidence of several witnesses, combined with his assessment of a substantial number of documents. Fact-sensitive evaluative conclusions of that kind do not readily lend themselves to reversal through judicial review.

F13. Thirteenth Challenged Findings (C's Grounds para 87 – 93)

145. This ground challenges the Chairman's finding that the "*process by which Mr Picardo and Mr Pyle raised their complaints against Mr McGrail was unfair*", because under s34 of the Police Act they are complainants only, and "*it was for the GPA to assess the adequacy of C's and* [the] *Governor's joint complaint*" (**C Skeleton para 119.2**). This is another semantic and technical argument, inappropriate for judicial review. C's role should have been as a complainant or consultee of the GPA – and even in that role he was under an obligation to provide proper particulars, and certainly not mislead as to his real reasons.

146. More importantly, however, that is not how events transpired:

    a. As explained above, C actively intervened in the GPA process and steered it, including editing the two letters to Mr McGrail which (a) omitted any proper mention of the lie; and (b) incorrectly sequenced the GPA process by inviting Mr McGrail to retire before he made representations. It will be recalled that the second letter was drafted by Mr Britto and C in response to Mr McGrail's request for written details of the allegations against him [**R/12.153 at 8/680**].

    b. This infected the GPA's entire process and meant that the GPA proceeded on a misleading basis: for example, it was not possible for the GPA to seek proper representations on the 'lie', when Dr Britto was evidently not clear what questions to ask and had not "*joined the dots*".

c. C's submission in **C's Grounds para 92.1(v)** that "*it was the GPA's responsibility to first assess the sufficiency of the reasons provided by the complainants, then (if sufficient) to provide them to Mr McGrail together with an opportunity to make representations*" is entirely divorced from the reality of the above.

147. C seeks to avoid responsibility by arguing that "*such procedural injustice as has been visited on IM has been inflicted on him by the GPA*" (**Skeleton para 120**). That is not a proper defence. The Report contains various serious findings about the failings of the GPA and Dr Britto to act independently, for example by asking "*searching questions*": see [**R/12.141 at 8/677**]. However, the Chairman held at [**R/12.156 at 8/681**] that: "*the flaws in the process adopted by the GPA does not in any way supersede or excuse what I have found to be misconduct on the part of Mr Picardo*." In addition, C played an active role in the GPA's process, and the Chairman also went on to find that unfairness infected the section 13 process [**R/12.382 at 8/742**], which was undertaken by Mr Pyle but in full knowledge of C. Accordingly, the Chairman's conclusions about C's unfairness are both rational and legally correct.

F14. Fourteenth Challenged Finding (C's Grounds para 94 – 97)

148. This ground objects to the Chairman's finding that Mr McGrail retired because "*he felt he was being unfairly and unlawfully compelled to do so*. *This was because neither* [Mr Picardo and Mr Pyle] *nor the GPA had followed the proper procedures, and because Mr Picardo had not explained the real reason for his loss of confidence*" [**R/12.389a at 8/745**]. There is another finding to similar effect at **R/12.370 at 8/740**.

149. This ground is legalistic and not appropriate for judicial review of a factual finding. A key word in the Chairman's finding is "*felt*", which demonstrates that this is the Chairman's assessment of Mr McGrail's perception (albeit with reference to facts that the Chairman found). While only the Governor could legally compel him to <u>resign</u> using s13, Mr McGrail could still "*feel*" compelled to <u>retire</u> because (as the Chairman found) no one had followed proper procedures, and Mr Picardo had not explained the real reason for his loss of confidence [**R/12.389a at 8/745**]. This also laid blame with the GPA and Mr Pyle, not just C.

150. D's assertion that "*only the Governor could compel*" Mr McGrail to retire (**C Skeleton para 124.2**) is not technically correct. In fact, only the GPA could invite Mr McGrail to *retire*, whereas the Governor could compel him to *resign* in the event of a default by the GPA in

fulfilling its statutory duties. More importantly, however, it is irrelevant. The Chairman's conclusion was that Mr McGrail *retired* because he *felt* he was being unfairly and unlawfully compelled to do so.

151. Of course, the Governor's threat to call for his resignation under s13 was a significant factor in Mr McGrail's decision, but it did not necessarily exclude any other factors contributing to Mr McGrail's decision. The Chairman also found that a range of other factors also made Mr McGrail feel "*compelled*" to retire, such as the looming threat of s13, his perception of C's machinations (see, eg, [**R/12.378, 380 at 8/741**]), his mental state [**R/12.386 at 8/744**], and his fear of losing his pension rights [**R/12.388 at 8/744**]. This was an entirely rational finding, in particular because the Chairman had the benefit of observing Mr McGrail's oral evidence and assessed his emotional reaction as "*plainly genuine*" [**R/11.58 at 8/533**].

152. It is also important to bear in mind that while the s13 process was for the Governor to conduct, it was evident to Mr McGrail that C and the Governor were of the same view and very much working together to achieve a desired outcome. As the Chairman found, "*the initiation of the process had been encouraged by Mr Picardo, who had his own agenda, as I have explained*" [**R/12.229 at 8/702**].

153. It is simply not arguable that this finding is ultra vires. C's motives in acting as he did, and the impact of those actions on Mr McGrail's arrival at his decision to retire, were at the very heart of the "*reasons and circumstances leading to Mr McGrail's retirement*".

G. REMEDIES

154. While a declaration as to the validity of one or more of the Report's conclusions is, in principle, a remedy which this Court is capable of making, C is not entitled to any remedies in circumstances where the grounds for judicial review are either not arguable at all or fail to demonstrate unreasonableness on the Chairman's part.

155. For the reasons stated above, permission should be refused or, at the very least, C's claim should be dismissed.

JULIAN SANTOS KC
HOPE WILLIAMS
5RB

19 October 2026