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 SUMMARY GROUNDS FOR CONTESTING THE CLAIM

References in these Summary Grounds Contesting the Claim are as follows:

- *To the Inquiry Report: [R/paragraph number]*
- *To the transcript of the Inquiry hearings: [T/day/page number]*
- *To C's evidence filed in support of the judicial review: [FP/exhibit number]*
- *To Bundles A, B and C from the Inquiry hearings: [A/page number], [B/page number] and [C/page number]*

INTRODUCTION

1. These Summary Grounds 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. The Chairman seeks, through these Summary Grounds, to assist the Court by ensuring that all relevant evidence and authorities are before it.

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 reports of an inquiry, and even rarer for such claims to succeed. Indeed, the Inquiry team has not been able to locate any successful

examples of an inquiry's final report being successfully challenged in the UK since the introduction of the Inquiries Act 2005. 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*", or to dissect the contents of the Report line by line. 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 Statement of Facts and Grounds ('**C's Grounds**') uses the language of "*irrationality*", "*illegality*" and "*breaches of natural justice*" to describe his grounds for review. In name alone, these are proper bases for judicial review proceedings. However, on closer inspection, most of the grounds are simply disagreements with the Chairman's factual findings, based on C's views on what weight should be given to conflicting evidence. That is not a proper basis for seeking judicial review.

5. Accordingly, the Chairman's position is that the Court should refuse C permission to proceed. C's Grounds do not disclose a valid basis for seeking judicial review or merit a full investigation. Alternatively, if the Court grants permission, it should dismiss the claim.

A. PROGRESS OF THIS CLAIM

6. The Chairman's primary position is that permission should be refused on all grounds. It would be open to the Court to refuse permission to proceed without a hearing: **CPR r54.12(1)**. As explained in the White Book Commentary at §**54.4.2**:

> "*Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (**R. v Legal Aid Board Ex p. Hughes** [1992] 5 Admin. L.R. 623, **R. v Secretary of State for the Home Department Ex p. Rukshanda Begum and Angur Begum** [1990] Imm. A.R. 1: [1990] C.O.D. 107. In essence, the court will need to be satisfied that there is an arguable ground of review which has a realistic prospect of success and where there is no discretionary bar to a remedy such as delay or an alternative remedy. See **Sharma v Brown-Antoine** [2007] 1*

W.L.R. 780 at [14(4)] and ***Simone v Chancellor of the Exchequer*** *[2019] EWHC 2609 (Admin) at [112].*"

7. For the reasons set out below, C's Grounds do not disclose a "*realistic prospect of success*". Their inappropriate approach – effectively an attempt to re-argue the merits through a forensic attack on specific passages of the Report – is clear from the face of the document.

8. However, the Chairman is conscious that the Court may prefer to consider its decision on permission and the merits of the judicial review at a single, '*rolled-up*' hearing, either after refusing permission on the papers (where a claimant applies for reconsideration of permission at an oral hearing under CPR r.54.12.(6)) or prior to determining permission altogether. If the Court considers that adopting a 'rolled up' approach would be appropriate in this case to expedite the proceedings or avoid duplication of judicial resources, the Chairman would not object.

B. JUDICIAL REVIEW OF PUBLIC INQUIRIES

9. 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.

10. The leading textbook on public inquiries, *Jason Beer KC on Public Inquiries* (2011), 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*". 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 p281 and p285.

B1. UK decisions

11. Counsel to the Inquiry 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.

12. 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 his life or that of his colleagues such that it was proportionate to open fire on him with a lethal weapon. A single judge of the High Court refused permission for judicial review, which was upheld by the Divisional Court.

13. 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]. 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]. The Divisional Court rejected the criticism of the Inquiry's conclusions, going so far as to say that the grounds were "*unarguable*": at [59]. Their approach is neatly summarised at [46]:

> "*... 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.*"

B1. Commonwealth decisions

14. 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.

Mahon v Air New Zealand [1984] AC 808

15. *Beer* describes this authority as "*one of the only reported successful challenges to the final conclusions of an inquiry*...": at §11.25. In this case, a Royal Commission into the Erebus Airline Disaster concluded that the dominant cause of the accident was the act of the airline 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 to costs of the Commission).

16. 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."*

17. It can readily be appreciated that these failings by the Commission were procedural in nature (i.e. a failure to put a serious allegation to a witness and a complete lack of evidence for a finding).

18. 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*."

19. Lord Diplock emphasised, at 832H, that:

> *"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 (in casu by failure to observe the rule of audi alteram partem) 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

20. In this case, the New Zealand ('**NZ'**) Court of Appeal 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 NZ 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.

21. The Court of Appeal 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.*"

22. While C seeks to rely on this NZ Court of Appeal 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.

23. 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 findings about the Income Tax Act 1976. 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

24. 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***, their 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]); and (3) the gist of the allegations not being put to him in advance of the hearing (at [81]). 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."*

25. The Board also found at [81] 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. Again, the basis for the Board's interference with the commission's findings can be seen to be founded upon serious procedural failings.

26. For further 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).

C. THE GROUNDS OF REVIEW IN THIS CLAIM

27. Paragraph 2 of C's Grounds 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, and 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 [**FP/26**]. 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 [**FP/27**]. C responded on 8 August 2025 [**FP/28**], 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.

28. 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.

C1. Reviewing findings of fact

29. 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: ***Pyanaedee*** at [52]. However, the law strictly circumscribes when findings of fact can be disturbed. This is because the Chairman is best placed to make findings of fact, in the present case having listened to some 24 days of evidence and submissions, and conducted careful reviews of the full body of documentary evidence. Respectfully, "*no review which this court can conduct could start to match the advantages that* [the Chairman] *had…*": per Leveson P in ***E7 v Holland*** at [20].

30. Accordingly, a finding of fact is only amenable to review if (1) the procedure by which such findings reached was unlawful; (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: ***Mahon*** (above) at 382H. As indicated above, C's Grounds do not allege that the Inquiry's procedure was procedurally unfair or unlawful. These Summary Grounds therefore address the second and third categories.

C2. No probative evidence

31. The authorities emphasise an important distinction between a finding being based on no 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.*"

32. 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 explained 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.*"

33. In the Inquiry context, these principles are also reflected 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.*"

C3. Irrational or unreasonable decisions

34. 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. Similarly, 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.

35. 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."

C4. Unlawful decisions

36. 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).

37. 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 were outside the Inquiry's terms of reference. This will be developed below in relation to each specific finding where this is alleged.

38. 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 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.

39. 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.

40. 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.

41. 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***:

> "*…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. <u>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</u>.*"

42. 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.

43. 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].

44. 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]

45. The extent to which Article 8 protects politicians was considered in detail by Warby J (as he then was) in ***Yeo v Times Newspapers Ltd*** [2015] EWHC 3375 (QB), a defamation claim relating to an article accusing an MP of agreeing to act as a paid Parliamentary advocate, promoting a foreign energy company's private agenda for cash. Addressing whether the MP's Article 8 right was engaged by the publication, Warby J 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*

[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.

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."

46. Thus, 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*" (*Beer* §11.54). 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)[2].

47. 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*" (underlining added). It is therefore necessary for the Court to consider whether any interference with C's Article 8 rights is proportionate, having regard to competing rights of others: in this case the Article 10 right to freedom of expression of public in reading the

[2] 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.*"

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.*"

48. 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 [**FP/31**]. 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 Azzopardi) and a political campaigner (Rebecca Calderon), opinion pieces by lawyers (Nick Cruz, 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.[3] It is difficult to reconcile these comments with the extensive alleged reputational damage that he now claims.

D. SUBMISSIONS ON THE FOURTEEN CHALLENGED FINDINGS

49. These Summary Grounds now focus on each of the fourteen challenged findings. In the interests of proportionality, and consistent with the authorities above on the Court's task in a judicial review, the Chairman has endeavoured to provide succinct responses rather than rebutting every aspect of the numerous and forensic grounds. The arguments about

[3] https://www.gibraltar.gov.gi/uploads/_PressOffice/Openshaw%20Report/989-2025%20-%20Ministerial%20Statement%20on%20the%20Publication%20of%20the%20McGrail%20Inquiry%20Report.pdf

unlawful reputational harm to C have been addressed generally above, and are therefore not repeated below in relation to every ground.

D1. First Challenged Findings (C's Grounds para 17-22)

50. This ground concerns the meeting between Mr McGrail, C and Mr Llamas on 12 May 2020, after officers attended Hassans with the warrant. As to rationality, C has fallen far short of demonstrating the Chairman's conclusions were "*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*****,** above).

    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**]. However, it does not follow from that specific finding that the Chairman's separate finding (that the meeting was an "*attempt to interfere in a legitimate police investigation and operation*") was wrong or inconsistent. 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. 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. 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 influence the direction of the continuing investigation. 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**].

    b. The Chairman was entitled to draw this conclusion on the basis on both the evidence of what occurred at the 12 May meeting, and later events such as the text messages exchanged between C and Mr Baglietto (addressed below), which shed light on the purpose of the berating. Further, Mr Llamas gave 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**].

c. 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.

d. Additionally, a finding that the berating was not designed to pressure Mr McGrail to call back the officers from Hassans leaves open the possibility that the berating was an attempt to interfere with the ongoing operation and investigation.

e. C also 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**]: this was not a marginal case, and therefore the difficulty did not arise.

f. 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 equally hopeless. In every human interaction, tone is clearly capable of changing the meaning and impact of spoken words.

g. 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.

h. 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**] – in instances where that criticism is delivered appropriately and properly motivated.

51. 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**] as ultra vires. But this was squarely within the terms of reference: he was through that comment rejecting C's "*jurisdiction argument*" (see below), which C used to explain why he stepped in to defend Mr Levy.

52. In one respect, the Inquiry accepts that C has identified an (immaterial) error in the Report. At [**R/11.39**], 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 slipup as opposed to a misunderstanding of the evidence – leads nowhere. The Chairman's lengthy discussion at [**R/11.141 – 11.151**] demonstrates he was acutely aware of C's evidence on whether and when he became aware that Mr Levy was a suspect. In particular, he found at [**R/11.150**]: "*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*." As a result, the finding that the 12 May 2020 meeting was an "*attempted interference*" was plainly not based on the misstatement in [**R/11.39**] 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.

D2. Second Challenged Findings (C's Grounds para 23 – 28)

53. 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/11.29, R/11.79**]. Again, this falls far short of demonstrating irrationality or a breach of natural justice:

    a. D's finding was two-fold: (1) 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; and (2) 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**]. 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 D, 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**]. It was certainly not an invitation for C to make submissions, let alone to deliver an immediate, in-person berating.

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. He 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 on C's motivation, including the strength of his reaction on 12 May, but also subsequent corroboratory evidence (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). These matters are addressed below.

54. As to 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. Furthermore, the Chairman's rejection of the "*jurisdictional argument*" did not "*usurp*" the functions of the Chief Minister. His finding was not about what would be in the best interests of Gibraltar. Rather, in relation to these events, he concluded that the Chief Minister was not genuinely acting in the public interest but rather motivated by other factors (most significantly, his relationship with Mr Levy).

D3. Third Challenged Findings (C's Grounds para 29 – 34)

55. 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**] This was an extract from the Police Disciplinary Regulations.

56. C's objection to the Chairman using the term "*removal*" to summarise C's evidence appears to be 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 remove a police officer. There was also no finding that the removal would be by C himself, as he had no such power under that legislation.

57. The Chairman was also entitled to reject C's evidence that this message was about Mr Richardson, 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: (1) C's berating of Mr McGrail and later steps to remove Mr McGrail from office; (2) the fact that C made this "*completely unexpected suggestion*" about Mr Richardson for the first time in his oral evidence, after filing (at that stage) four witness statements [**R/11.302**]; and (3) 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**]. 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.

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

59. The fact that the Operation Delhi investigation continued notwithstanding Mr McGrail's removal did not make it irrational to find that the message constituted attempted interference. Even if it continued, it is easy to see how the removal 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.

D4. Fourth Challenged Findings (C's Grounds paras 35 – 40)

60. This finding concerns the message sent by C to Mr Llamas on 18 May 2020, which was a copy of s59 of the Gibraltar constitution [**R/11.52**]. Mr Llamas responded "*(2)(b)?*"; to which C responded "*Exactly. In re a search warrant as a 'proceeding'*" [**R/11.353-354]**. 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."

61. 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**]. It is also noteworthy that 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. Even if the Chief Minister may be entitled to ask the Attorney-General to consider "*properly*" using his powers, the Chairman had already found that C was acting under the improper motive of protecting Mr Levy: see the evidence explained above. It is immaterial that Mr Llamas did not ultimately use his powers in this way, or that a Court would have needed to supervise the use of these powers (a point which the Chairman queries but is not necessary to resolve). 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.

62. The objection in C's Grounds para 39.4 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*" [**T/16/300.23**]. This was notwithstanding C's disavowals of acting in the interests of his friend elsewhere in his evidence. C's interjection accepted that he was acting to protect Mr Levy, the only question being his motive for doing so (personal or jurisdictional). For the reasons already explained, the Chairman was entitled to reject C's evidence that it was the latter. This finding was therefore not irrational, nor in breach of any rule of natural justice.

D5. Fifth Challenged Finding (C's Grounds para 41 – 45)

63. 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*

would have at least the appearance of an interference with the police investigation" [**R/11.151**]. This finding comes nowhere close to the threshold for irrationality. Indeed, at one point C himself recognised the need to be cautious: after Mr McGrail notified C that the officers were at Hassans, he responded that "*Given my close personal relationship with JL, I won't comment further*" [**R/11.3**].

64. 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. 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 investigation. 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). Further, 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.

"Additional ground of irrationality applicable to all of the first to twelfth challenged findings" (C's Grounds para 46)

65. This ground alleges 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 (because he took no further steps after Mr McGrail retired). However, the fact that C did not later interfere or attempt to interfere in the investigation could be attributable to any number of reasons. For example, Mr Levy's phone was returned to him in October 2020 without being examined [**C5177**]; 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. This retrospective reasoning certainly does not render the Chairman's finding irrational.

D6. Sixth Challenged Findings (C's Grounds para 48 – 52)

66. This ground objects to the Chairman's findings that it was improper for C to meet with and speak to Mr Levy (an RGP suspect) and Mr Baglietto (his lawyer) about the suspected

offence. C objects that they are 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 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.

67. The fact that the Chief Minister has no legal standing in prosecutions in Gibraltar, as the Chairman pointed out in [**R/11.83**], does not exonerate him. To the contrary, it demonstrates that he needed to act with circumspection and care when expressing views on criminal investigations, and interacting with suspects and their lawyers. C recognised this himself 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**]. 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 provided with sensitive and confidential information (albeit ultimately erroneous) as to the DPP's 'advice' on the warrant.

D7. Seventh Challenged Findings (C's Grounds para 53 – 56)

68. 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, R/11.332**]. 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 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 14.51. The meeting had started sometime after 14.03 [**R/11.313**]), 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**].

    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 (addressed below), which he assessed as lacking in credibility.

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, from which the Chairman concluded that he had deliberately concealed this meeting (addressed below).

69. The finding that this approval by C was "*improper*" is also not irrational. Whether or not the RGP had already agreed to this course, 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. The Chairman considered his very involvement to be objectionable, no matter its impact.

70. The objection in C's Grounds para 55.5 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 (ie, the day after the meeting in the Chief Minister's home) that events were *set in train* when Mr Pyle invited Mr Britto to a meeting [**R/12.52**].

D8. Eighth Challenged Findings (C's Grounds para 57 – 61)

71. 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**]. C objects to the Chairman's finding that Mr Levy had been reassured by C's approach to Mr McGrail and Operation Delhi. This was an entirely rational conclusion: C's evidence that the meeting had been about Mr Levy's position with the Gibraltar Community Care Trust was implausible, as the Chairman found. The following evidence supported this conclusion, which was neither irrational nor in breach of the rules of natural justice:

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 [**T/9/137.15**] and no recollection of it being the purpose of the meeting [**T/9/141.12**], whereas he thought it "perfectly plausible" that the search warrant was raised [**T/9/142.4**];

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*" [**T/16/323.1**];

c. C's evidence that the matter of the search warrant was discussed at the meeting (Picardo 4 para 17 [**A1448**])**;**

d. the email sent by Mr Baglietto to Mr Llamas 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**]; and

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

D9. Ninth Challenged Finding (C's Grounds para 62-66)

72. 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**]. C accepted in evidence that this was very likely a proposal to retrieve Mr Levy's phone from the RGP [**R/11.307**].

73. 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**].

74. 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**]. However, 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. 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**]. Further, as explained above, 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.

75. Further, the fact that the Court would need to adjudicate on any application under s76 does not exonerate C. He was still seeking to prevent the police from interrogating a suspect's phone by proposing ideas to his lawyer [**R/11.311**].

D10. Tenth Challenged Finding (C's Grounds para 67-70)

76. 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] - [R/11.315]**, summarised below:

    a. C did not mention the meeting in his lengthy First or Second Affidavits.

    b. He did not mention it even in his Third Affidavit, written in response to the Inquiry specifically asking him about his contact with Mr Levy, and requesting dates and times of any relevant conversations.[4] CTI asked C why the meeting was not mentioned in this Affidavit. C responded that it fitted within paragraph 11, in which he had stated that "[his] *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 [**T/16/234.23**].

    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!*" [**B1422**]. The Inquiry then had to follow up with yet further questions before C finally addressed the meeting in his Fourth Affidavit.

[4] See Annexed 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 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*."

d. In his Fourth Affidavit, C 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) [**T/16/275.20**]. 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*".

77. In these circumstances, it was open to and rational for the Chairman to infer, as he did in [**R/11.316**], that C did not refer to this meeting earlier because he "*knew that others would find it to be deeply inappropriate*". 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.

78. Even though C maintained that he was free to meet with Mr Levy [**R/11.319**], 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.

D11. Eleventh Challenged Finding (C's Grounds para 71-74)

79. 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**]. 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**]. This is wrong: there was copious evidence to this effect, 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;

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**];

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**]. 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**]. 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**].

80. The Chairman also found at [**R/11.25**] 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 highly semantic for C to argue that he could not have "*thwarted*" the warrant because it had not been executed. Mr Levy had handed over his devices, and the threat of those devices being examined, Mr Levy attending a police interview, a further warrant being obtained, or even Mr Levy being charged, remained very much live.

D12. Twelfth Challenged Findings (C's Grounds para 75 – 86)

81. 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 be reviewing the report "*sentence by sentence*". 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*". Taking these 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" [Report para 12.67]

82. 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:

"*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).*"

83. 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, the following matters also provided a rational basis for this finding:

    a. Mr Pyle's evidence (Pyle 1 para 14.3 [**A241**]), confirmed in an email to the FCDO dated 21 May 2020, was that he told Dr Britto in the meeting between C, Mr Pyle and Dr Britto 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 (i.e. that 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 that this stern warning had had 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**].

    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**]. 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**]; and was told "*this had to happen before the new Governor came in*", contributing to a sense of urgency [**R/12.102**]. The Chairman concluded, on the basis of 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**].

c. Dr Britto was confused about the process for inviting representations, and expressly sought C's counsel on this point [**R/12.143**]. 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**]. Whilst Mr Pyle accepted that the procedure described in this letter was flawed [**R/12.156**], C refused in evidence to give a view on whether this was consistent with s34 [**R/12.157**].

d. 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.

e. 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**], while omitting any express references to his main reason, which the Chairman considered "*sinister*". 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**].

f. The Chairman considered, as he was entitled to do, that the evidence above was more probative than the statement in the note of the meeting between C, Dr Britto and Mr Pyle (prepared by C): "*It is now a matter for the GPA to decide how to act and to decide that they want to engage the s34(1) power*" [**R/12.80**]. The Chairman concluded, again as he was entitled to do, that despite paying lip service to the independence of the GPA, C's actions said otherwise.

g. 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**]. 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.

(b) Deliberate concealment and misleading

84. 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**, **R/12.103**]). 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: see above.

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

85. This lengthy objection can be divided into four sub-parts.

86. 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 not C's. The Report acknowledges the evidence that Dr Britto knew about the lie to some extent.

87. 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**] and in full. 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**]

88. Ultimately, the Chairman concluded at [**R/12.182**]: "*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'."

89. Most strikingly, in the documents which C had control over and amended (both draft letters and the minute 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. C knew that Dr Britto would rely on the note of meeting when reporting back to the GPA. 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…*" [**B1435**]. Therefore, C's submission leads nowhere.

90. Second, C asserts that the members of the GPA did know the "*truth*" but did not make a more searching enquiry. The Chairman's finding at [**R/12.85**] must be read in full, and in the context of the entirety of his conclusions in this regard. Even the findings that C specifically seeks to challenge state that C "*told Dr Britto very little about his real complaint*", that "*if he had set out in detail the lie which he alleged had been told to him it would – or certainly should – have prompted a series of questions about his links to Mr Levy, and to Hassans, and to 36 North*", and that his "*by his cryptic reference …* [C] *did not spell out that his real grievance arose from the issue of the warrant against Mr Levy, including the alleged lie, and left the GPA to focus on a loss of confidence arising from the concerns of Mr Pyle about the Incident at Sea and, to a lesser extent, the HMIC Report*". Therefore, in its proper context, the finding at [**R/12.85**] is referring to C's underplaying and lack of particularisation of his real grievance, and is not, as C characterises it, a finding that the reason was never mentioned at all to Dr Britto or passed on to the GPA. This is the mischief of C's attempt to isolate and challenge specific statements within the Report, as opposed to the general thrust of the findings. C's approach is inappropriate and should be resisted.

91. As the witness statements of the GPA members made clear, their decision was largely based on the loss of confidence by C and Mr Pyle: [**R/12.120-121**]. 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**]. The Chairman was entitled to deem these as consequences of C's deliberate underplaying (and thus concealment) of his real grievance.

92. 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. 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. Therefore even if the Gomez Letter had made "*no difference*", that is not a fair comparison. In any event, **C's Grounds para 83.5** mischaracterise Dr Britto's evidence: he 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 [**T/15/126.24**]. It is also incorrect that after receipt of the Gomez Letter, the GPA took no action. To the contrary, they immediately sought legal advice from Mr James Neish KC, and then instructed Mr Neish to write to Mr McGrail withdrawing the s34 process. This is all detailed in [**R/12.220-224**].

93. Fourth, C concludes that the GPA had not been "*misled*" by C – that they knew the truth and it made no difference to them. This submission is unsustainable in circumstances where C did not refer specifically to the lie/Hassans connection in the meeting note or the two letters that he edited. These matters are canvassed in detail in [**R/12.104** and **R/12.178-184**]. That is the real thrust of the Twelfth Challenged Findings – that C deliberately underplayed his real grievance and thereby misled Mr Britto and ultimately the GPA. The Chairman set out a compelling evidential basis for that conclusion, which he was plainly entitled to draw.

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

94. 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**] 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**]. 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, given the wider context of it – namely the inappropriate berating, and C's relationship with Mr Levy. It was evident from the pattern of the first letter, second letter and note of meeting, none of which referred to the '*lie'* in any clear detail, that C was not willing to be open and transparent as to his real reason. As the Chairman commented, "*being 'coy' about the events of 12 May does not catch the significance of this omission"* [**R/12.178**].

95. **C's Grounds paras 84.2 – 85.5** are attempts to reargue C's position at the Inquiry that it was reasonable not to refer to the lie in the second letter. C might disagree with the Chairman's conclusion, but that is not a proper basis for judicial review: this is not a case of there being no probative evidence, or his reasoning being "*outrageous*" such as to support a finding of irrationality. For the same reason, the Chairman's conclusion is not a breach of natural justice.

D13. Thirteenth Challenged Findings (C's Grounds para 87 – 93)

96. 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. 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 those circumstances, given his role (as Chief Minister and complainant), he was under an obligation to provide proper particulars and not mislead as to his real reasons). More importantly, however, that is not how events transpired. As explained above, C actively intervened in the GPA process, including editing the two letters to Mr McGrail and the note of the meeting, and omitted any proper mention of the lie. This infected the GPA's entire process: 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.

97. 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 what transpired, given that C bypassed that entirely by reviewing and editing both letters to Mr McGrail himself (and the second letter was based on his note of the meeting).

98. 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**]. However, the Chairman held at [**R/12.156**] 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. Accordingly, the Chairman's conclusions about C's unfairness are both rational and legally correct.

D14. Fourteenth Challenged Finding (C's Grounds para 94 – 97)

99. 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**]. This ground is legalistic and not appropriate for judicial review. A key word in the Chairman's finding is "*felt*", which demonstrates that this is the Chairman's assessment of C's perception (albeit with reference to facts that the Chairman found). While only the Governor could legally compel him to resign using s13, Mr McGrail could still "*feel*" compelled to retire as a result of that and his interpretation of the position based on other influences – including his perception about C's machinations and the unfair GPA procedure (which C participated in). This was an entirely rational finding by D.

100. 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*".

E. REMEDIES

101. 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 not arguable. Permission should be refused, or the challenge should be dismissed in any event.

JULIAN SANTOS KC
HOPE WILLIAMS
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23 March 2026